



## *Reaction on the comments on the ENCJ study on Method for Assessment of Judicial Independence and Accountability.*

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We are grateful for the contribution of Stefan Voigt, Elaine Mak, David Kosař, Samuel Spáč, Ingo Keilitz and Marco Fabri to this Special Issue. Their commentaries on the indicators for independence and accountability of the judiciary as developed for the ENCJ give many useful ideas for future development. The comments also reflect the different disciplinary backgrounds of the authors and point to the need to position the ENCJ approach within the diverse disciplines that engage in the analysis of judicial independence. It is obvious that the approaches of the commenters on the ENCJ study differ widely. In economics the approach focuses on measuring independence for inclusion as variable in econometric models about, for instance, economic growth or protection of property rights. More (de-facto) independence enhances economic performance, but how more independence is to be achieved is not addressed. From the perspective of performance management of organizations, independence is part of court performance for the clients and to some degree subservient to it. In a legal, descriptive approach, the situation in different countries is described in detail, also as a part of judicial culture. The ENCJ study only sets criteria for measuring judicial independence, and does not address performance measurement of courts and judges in general.

### **Independence and autonomy in public administration**

At the basis of the approach of the ENCJ is the institutional design of the judicial system. Its core mission is the delivery of fair trials. Judicial independence is a precondition for conducting fairness in trials. Not the performance of courts and judges, but the constitutional norm that judges must be independent and impartial is at the basis of this study. The study has tried an approach where the current independence is measured and can be used as a part of accountability of judiciaries for the outcome by publishing the outcome.

What does it take for the judiciary to be independent, taking into account the variety of circumstances in Europe? Judiciaries have developed guidelines for judges and maintaining judicial values at a detailed level, as described by Elaine Mak in this issue.<sup>1</sup> Regarding the organization and its processes the ENCJ has developed guidelines, for instance about the composition of Councils for the judiciary and proper safeguards for disciplinary procedures against judges. Although the ENCJ's set of indicators is more normative and has been developed in parallel, its analysis of independence is closely related to that of autonomy in administrative/political science. Autonomy of public agencies in relation to their functioning in complex bureaucracies is a major field of study. Autonomy of agencies and independence of the judiciary have different starting points, where the independence of the judiciary as a whole serves the independence of the judge, but lead to very similar operationalisations. In their review of this literature Verhoest et al.<sup>2</sup> (2004) show that autonomy is a multi-dimensional concept, and distinguish managerial, policy, structural, financial, legal and interventional autonomy. These types of autonomy are largely self-explanatory, except perhaps for structural and interventional autonomy. Structural autonomy concerns the influence of government in the decision making body of the agency. Interventional autonomy concerns the possibilities to intervene based on oversight mechanisms, such as performance measurement and auditing. This is the other side of the coin of accountability. The authors note that for an agency to be autonomous, all types of autonomy must be met, and show in their empirical study of public agencies in Belgium/Flanders that this often not the case.

The position of some public agencies is close to that of the judiciary. For instance, the national central banks in the EU are expected to determine monetary policy independently. These national central banks form an interesting case, as at the EU level criteria have been developed for their independence that apply to member states that have adopted the euro or are going to adopt the EU currency (stage three of EMU). This case is interesting not only because of the European framework but also because it was recently developed. In this framework functional, institutional, personal and financial independence are distinguished.<sup>3</sup> As to the relationship with accountability the ECB states: "Central bank independence is fully compatible with holding NCBs accountable for

1 Elaine Mak, Researching judicial ethical codes, or: how to eat a mille-feuille? *International Journal for Court Administration*, Volume 9, nr. 3, 2018, p. 55-66.

2 K. Verhoest, B.G. Peters, G. Bouckaert and B. Verschuere (2004). The study of organisational autonomy: a conceptual review. *Public Administration and Development* 24, 101-118.

3 ECB (2018). Convergence Report.

their decisions, which is an important aspect of enhancing confidence in their independent status. This entails transparency and dialogue with third parties.”<sup>4</sup>

The table compares the ENCJ framework for the judiciary as a whole with the framework of Verhoest et al. and for national central banks. It should be stressed that the ENCJ framework also contains indicators about the independence of the individual judge.

### Comparison of frameworks for independence and autonomy at organization level

Framework Verhoest et al. for agencies	Framework ENCJ for courts	Framework for national central banks
Managerial autonomy	Management of court system	Autonomy in staff matters as part of financial autonomy
Policy autonomy	[Procedural laws vs court regulations]	Functional autonomy
Structural autonomy	Organizational independence	Institutional independence
		Personal independence
Financial autonomy	Funding	Financial autonomy
Legal autonomy	Legal basis of independence	Functional autonomy
Interventional autonomy	Accountability (inverse)	Accountability (inverse)

We conclude that the ENCJ framework is consistent with conceptual and applied frameworks about autonomy/independence in the public sector. Independence is multi-dimensional and this needs to be reflected in any measurement system. In response to Voigt who states that the available economic empirical research is sufficient for any purpose the ENCJ may have, this literature, while extremely important in its own right, does not address the complex issues at hand when organizing independence. Furthermore, Voigt presupposes that judiciaries and judges are driven by incentives that are economically relevant. Even although European judiciaries are very different in their organisational design, and even although in some countries career-incentives are missing, whilst in others corruption is an issue, these observations should not obscure that in these and other countries most judges show responsible, unselfish behaviour in order to serve justice in the cases assigned to them.

Keilitz compares the operationalizations in the ENCJ study with the performance measures in the International Consortium for Court Excellence’s Global Measures of Court Performance, and the NCSC’s CourTools.<sup>5</sup> His criticism of the ENCJ indicators is that they are too many, internally oriented and not accurate enough. He advises to reduce the amount of indicators to a vital few. We think his criticism makes sense from an overall performance of courts and judges perspective, but that goes beyond the scope of the ENCJ study. Judicial independence is a very complex concept and in the end it is related to the judicial conscience. That is what the ENCJ study tries to grasp. Fabri discusses the accuracy of ENCJ’s operationalisations into detail. He welcomes the ENCJ’s efforts against the backgrounds of the methodological weaknesses in the EU Justice Scoreboard and the limitations in the comparability of CEPEJ data. From that position he criticises the ENCJ questionnaire. For example he asks for a clear definition of what a judge is that applies throughout the EU, and he shows deficits in the self-reporting by judicial councils.

### Accountability

The operationalization of accountability is criticized by Kosař and Spáč in particular, as missing important issues and including irrelevant issues.<sup>6</sup> Accountability is, obviously, a complex concept, in this context foremost because of its interaction with independence. As clearly summarized by Scholten<sup>7</sup>, independence and accountability are negatively correlated: when greater independence is granted, less options exist for mandatory accountability. This is reflected in the framework of Verhoest et al. by the use of interventional autonomy instead of accountability. If independence of the judiciary is strived for, the instruments for mandatory accountability are limited, and consist mainly of transparency and dialogue, as the ECB notes for the national central banks. This leads to indicators that centre on transparency, explanation and dialogue with society, as in the ENCJ framework. For Kosař and Spáč accountability is foremost about individual judges being accountable to authorities within or even outside the judiciary. Implicitly they presume that judges as civil or public servants are accountable to superiors in a hierarchy. Transparency should include information about disciplinary procedures, but the reliance on discipline to improve the functioning of the judiciary reflects hierarchical thinking instead of promotion of intrinsic motivation of highly trained professionals on which the judiciary depends. The ENCJ indicators in this area cover the protection of judges against the abuse of disciplinary procedures by procedural safeguards. Keilitz describes accountability of judiciaries as a part of the democratic process. Accountability is necessary to inform the general public and policymakers. But measurement of performance in the courts is also necessary for the management of the courts and

4 ECB (2018). Convergence Report, p 20.

5 Ingo Keilitz, Viewing Judicial Independence and Accountability through the “Lens” of Performance Measurement and Management, *International Journal for Court Administration*, Volume 9, nr. 3, 2018, p. 23-36.

6 David Kosař and Samuel Spáč, Conceptualization(s) of Judicial Independence and Judicial Accountability by the European Network of Councils for the Judiciary: Two Steps Forward, One Step Back, *International Journal for Court Administration*, Volume 9, nr. 3, 2018, p. 37-46.

7 M. Scholten (2014). Independence vs accountability: proving the negative correlation. *Maastricht Journal of European and Comparative Law* 21, 197-204.

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the judges. In that frame of mind he sees an adequate measuring system of the functioning of courts and judges also as a tool to ward off efforts to politicise the judiciary by 'Strongmen'. So, while Fabri also calls for an elaboration of indicators of accountability for the functioning of courts and judges, the debate should focus on the question if and how far courts as organisations and judges as professional are or should be hierarchically accountable to superiors. The more they are mandatory accountable, the less judges function independently. Here lies a subject for further research.

### **Organizational independence and councils for the judiciary**

Kosař and Spáč argue that the indicators on organizational independence favour councils for the judiciary, while these councils may be a threat to independence.<sup>8</sup> Voigt suggests a negative relation between having a council and productivity of the judiciary.<sup>9</sup> It should be stressed that the indicator system allows for other governance structures than a council. Furthermore, a council for the judiciary is not a precise concept: councils vary enormously in their responsibilities and in their independence, as reflected in their composition and the way members are appointed. The indicator system solves this by defining organizational (structural) independence as a quasi-continuous variable, mainly consisting of the scores on two factors: the breadth of responsibilities of a council and adherence to the minimum standards of the ENCJ as to its independence. In reply to Voigt, it shows that many councils have no competences to influence the efficiency of the judiciary and these cannot be seen as the cause of inefficiency.

In his recent review of the agency literature Verhoest sees a shift of research focus to the dynamic nature of agency autonomy and control and to the relationship with the increasingly multi-level administration within the EU (Verhoest 2017<sup>10</sup>). Both aspects are observable for the governance of the judiciaries within the EU. For instance, the demarcation of the required independence of the judiciary and, in particular, a council for the judiciary, is dynamically developing. The ENCJ has developed guidelines that recently led it to suspend the Polish Council for the judiciary. The ENCJ is just one of organizations/networks active at the EU level, and its guidelines are, at best, soft law, but these may help to gradually develop hard law. The EC and the CJEU play crucial roles in this process. This gradual emergence of standards would offer opportunities to make the indicator system less subjective than, as pointed out by the commentators, it can now be.

### **Conclusion**

The ENCJ framework of judicial independence and accountability is consistent with frameworks developed in parallel for other parts of the public sector. In particular, the multi-dimensional nature of independence is crucial to recognize. For instance, in many judiciaries, also where the other dimensions of independence are well taken care of, lack of financial independence is seen to undermine the functioning of the courts. This basic structure of the indicator system is, therefore, in our view sound. However, there is much room for improvement, for instance, by the inclusion of hard data, extension of surveys to the clients of the courts and refinement and, where possible, simplification of the indicators. At this stage, the normative and subjective nature of indicators is unmistakable. It is likely that by the gradual emergence of EU-standards the subjectivity will decline over time. In that context, more research on the development of better indicators for the evaluation of performances of courts and judges is necessary!



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8 Kosař and Spáč, *supra* footnote 6, pp. 41 and 43.

9 Stefan Voigt, *Innovate – Don't Imitate! - ENCJ Research Should Focus on Research Gaps*, *International Journal for Court Administration*, Volume 9, nr. 3, 2018, p. 41.

10 K. Verhoest *Agentification*. In: E. Ongaro and S. van Thiel (eds.). *The Palgrave Handbook of Public Administration and Management in Europe*. Basingstoke: Palgrave Macmillan. (2017).