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# CONCEPTUALIZATION(S) OF JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY BY THE EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY: TWO STEPS FORWARD, ONE STEP BACK

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**Abstract**

This article focuses on conceptual issues regarding the new methodology of the European Network of Councils for the Judiciary (ENCJ) for measuring judicial independence and accountability. First, we argue that the proposal mixes up several concepts – judicial independence, judicial accountability, transparency of the judiciary, and public trust in the judiciary – which should be treated separately. Second, the proposal relies too much on conceptions of independence developed by the judicial community. As a result, it treats judicial administration with higher levels of involvement of judges as inherently better without empirical evidence, and does not sufficiently distinguish between *de iure* and *de facto* judicial independence. Moreover, the ENCJ's indicators of judicial accountability are underinclusive as well as overinclusive and do not correspond to the traditional understanding of the concept. Finally, we argue that the ENCJ has to accept the possibility that (at least some types of) judicial councils (at least in some jurisdictions) might negatively affect (at least some facets of) judicial independence and judicial accountability. As a result, the ENCJ must adjust the relevant indicators accordingly.

**Keywords**

courts, judicial independence, judicial accountability, ENCJ

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# CONCEPTUALIZATION(S) OF JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY BY THE EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY: TWO STEPS FORWARD, ONE STEP BACK

David Kosař & Samuel Spáč[1]



## 1. Introduction

The European Network of Councils for the Judiciary (hereinafter "ENCJ") launched its ambitious project to develop indicators for measuring the independence and accountability of the European judicial system in 2013. It published its first report in 2014 and soon initiated its survey among judges to study perceptions of judicial independence. Then it fine-tuned the performance indicators of independence and accountability, and managed to received responses from 11,712 judges across Europe in its 2016-2017 edition of the survey. During those years the ENCJ worked hard to improve its understanding of judicial independence and accountability and, in doing so, greatly advanced our knowledge of European judicial systems.

This short article zeroes in exclusively on the conceptual issues regarding the ENCJ's methodology,[2] as developed by van Dijk and Vos in their leading article to this special issue.[3]

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More specifically, it focuses on the ENCJ's conceptualization of judicial independence and accountability, and then makes a few suggestions about how to make the ENCJ's reports even more valuable for policy makers, scholars and other stakeholders. First, we argue that the current ENCJ report mixes up together too many concepts – judicial independence, judicial accountability, transparency of the judiciary, and public trust in the judiciary – that should be treated separately. Second, the ENCJ report does not sufficiently distinguish between *de iure* and *de facto* judicial independence. Moreover, it does not give proper credit to well-known experiences in some judiciaries where judicial self-government proved to be perilous to the judiciary. These experiences demonstrate the necessity to widen the focus to a variety of informal mechanisms, which can be easily misused. If we overlook these misuses, we might get a distorted picture of the functioning of the judiciary. Third, the ENCJ's conceptualization of judicial accountability does not correspond to the traditional understanding of the concept of accountability. The ENCJ's definition of accountability is underinclusive as well as overinclusive. More specifically, it overlooks well-known accountability mechanisms (such as disciplining of judges), while at the same time it includes mechanisms (such as understandable procedures and recusal) that have little to do with holding judges to account.

We sincerely believe that if the ENCJ manages to fix these conceptual issues, it might avoid several problems in the operationalization of performance indicators and in the subsequent steps in its analysis of judicial independence and accountability addressed by other articles in this special issue.[4]

## 2. Judicial Independence: connecting means and ends

In this part we focus on two broader conceptual issues of van Dijk and Vos's proposal[5] to measure judicial independence that has been utilized by the ENCJ in its surveys. First, the methodology relies too heavily in its definition of judicial independence on standards developed by the judicial community and does not pay sufficient attention to well-documented threats to judicial independence coming from within the judiciary. Second, the operationalization of judicial independence conflates the approach focused on independence as a feature of institutional design and the approach focused on judicial decision-making. Moreover, van Dijk and Vos rely on data measuring public trust in the

[2] We therefore leave aside, among other things, the issues of operationalization, coding, aggregation of data, and reliability of the used sources.

[3] See van Dijk and Vos: Frans van Dijk and Geoffrey Vos, A Method for Assessment of the Independence and Accountability of the Judiciary, International Journal for Court Administration, Volume 9, nr. 3, 2018, p. 1-21.

[4] See the contributions by Voigt, Fabri and Kellitz in this special issue: Stefan Voigt, Innovate – Don't Imitate! - ENCJ Research Should Focus on Research Gaps, International Journal for Court Administration, Volume 9, nr. 3, 2018, p.47-53; Marco Fabri, Pitfalls in data gathering to assess judiciaries, International Journal for Court Administration, Volume 9, nr. 3, 2018, p. 67-75; ngo 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.

[5] van Dijk and Vos, supra note 2.

judiciary instead of judicial independence, which is the central concept of the proposed study.

### 2.1. Conceptual consequences of reliance on international standards

The conceptualization of judicial independence proposed by van Dijk and Vos relies too heavily on the standards developed, to a large extent, by the international judicial community. Consequently, it leads to a problematic assumption present throughout the methodology that judicial independence is best served when judicial administration is carried out predominantly by judges appealing to *communis opinio*, as international documents that provided some recommendations on how to secure judicial independence really hold a similar position.[6] However, the usefulness of this approach has been criticized on numerous occasions.[7]

With regard to the proposed methodology and its future application in (and beyond) Europe it is problematic from at least two perspectives. First, it largely ignores a literature that shows that threats to judicial conduct may come from inside the judiciary as well.[8] Second, since the conceptualization of judicial accountability in the proposed methodological design stresses the importance of answerability of the judiciary to the general public, it is surprising that as regards independence the influence of democratically elected politicians creating a link of legitimacy between the judiciary and the *demos* is portrayed as a danger to 'the balance of state powers'.[9]

Judicial independence is, first and foremost, a relational concept. It focuses on connections between the judiciary and other actors in the political arena – most usually on the interaction with the political branches of power.[10] In this vein, Van Dijk and Vos argue that independence is secured when the judicial power is protected from political branches, for

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[6] For a similar criticism, see e.g. D. Smilov, EU Enlargement and the Constitutional Principle of Judicial Independence, in: W. Sadurski et al. (eds.), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargemente for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer 2007), pp. 313-334; C.E. Parau, The Drive for Judicial Supremacy, in: A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012), pp. 619-666.

[7] E.g. L.A. Kornhauser, Is Judicial Independence a Useful Concept?, in: S.B. Burbank and B. Friedman (eds.), *Judicial Independence at the Crossroads* (Sage Publications 2002), pp. 45-55; or S. Voigt et al., Economic Growth and judicial independence, a dozen years on: Cross-country evidence using an updated set of indicators, *European Journal of Political Economy 38* (2015), pp. 197-211.

[8] E.g. J.M. Ramseyer and E.B. Rasmusen, Judicial Independence in a Civil Law Regime: The Evidence from Japan, *The Journal of Law, Economics, and Organization 13(2)* (1997), pp. 259-286; D.M. O'Brien and Y. Ohkoshi, Stifling Judicial Independence from Within, in: P.H. Russell and D.M. O'Brien (eds.), *Judicial Independence in the Age of Democracy: Critical perspectives from around the world* (University of Virginia Press 2001), pp. 37-61; M. Bobek and D. Kosař, Global Solutions, Local Damages, *German Law Journal 15(7)* (2014), pp. 1257-1292; D.Kosař, *Perils of Judicial Self-Government in Transitional Societies* (CUP 2016); S.Spáč, *By the judges, for the judges: The study of judicial selection in Slovakia* (Comenius University, PhD Thesis 2017).

[9] See van Dijk & Vos, supra note 2.

[10] E.g. P.H. Russell, Toward a General Theory of Judicial Independence, in: P.H. Russell and D.M. O'Brien (eds.), *Judicial Independence in the Age of Democracy: Critical perspectives from around the world* (University of Virginia Press 2001), pp. 2-4.

instance by arguing that "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 other state powers".[11]

This argument is certainly valid, but the checks and balances do not operate in only one direction. More specifically, the courts are not just checks upon other branches, but are also subject to checks by those branches. The same applies to the balances that also operate in both ways. Other approaches posit that judicial independence ought to secure that judges are free to decide cases according to law and evidence,[12] in order to secure equality before law.[13] To be fair, van Dijk and Vos also present this argument. However, the indicators in their methodology focus primarily on *de iure* aspects of the issue with considerable preference for systems where judicial councils dominated by judges represent the independence of the judiciary.

We argue in favor of analyzing judicial independence, and its presence or absence in any polity, with a focus on undue influence rather than separation of the judiciary from political branches. The institutional approach fails to give due credit to the empirical evidence showing that judicial conduct can be threatened from inside as well as from outside of the judiciary.[14] That means that the ENCJ needs to study not only external, but also internal independence.[15] In fact, even the ECtHR recognizes the requirement of internal independence of judges and the dangers of judges being influenced by their colleagues and superiors.[16]

As several studies have shown, judicial self-government may lead to misuse of disciplinary procedures and other accountability mechanisms,[17] distortion of merit-based selection system,[18] or can cause encapsulation of the judiciary and its disappearance from the public

[11] See van Dijk & Vos, supra note 2.

[12] E.g. Russell, supra note 9; P.S. Karlan, Judicial Independences, *The Georgetown Law Journal 95* (2007), pp. 1041-1059; L.B. Tiede, Judicial Independence: Often Cited, Rarely Understood, *Journal of Contemporary Legal Issues 15* (2006), pp. 129-161.

[13] M.Popova, *Politicized Justice in Emerging Democracies: A study of Courts in Russia and Ukraine* (CUP 2012).

[14] See examples from Russia and Ukraine: A. Ledeneva, Telephone Justice in Russia. *Post-Soviet Affairs 24(4)* (2008), pp. 324-350; Popova, supra note 12, pp. 134-147; from Slovakia under Štefan Harabin: L. Bojarski and W. Stemker Köster, *The Slovak judiciary: its current state and challenges* (Open Society 2012), particularly see the case of judge Benešová, p. 104; or from Germany: S.R. Levitt, The Life and Times of a Local Court Judge in Berlin, *German Law Journal 10(3)* (2009), pp. 169-204; A. Seibert-Fohr, Judicial Independence in Germany, in. A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012), pp. 447-521.

[15] D. Kosař, Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice, *European Constitutional Law Review 13(1)* (2017), pp. 114-122.

[16] See e.g. ECtHR, 15 July 2010, *Gazeta Ukraina-Tsentr v. Ukraine*, no. 16695/04, §§ 33-34; ECtHR, 10 October 2000, *Daktaras v Lithuania*, no. 42095/98, §§ 35-38; ECtHR, 3 May 2007, *Bochan v. Ukraine*, no. 7577/02, § 74; ECtHR, 9 October 2008, *Moiseyev v. Russia*, no. 62936/00, §§ 182-184; ECtHR, 5 October 2010, *DMD GROUP, a.s. v. Slovakia*, no. 19334/03, §§ 65-71; ECtHR, 3 May 2011, *Sutyagin v. Russia*, no. 30024/02, § 190; and ECtHR, 12 January 2016, *Miracle Europe Kft. v. Hungary*, no. 57774/13, §§ 53-63.

[17] Bojarski and Stemker Köster, supra note 13; Kosař, supra note 7, pp. 317-329.

[18] Spáč, supra note 7.

eye.[19] To put it bluntly, there is no particular reason (at least in some societies) that judges will behave any differently than politicians when using these powers.[20] At the same time, there are several examples suggesting that when politicians have formal powers to interfere with judicial careers, they may to a large extent opt out from using them.[21]

Consequently, it is necessary to take into consideration that there always will be actors empowered to influence the judiciary, and that there is no reason to believe that judges, as a group or its individual leaders, do not have any selfish interests just like any other actors. Therefore, judicial independence should rather be understood as a 'consequence of self-restraint by powerful actors',[22] and less as the feature of a particular institutional design. Certainly, institutional design can make it more difficult for powerful actors to exert influence over the judiciary, but, to put it simply, it cannot preclude the existence of 'powerful actors' and it cannot prevent them from influencing courts altogether. As a consequence, it is necessary to distinguish between the capacity of these powerful actors – understood as existing channels to exercise pressure on courts, and their willingness – a result of conscious choice, to utilize this capacity.[23]

There are several reasons why powerful actors may not be willing to pressure courts and exhibit self-restraint. It can be the result of their strategic calculation suggesting that benefits do not outweigh costs, or it can be their honest adherence to values of democracy and the rule of law. In addition, the judiciary itself can pose as a counterweight to powerful actors' whimsy, and certainly can resist the attempts of undue influence – be it on the basis of their own belief in the rule of law, their understanding of their role in the broader context, cost-benefit analysis, or perhaps it can depend on their social legitimacy[24] or support from the media.[25]

To put it differently, proposed conceptualization and operationalization of judicial independence seem to be skewed in favor of countries that followed a variety of international recommendations and transferred considerable powers into the hands of the judiciary. However, as several scholars have argued before and as empirical evidence suggests,[26] the transfer of formal powers from political branches to the judiciary does not

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[19] B.Iancu, Perils of Sloganised Constitutional Concepts. Notably that of 'Judicial Independence'. *European Constitutional Law Review 13(3)* (2017), pp. 582-599.

[20] C.Hanretty, The Appointment of Judges by Ministers: Political Preferment in England, 1880-2005, *Journal of Law and Courts 3(2)* (2015), pp. 305-329.

[21] E.g. A. Blisa et al., Judicial Self-Government in Czechia: Europe's Black Sheep?, *German Law Journal* (2018 forthcoming); J.C. MacNeill, *The Politics of Judicial Selection in Ireland* (Four Courts Press 2016).

[22] J. Ferejohn, Independent Judges, Dependent Judiciary: Explaining Judicial Independence. *Southern California Law Review 72* (1999), p. 375.

[23] Popova, supra note 12, pp. 20-23.

[24] T. Clark, *The Limits of Judicial Independence* (CUP 2011).

[25] J.Widner, Building Judicial Independence in Common Law Africa, in A. Schedler et al. (eds.), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner 1999), pp. 177-194.

[26] See e.g. Iancu, supra note 18; Parau, supra note 5; R.Coman and C.Dallara, Judicial Independence in Romania, in: A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012), pp. 619-666 (on Romania); Bojarski

necessarily decrease the threat of misuse of these powers, but rather should expand our attention to other actors (including those within the judiciary) as well. Relying on assumptions which hold that the judiciary governed by judges is an independent judiciary treats judicial independence, in institutional terms, as an end in itself, even if it does not bring desired outcomes.

### 2.2. Reconciling *de iure* and *de facto* definitions

Probably all conceptualizations of judicial independence fall in the spectrum between perceiving independence as a feature of institutional design, and as a feature of judicial decision-making. Various terms can be applied to this dichotomy: some differ between independence as means and ends;[27] others apply labels such as 'structural insulation'[28] or refer to judicial independence as a specific mechanism[29] when speaking about the former; while others perceive it as a value in itself,[30] or label it as 'party detachment',[31] 'impartiality'[32] or 'judicial autonomy',[33] when speaking about the latter. One can also distinguish between institutional, decisional and behavioral independence,[34] where the first term focuses on the level of the judiciary, while the other are understood at the level of individual judges.

The methodology proposed by van Dijk and Vos correctly distinguishes between the two approaches by differentiating between independence on the level of the judiciary as a whole and on the level of individual judges. However, authors do in this regard make at least three noteworthy methodological choices. First, they do not treat the two approaches separately, even though they measure different (although possibly related) dimensions of the concept. Second, they overlook an important link between the two, leaving them rather unconnected (yet analyzed as a single concept) without sufficient attention being paid to how institutional

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and Stemker Köster, supra note 13; Spáč, supra note 7; Bobek and Kosař, supra note 7; and Kosař, supra note 7 (on Slovakia); M. Popova, Be Careful What You Wish For: A Cautionary Tale of Post-Communist Judicial Empowerment, *Demokratizatsiya 18(1)* (2010), pp. 56-73; M. Popova, Why the Bulgarian Judiciary Doesn't Prosecute Corruption? *Problems of Post Communism 59(5)* (2012), pp. 35-49 (on Bulgaria); and L.F. Müller, Judicial Administration in Transitional Countries, in: A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012), pp. 937-970 (on Post-Soviet countries).

[27] S.B. Burbank and B.Friedman, Reconsidering Judicial Independence, in: *Judicial independence at the crossroads: an interdisciplinary approach* (Sage 2002), pp. 9-42.

[28] Popova, supra note 12.

[29] M.C. Stephenson, "When the Devil Turns...": The Political Foundations of Independent Judicial Review, *The Journal of Legal Studies 32(1)* (2005), pp. 59-89.

[30] S. Shetreet, Judicial independence and accountability: core values in liberal democracy, in: H. Lee (ed.), *Judiciaries in Comparative Perspective* (CUP 2011), pp. 3-24.

[31] O. Fiss, The Limits of Judicial Independence, *University of Miami Inter-American Law Review 58* (1993), pp. 57-76.

[32] E.g.: V.C. Jackson, Judicial Independence: Structure, Context, Attitude, in: A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012), pp. 19-86; Russell, supra note 9.

[33] R.E. Bowen, Judicial Autonomy in Central America: A Typological Approach. *Political Research Quarterly 66(4)* (2013), pp. 831-842.

[34] Popova, supra note 12, pp. 14-19.

design translates into courts' ability to deliver independent outcomes. Finally, to assess independence in terms of judicial decision-making the authors use perception indicators, considerably resembling indicators for a completely different concept – public trust.

As regards the relationship between independence understood in institutional terms and independence on the level of judicial decision-making, several authors have addressed the issue. According to Tiede, for a judiciary to be considered independent, it first needs to be independent institutionally, and only afterwards can its independence be measured as the amount of discretion judges enjoy.[35] Russell, like van Dijk and Vos, distinguishes between collective and individual targets of undue influence, while arguing that a greater amount of institutional autonomy does not secure 'that judges will think and act in an independent manner.' However, if they do not enjoy autonomy in institutional terms, odds on their defiance to powerful actors decrease.[36] Burbank and Friedman in a comparable manner suggest that independence should be perceived as a means to an end, not an end in itself.[37] In general, there seems to be an assumed link between independence in institutional terms and independence understood at the level of individual judges. Nevertheless, the former should not be perceived as a *sine qua non* for the latter. Even comparative empirical evidence fails to support the existence of a strong relationship between the two.[38] All in all, the literature suggests the two approaches should be treated separately as they may or may not be associated.

We argue that the missing link between the two approaches is the way in which powerful actors utilize their formal powers to modify the composition of the judiciary. As was shown by previous research, *de facto* judicial independence, when operationalized as the utilization of formal powers, may serve as a predictor for variables related to well-performing judicial systems.[39] According to Popova, an independent judiciary produces decisions that do not show a consistent preference for any actor or group of actors. There are two reasons why researchers should be concerned with the way formal powers translate into the composition of the judiciary. First, powerful actors can systematically favor judges (either consciously or subconsciously) with certain characteristics, e.g. in the process of the selection or promotion of judges, in such a way that no other pressure would be necessary to secure desired outcomes. However, skewing the composition of the bench through selection and promotion of judges is a rather long-term project requiring concentrated action for a longer period. Contrarily, if powerful actors use their powers to discipline, transfer or dismiss judges they can effectively demonstrate their capacities to the judiciary motivating judges to certain actions, or discouraging them from others, in a shorter time period. In sum, we hold that to study judicial independence one should look at three levels: distribution of formal

[35] Tiede, supra note 11, pp. 133-135.

[36] Russell, supra note 9, p. 7.

[37] Burbank and Friedman, supra note 26.

[38] E.g.: Voigt et al., supra note 6; J. Gutmann and S. Voigt, Judicial independence in the EU: a puzzle. *European Journal of Law and Economics* (forthcoming).

[39] Voigt et al., supra note 6.

powers, utilization of these powers to alter the judiciary, and the output of judicial conduct,[40] while treating them separately in order to understand how they are interconnected.

Finally, as regards the proposed indicators of the subjective independence of the judiciary and individual judges, we understand authors' choice to use data from opinion surveys as a proxy. However, it needs to be borne in mind that more than what they want to measure (judicial independence) they may in fact measure public trust, a concept not necessarily related to independence. Public trust/confidence in the judiciary[41] can be understood as the public's belief in the reliability and honesty of courts and judges, and their ability to competently perform functions that are assigned to them.[42] To be sure, perception of independence may be a substantial part of such an evaluation, but not necessarily the most important one.

## 3. Judicial accountability: in search of a viable conceptualization of an understudied concept[43]

In this part we argue that the conceptualization of judicial accountability used by the ENCJ reports and defended by van Dijk and Vos in their leading article is even more problematic than ENCJ's conceptualization of judicial independence. Most importantly, this part of the ENCJ's assessment does not communicate with the existing (judicial) accountability literature at all,[44] which results in several conceptual problems. First, while the ENCJ report does not provide any definition of accountability, the definition proposed by van Dijk and Vos is tautological, vague and normatively loaded, which makes it unsuitable for comparative analysis. Moreover, merging accountability with transparency causes serious methodological

[40] We do understand that to study output of the judicial conduct in all European judiciaries is beyond the capabilities of the ENCJ. However, the ENCJ could and should distinguish between distribution of formal powers (*de iure* independence) and utilization of these powers to alter the judiciary (*de facto* independence),

[41] Sociological tradition distinguishes between 'confidence' referring to living with everyday dangers wothout consideration of alternatives, and ‚trust' related to a situation of risk where an actor engages with an institution and must bear the consequences of such an engagement. See for instance: N. Luhmann, Familiarity, Confidence, Trust: Problems and Alternatives, in D.Gambetta (ed.), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell 1988), pp. 94-107.

[42] G. W. Dougherty et al., Evaluating Performance in State Judicial Institutions: Trust and Confidence in the Georgia Judiciary, *State and Local Government Review 38* (2006), p. 176.

[43] CCJE, Opinion No. 18 (2015) to be taken into account.

[44] On judicial accountability, see e.g. G. Canivet et al (eds.). *Independence, Accountability, and the Judiciary* (British Institute of International and Comparative Law 2006); A. Le Sueur, Developing mechanisms for judicial accountability in the UK, *Legal Studies 24(1-2)*; D. Kosař, The least accountable branch, *International Journal of Constitutional Law 11(1)*, pp. 234-260; Kosař, supra note 7, in particular chapters 1-2; S. Voigt, The economic effects of judicial accountability: cross-country evidence, *European Journal of Law and Economy 25* (2008), pp. 95-123; D. Piana, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice* (Routledge 2010); On accountability more generally, see M. Bovens, Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism, *West European Politics 33(5)*, pp. 946-967; A. Schedler, Conceptualizing Accountability, in: A. Schedler et al. (eds.), *The self-restraining state: power and accountability in new democracies* (Lynne Rienner 1999), pp. 13-28; J. Ferejohn, Accountability in a Global Context, *IILJ Working Paper 2007/5, Global Administrative Law Series*.

concerns. Second, we show that several indicators measured under the ENCJ's judicial accountability assessment have little to do with holding judges to account in the traditional sense, while at the same time the ENCJ overlooks well-known accountability mechanisms such as disciplinary measures. Third, we propose a means of moving forward with the conceptualization of judicial accountability.

### 3.1. We need a definition of judicial accountability before moving to indicators

The concept of accountability is notoriously difficult to define. The very fact that this term lacks a proper equivalent in most non-English languages makes the inquiry difficult. What is more, lawyers lag behind political scientists[45] and economists[46] in analyzing this concept. As one of us lamented a few years ago when reviewing three books on judicial accountability, 'none of the authors devotes much attention to the conceptual question: what exactly is meant by accountability?' and that '[t]his deficit, in turn, results in conceptual confusion that hampers scholarly progress'.[47]

However, since then the relevant political science and economics literature has become widely known among lawyers.[48] As a result, it became clear that in order to save the term judicial accountability from becoming a meaningless 'buzz-word' and to make it analytically useful, every study on judicial accountability should take a stance on two issues. First, it should make clear whether it is studying judicial accountability as a virtue or as a mechanism.[49] Secondly, it should signal the scope of its inquiry to the reader by providing answers to three fundamental questions, namely: (1) is the term 'mechanisms of judicial accountability' reserved solely for ex post mechanisms?; (2) must accountability mechanisms entail consequences[50] for the actor that is held to account?; and (3) does accountability encompass only sanctions or both sanctions and rewards?

In a recent study on the impact of introducing into Slovakia the judicial council on judicial accountability, one of us made clear that he studies accountability as a mechanism, and that he defines accountability mechanisms as ex post mechanisms that must entail consequences, in the form either of a sanction or a reward. This resulted in the following definition of judicial accountability: 'a negative or positive consequence that an individual judge expects to face from one or more principals (from the executive and/or from the legislature and/or from the court presidents and/or from other actors) in the event that his

[45] Bovens, supra note 43; Schedler, supra note 43; Ferejohn, supra note 43.

[46] Voigt, supra note 43.

[47] Kosař, supra note 43.

[48] See e.g. A. Paterson, *Lawyers and the Public Good: Democracy in Action?* (CUP 2011), pp. 137-141; D. Dyzenhaus, Accountability and the Concept of (Global) Administrative Law in Global Administrative Law, *Acta Juridica* (2009), pp. 3-31; N. Bamforth and P. Leyland (eds.), *Accountability in the contemporary constitution* (OUP 2013); Kosař, supra note 7; C. Krenn, The European Court of Justice's Financial Accountability, *European Constitutional Law Review* 13(3) (2017), pp. 453-474; S. Benvenuti, The Politics of Judicial Accountability in Italy: Shifting the Balance, *European Constitutional Law Review* 14(2) (2018), pp. 369-393.

[49] See Bovens, supra note 43.

[50] In other words, must the principal be able to impose sanctions or grant rewards?

behavior and/or decisions deviate too much from a generally recognized standard'.[51] To be sure, this definition is neither the only correct one nor the only possible one. It is quite narrow as it focuses only on the accountability of individual professional judges[52] and only on ex post mechanisms that entail consequences, hence may be potentially unpromising for the ENCJ's analysis. However, it makes clear what is 'in' and what is 'out', and thus every policy-maker may have an opinion on its usefulness.

Compare it with the ENCJ's and van Dijk and Vos's approach to judicial accountability. As mentioned above, the ENCJ reports do not provide any definition of judicial accountability. Van Dijk and Vos suggest in their article that '[a]ccountability is used here in the sense of the judiciary being *morally accountable* to society in general'.[53] Such definition is both tautological and vague.[54] Defining the noun accountability with the adjective 'accountable' does not clarify what is meant by holding judges to account, because it is circular reasoning. Using 'morals' a substantive standard is even more problematic as everybody can read his or her own moral intuitions in the assessment of judicial accountability.

It is possible that van Dijk and Vos implicitly treat accountability as a virtue, but such approach raises many problems. Such theories are normative as they view accountability as a set of standards for evaluation of the behavior of actors. However, van Dijk and Vos do not define the normative benchmarks they use. It seems that, according to their vision of accountability, only those mechanisms they consider 'good' (or 'moral'") count as accountability mechanisms.[55] But people often disagree about what is 'good' ('moral') and 'bad' ('immoral'). That makes van Dijk and Vos's definition particularly unsuitable for comparative empirical analysis (especially surveys), where the consistency in understanding of the indicators is crucial. Moreover, their definition restricts accountability only to accountability to the society without any justification. Why is accountability to the legislature, which represents the people, ruled out? In many developed European societies, the democratic principle forms the backbone of the constitution[56] and may sometimes even be protected by the unamendable part of the constitution, the so-called eternity clause.[57] Again, van Dijk and Vos's definition is normatively loaded, as it implicitly finds accountability to the elected politicians inappropriate and thus outside their definition.

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[51] Kosař, supra note 7.

[52] That stems from Kosař's particular definition of the adjective "judicial", which we cannot discuss here in more detail.

[53] See van Dijk & Vos, supra note 2.

[54] See Voigt in this issue.

[55] The same problem arises, mutatis mutandis, if we treat the "rule of law" as the "rule of *good* law". See J.Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979).

[56] This is a standard position of all relevant stakeholders in Austria.

[57] F.Wittreck, Judicial Self-Government in Germany: Resistance and the Roots of Counter-Resistance, *German Law Journal* (2018 forthcoming). For further details, see K.-E. Hain, in: P. M. Huber et al., *Commentary on the Grundgesetz*, 7th ed. (Munich 2018), vol. II, Art. 79 notes 83 f.

Yet another conceptual problem arises from the conflation of accountability and transparency. More specifically, van Dijk and Vos claim that '[a]ccountability and transparency are … closely linked' and thus they 'use these terms interchangeably'.[58] While there are some broad conceptions of accountability that take a similar approach,[59] such merger suffers from two problems.

First, it means that judicial accountability is defined without the 'enforcement' pillar[60] and implies that if the judiciary is transparent (and under public control), it will act properly. That is a very bold assumption. Has transparency ever changed performance in itself? More specifically, why and how should a transparent judiciary change performance if there is no one particularly responsible to the public? What if the courts were forced to be transparent by an external actor, such as the parliament that found the functioning of the judiciary opaque and problematic?[61] While transparency may very well contribute to the change in judicial performance, it is not necessarily so and the mere correlation should be distinguished from causality.

Secondly, merging accountability and transparency into one concept blurs rather than clarifies things, as transparency is in itself a complex concept. Transparency is not only about accessibility, but also about findability and understandability of the accessible information.[62] Information about courts and judges is available when it is possible to access it. Information about courts and judges is findable if it is visible – it reflects the degree to which information can easily be located. For instance, if information is available in the open access regime (rather than upon request or even subject to fees) and via many channels (online, in press releases, in a specialized journal etc.), it is more findable. Finally, understandability of information reflects the extent to which it can be used to draw accurate conclusions. For instance, if information is provided in the user-friendly format[63] (e.g. in aggregated form, as a summary or commented document rather than just raw data that require time-consuming and resource-heavy processing), the reader can easily infer the findings and their significance, and thus such information is more understandable. Merging all of this under the heading of accountability makes the concept of accountability extremely complex.

This is not to say that the transparency of the judiciary should not be studied by the ENCJ. To the contrary, it is an important value. We also agree that transparency and accountability are interrelated, at least in the sense that transparency is a prerequisite for accountability,

[58] See van Dijk & Vos, supra note 2.

[59] Bovens, supra note 43.

[60] Schedler, supra note 43.

[61] S. Spáč et al., Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia, *German Law Journal 19* (2018) p. 1741.

[62] E.g. J. De Fine Licht et al., When Does Transparency Generate Legitimacy? Experimenting on a Context-Bound Relationship, *Governance 27* (2014) p. 111; and G. Michener and K. Bersch, Identifying Transparency, *Information Polity 18* (2013) p. 233.

[63] In fact, the following three attributes increase understandability (inferability) of data: disaggregation (raw data are the least biased), verifiability (ability to be marked as right data by a third party), and simplification (providing tools for lay people to understand the data, codebooks etc.). See Michener and Bersch, supra note 61.

but they should be treated separately. In sum, transparency is a separate concept that operates rather as the contingent circumstance that might influence whether a certain form of accountability will bring about a certain set of results.[64]

### 3.2. Accountability indicators: overinclusive as well as underinclusive

The abovementioned conceptual problems translate into a very peculiar selection of accountability indicators and sub-indicators that is far away from a traditional understanding of accountability mechanisms. More specifically, the ENCJ's set of indicators is both overinclusive and underinclusive.

Out of the indicators of the objective accountability of the judiciary as a whole, only the complaints procedure and judicial performance evaluation (periodic and public benchmarking of the courts) are accountability mechanisms under any conception of accountability as they entail consequences for the judiciary. It is less clear how the mere publication of the annual reports, the transparent allocation of cases, and relations with the press in themselves may hold the judiciary to account. These three measures tell us more about transparency than about accountability, since without further action they do not result in any consequences for the judiciary. The indicator of "external review" is then too vague as it is not clear what it means if the judiciary is open to external review.

The indicators of the objective accountability of individual judges are even more problematic. A code of ethics in itself does not hold individual judges to account. In several countries, judges openly ignore the code of ethics and do not face any consequences.[65] It is only the subsequent disciplinary action that holds the given judge who breached the code of ethics accountable. The same applies to recusal, admissibility of external functions, and disclosure of financial interests. These indicators just set the standard, but do not ensure that someone will enforce it against recalcitrant judges. Finally, understandable proceedings are totally unrelated to any plausible conception of judicial accountability.

At the same time, the set of indicators in van Dijk and Vos's article is underinclusive. Typical accountability mechanisms of the judiciary include budgeting for the courts, reducing the compulsory retirement age of judges, and the dismissal of court presidents. As to the accountability of individual judges, one of us has provided a detailed account of this aspect of judicial accountability elsewhere,[66] and thus we will not elaborate on it here. It suffices to say that virtually any definition of accountability of individual judges includes disciplinary proceedings.[67] It is unclear to us why both the ENCJ and van Dijk and Vos's article exclude

[64] For a similar approach, see M. Philp, Delimiting Democratic Accountability, *Political Studies 57*, pp. 28-53.

[65] See e.g. Iancu, supra note 18 (regarding Romania); Kosař, supra note 7, pp. 317-329; S. Spáč et al., supra note 60; and Spáč, supra note 7; and (regarding Slovakia).

[66] Kosař, supra note 7.

[67] A. Le Sueur, supra note 43; Kosař, supra note 7; Bovens, supra note 43; Voigt, supra note 43; D. Piana, supra note 43.

this mechanism from their account of accountability.[68] This of course is not to suggest that disciplinary proceedings are the only accountability mechanism. The other mechanisms may include, among other things, impeachment, retention, relocation, reassignment, and demotion of judges, volatile judicial salaries, case assignment and reassignment.[69] Broader conceptions of accountability may also accept the election of judges as a method by which judges are held to account.

### 3.3. How to move forward?

In order to improve our knowledge of how judges are held to account in different societies, we urge the ENCJ to sharpen its definition of judicial accountability (that it avoid tautological definition and replace the current vague moralizing language), strip it from the normatively indefensible limitations (such as a very narrow understanding of the accountability of whom question), and to distinguish it clearly from adjacent concepts such as judicial transparency and from wholly different issues such as recusal of judges and understandable proceedings.

Irrespective of how broad or narrow a definition of accountability the ENCJ eventually adopts, we believe that the ENCJ should focus on three dimensions of judicial accountability: (1) *de iure* accountability of both the judiciary and individual judges; (2) *de facto* accountability of both the judiciary and individual judges;[70] and (3) informal accountability of both the judiciary and individual judges. *De iure* judicial accountability should ask who has the formal power (as defined by legal rules) to hold the judiciary and judges to account and for what.[71] *De facto* judicial accountability should probe into how these formal rules operate in practice and which formally empowered actors actually hold the judiciary and judges to account in practice and for what. Finally, informal judicial accountability would explore whether there are any informal mechanisms (not regulated by law) via which the judiciary and judges are held to account. Such informal mechanisms may include, among other things, forced retirements, media pressure, powers of court presidents to assign subsidized flats and to decide on attending foreign conferences, and the ruling party implicating a judge's family in a scandal.[72]

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[68] One possible explanation would be that the ENCJ treats judicial independence and judicial accountability as mutually exclusive concepts. However, this is an indefensible position (even van Dijk and Vos themselves in their article acknowledge that certain accountability indicators such as allocation of cases also raise independence concerns, see van Dijk and Vos, supra note 2).

[69] Kosař, supra note 7.

[70] On the distinction between *de iure* and *de facto* judicial accountability, see Voigt, supra note 45; and Kosař, supra note 7 (especially chapters 1 and 2).

[71] Ideally, the ENCJ should also inquire into through what processes are judges held to account, by what standards, and with what effects, but we have to simplify here. For more details, see J. Mashaw, Accountability and Institutional Design: Some Thoughts on the Grammar of Governance, in: M.W. Dowdle, *Public Accountability: Designs, Dilemmas and Experiences* (CUP 2006), p. 118; and Kosař, supra note 7, pp. .40-58.

[72] See Kosař, supra note 7; M. Popova, Be Careful What You Wish For: A Cautionary Tale of Post-Communist Judicial Empowerment, supra note 25; A. Castagnola, Manipulating Courts in New Democracies: Forcing Judges off the Bench in Argentina (Routledge 2018).

In the long term, the ENCJ might also advance our understanding of perceptions of judicial accountability (i.e. subjective judicial accountability in the ENCJ's parlance). To start with, the ENCJ could add a new question to the ENCJ survey that would ask European judges about "accountability as perceived by judges". In addition, it may initiate the inclusion of a similar question to the Flash Eurobarometer, to national surveys among court users, and to the EU Anti-Corruption reports.

## 4. Conclusion

We are extremely grateful that we were allowed to reflect on the ENCJ's methodology and engage with van Dijk and Vos's article. It should be particularly appreciated that the ENCJ opened this debate and invited practitioners and scholars from different fields and with different views on the subject matter. It is a bold move that only a few international associations are willing to make. We did our best to contribute to the development of the ENCJ's conceptualization of judicial independence and accountability. We also understand that one of the key objectives of the ENCJ's Project on Independence and Accountability is 'to present an *ENCJ vision* on the independence and accountability of the judiciary'.[73] This vision is based on the assumption that judicial independence is best served when judicial administration is carried out predominantly by judges. However, this approach, even though a part of the raison d´être of the ENCJ, at best prioritizes judicial supremacy despite unclear evidence about real performance of judicial self-government, and at worst overlooks the growing evidence that judicial councils may actually weaken judicial independence.

Therefore, there are some hard decisions to be made by the ENCJ. Most importantly, it needs to accept the possibility that (at least some types of) judicial councils (at least in some jurisdictions) might negatively affect (at least some facets of) judicial independence and judicial accountability.[74] If the ENCJ contributes to our knowledge of how this is done (by what means and which actors), it would in itself be a great achievement. We believe that the ENCJ is particularly suited to this task, as judges know best what negatively affects their independence and accountability. And if the ENCJ manages to finetune its indicators so that the revised operationalization allows us even to identify which organizational traits of judicial councils matter and under what conditions judicial councils increase both judicial independence and judicial accountability (and, potentially, also the transparency of the judiciary and public trust in courts), it would be a tremendous breakthrough.

[73] ENCJ, *ENCJ project on Independence and Accountability*, available at: https://www.encj.eu/articles/71 (emphasis added).

[74] We leave transparency and public trust aside here. For more on the impact of judicial councils on public confidence in the judiciary, see: M. Urbániková and K. Šipulová, The Failed Expectations: Does the Establishment of Judicial Councils Enhance Confidence in Courts? *German Law Journal* (2018 forthcoming).

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2015/7: Martina Baráková_Stanoviska nejvyšších soudů_efektivní prostředek sjednocování judikatury nebo přežitek socialistické justice
2015/8: Ondřej Málek_Vybrané důsledky jednání v rozporu s péčí řádného hospodáře a jejich komparace

**Year 2014**
2014/1: David Kosař_Selecting Strasbourg Judges
2014/2: Luboš Brim_Ustanovení zástupce dle OSR II
2014/3: Ladislav Vyhnánek_Proporcionálně či jinak_Problém ústavního přezkumu zásahů do sociálních práv
2014/4: Tomáš Sobek_Právní welfarizmus
2014/5: Jan Neckář_Sleva na dani u pracujících starobních důchodců z pohledu zneužití práva
2014/6: Alžbeta Rosinová_Úprava ústavní stížnosti v státech V4
2014/7: Jaroslav Benák_Vznik a vývoj ústavního soudnictví v ČR
2014/8: Libor Kyncl_Zneužívání veřejných výdajů a svévole v právu veřejných výdajů