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Innovate – Don't Imitate! – ENCJ Research Should Focus on Research Gaps

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Abstract:
After a critical evaluation of the proposal by van Dijk and Vos to make judicial independence and accountability measurable, this paper discusses a number of basic methodological decisions that need to be made before meaningful indicators can be constructed. The paper then moves on to deplore the lack of knowledge regarding the effects of judicial councils and proposes that more research be carried out to reduce our knowledge deficit. It further describes the rising importance of prosecutors and the complete lack of indicators regarding prosecutorial accountability. It argues that producing indicators with regard to prosecutors could add a lot more value than yet another indicator on judicial independence.

Key words: judicial independence, judicial accountability, prosecutorial independence, prosecutorial accountability, judicial councils, indicator construction.

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1 Introduction

Reliable measures for both judicial independence (JI) and judicial accountability (JA) are a desideratum. Only if we are able to reliably measure the degree to which various countries have realized the independence and accountability of their judiciaries are we able to ascertain their effects empirically. Policy recommendations aiming to improve JI and JA will only be convincing if the precise weaknesses that a judiciary suffers from are well known. Those are only two important reasons for why reliable measures are dearly needed. In principle, then, the attempt of the ENCJ to help establish such indicators is highly welcome and the responsible ENCJ bodies are to be congratulated for their initiative.

But there is an important limitation. The proposal by van Dijk and Vos to be discussed here does not really get us closer to reliable indicators. Let me briefly summarize. The proposal rests on questionable assumptions, the most important of which is that the judicial councils are conducive to both JI and JA. Empirical evidence in support of this assumption is lacking and relevant studies seem to indicate the exact opposite. Furthermore, the proposed indicators are undertheorized, some variables included in the proposed indicator are fraught with problems and the proposed way to aggregate the single variables into an overall indicator is flawed . Several indicators that suffer neither from the theoretical nor the empirical flaws of this proposal are readily available. In other words: It is not clear what the new indicators could contribute to the debate on how to optimally design the judiciary.

How to get out of this mess? I suggest to rely on existing indicators and redefine this data gathering project. The ENCJ should focus on its strengths. It has the capacity to get in touch with thousands of judges – and possibly also with thousands of court users. There are many things these people know that are not commonly known – and are of relevance to the perception as well as the functioning of judicial systems. Tapping this resource could add significant value to the academic and policy debate.

The remainder of my contribution is structured in the following way: In the next section, I explicitly deal with some of the flaws of the proposal by van Dijk and Vos. The following section discusses a number of methodological decisions that need to be taken before constructing an indicator. In a sense, it serves to offer some background regarding the heavy criticism in Section 2. In Section 4, I encourage the ENCJ bodies to be innovative and sketch one or two projects where a real value added seems possible.

2 Shortcomings of the Proposal

In the introduction to their paper, the authors write that "the lack of a comprehensive approach in the assessment of judicial independence and judicial accountability is striking." They conclude that "most studies are of an ad-hoc nature", somewhat implying that theirs is not. I think that both claims are massively exaggerated.

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Over the last 20 years, there has been a broad discussion in both academia and policy circles on how to assess JI and JA. Rick Messick's (2001) paper on "Key Functions of Legal Systems with Suggested Performance Measure" was an important early contribution. The 2003 paper by Feld and Voigt contains objective (non-perception-based) measures for both *de jure* and *de facto* JI. These country indicators have not only led to many contributions on how the indicators could be improved but they have also been used in many empirical studies. In later years, a number of think tanks have invested ample resources to produce many more reliable indicators (many of which are included in the survey by Ríos-Figueroa and Staton 2014).

Compared to what is readily available, the current proposal is rather disappointing as it suffers from many flaws. Let me mention some of them. A necessary condition for producing reliable indicators is a precise definition of the key terms. A previous version of the paper did not contain any definition of the term "judicial accountability". The authors have now added this sentence: "Accountability is used here in the sense of the judiciary being morally accountable to society in general." This definition is puzzling for many reasons: It "defines" the noun accountability with the adjective accountable. By adding "morally" it becomes incomprehensible in what situation the defining elements of judicial accountability are present or absent. Moral intuitions are likely to differ across countries. Does that mean that the standard for JA should be context-dependent as well? If the authors are serious about this, then the attempt to come up with an indicator across countries is a non-starter. Moreover, accountability to the population is distinct from accountability to higher courts, to the law, to the law-makers, to disciplinary bodies, etc. In a judicial system that does not publicly elect judges, other forms of accountability appear to play a far more important role.

Some of the variables proposed to be included in the indicators are questionable, to say the least. On what theoretical grounds should there, e.g., be any "formal guarantees for involvement of judges in development of legal and judicial reform"? I might be old-fashioned, but the separation-of-powers doctrine would seem to say otherwise. Even if there were such guarantees, I do not see why that should necessarily lead to higher levels of JI.

Here is another example: the existence of a council for the judiciary is interpreted as one variable causing or reflecting high levels of JI. It is not only the existence of a council that counts, but also whether the council complies with ENCJ guidelines. True, councils have been high on the agenda of organizations like the World Bank who have encouraged many governments to adopt them. Yet, the empirical evidence regarding their effects that I am aware of sheds doubt on the assumption that they help making the judiciary more independent. In an early paper on judicial councils, Garoupa and Ginsburg (2009) find that neither the composition nor the competences of judicial councils are significant in explaining differences in the degree to which the rule of law is realized (of which JI is, of course, a central component). In a more recent paper, Voigt and El Bialy (2016) analyze the determinants of judicial performance based on data provided by the European Commission for the Efficiency of Justice (CEPEJ). To their surprise, judicial councils were consistently correlated with a worse, rather than a better performance. Although judicial efficiency is obviously not identical to JI, the sparse empirical evidence on the effects of judicial councils is sobering and raises the question whether promoting their introduction may have been ill-advised.

In aggregating single variables to an overall indicator, transparent and effective aggregation rules are needed. Attaching equal weight to all variables is common practice here and can be considered the default option. Attaching different weights to different variables makes sense, but needs to be thoroughly theorized. In the proposal under scrutiny here, the most frequently used scores are 0, 1, and 2. There are, however, exceptions: if it is not possible to transfer judges without their consent, the country receives 15 points. Why 15 and not any other number remains unclear. The authors do not provide any reasons for their coding decisions and the proposal is, hence, seriously undertheorized.[1]

Probably the most serious and fatal flaw in the indicator's construction is that countries for which no data on a specific variable is available, are simply coded 0. Two things are, hence, conflated here: country characteristics actually lowering JI on the one hand and lacking willingness or ability to provide data on the other. A country with a highly independent judiciary could, hence, score very badly simply because it did not report enough data.

From previous research, we do not only know that *de jure* and *de facto* JI are not very highly correlated but also that high levels of *de jure* JI have no positive (economic) effects, whereas *de facto* JI is highly correlated with economic growth (Feld and Voigt 2003, Voigt et al. 2015). This finding implies that reliable *de facto* indicators are of particular interest. Unfortunately, the current proposal does not contain such an indicator but relies, instead on "perceived independence." In all likelihood perceived independence will be influenced by media reports and will thus be influenced by recent stories about cases in which the judiciary could not act independently and by the overall degree of press freedom. Regarding what is most likely the most important aspect of JI, namely its actually realized degree, the proposal remains essentially mute.

3. Methodological Considerations

Until now, my comment has been rather harsh and not very constructive. In the next two sections, I focus on suggestions for how the measurement project could be improved. This section contains a number of methodological considerations that should be dealt with before delving into the business of constructing indicators.

1 Interestingly, the term "transfer" is nowhere specified and seems, hence, to be used in a very general fashion. It might have been interesting to separate different kinds of transfer, such as to different locations, to other types of courts, or other positions in the judicial system more generally (such as being transferred to become a prosecutor).

Choice of Method Depends on Underlying Goal

I assume that the underlying goal of the entire project is to help strengthen both JI and JA, e.g., because they are seen as important components of the rule of law or because they have positive economic effects (such as more transactions, more investment and, at the end of the day, faster economic growth). If this is the final goal, an intermediate goal would be to generate policy proposals conducive to that final goal. One precondition for getting there has already been named in the last section of this comment: the central terms need to be defined precisely. Whereas van Dijk and Vos start off by offering a definition of JI, JA is delineated in an extremely fuzzy way.

If one is indeed interested in the generation of policy proposals, it is important that indicators are "actionable." Telling politicians merely that the JI score of their country is low will not be helpful in that regard. So, highlighting single aspects or dimensions that could be improved promises to be more helpful than focusing solely on one highly aggregated indicator. At the very least, it would have to be shown that sub-indicators tend to move in the same direction as the overall indicator.

That being said, a word of caution is in order: The low correlation between *de jure* and *de facto* JI shows that many countries have legislation conducive to JI which is, however, often not implemented on the ground. While incapacity might be one reason, the preferences of politicians might be another. When push comes to shove, many politicians seem to be ready to renege upon formal legislation and interfere into the business of a formally independent judiciary. Not taking the preferences of politicians into account while offering policy advice is therefore unlikely to have any beneficial effects.

But that is not the only reason to be cautious. Many programs aiming at improving the rule of law, of which JI and JA are important parts, miserably failed (e.g. Andrews 2013). And this outcome is likely even when we assume that politicians are genuinely interested in high levels of JI and JA because formal institutions – such as laws – can be radically changed overnight but it might take years or even decades until they really constrain and channel behavior in the way intended. Sounds like wild speculation? Here is some evidence: Based on data from the EU Justice Scoreboard, Gutmann and Voigt (2018a) show that national levels of judicial independence (as perceived by the citizens of EU member states) are negatively associated with the presence of formal legislation usually considered as conducive to judicial independence. The authors try to solve this puzzle based on political economy explanations and specificities of legal systems, but to no avail. They then ask whether cultural traits can help to put together the puzzle. And indeed, countries with high levels of generalized trust (and to a lesser extent individualistic countries) exhibit increased levels of *de facto* judicial independence and, at the same time, reduced levels of *de jure* judicial independence. The combination of these two effects of culture on judicial institutions can explain why judicial reforms that should be conducive to an independent judiciary may seem to have adverse consequences. The authors conclude that cultural traits are of fundamental importance for the quality of formal institutions, even in societies as highly developed as the EU member states.

Objective vs. Subjective Indicators

In developing indicators, a decision needs to be taken whether one wants to rely on objective or subjective indicators (a mixture is, of course, possible, but not necessarily preferable). Subjective indicators are based on the perceptions of citizens or experts. The subjective indicators dealing with JI very frequently rely on assessments by so-called country experts or businesspeople. The Global Competitiveness Report of the World Economic Forum or the World Competitiveness Ranking by the IMD Business School are some of the best-known examples. They provide very interesting information. If business people perceive a country's judiciary as not independent from government, they are likely to invest less. In that sense, they are not only interesting, but also highly relevant. They do, however, have an important drawback: these indicators are not actionable. If a government wants to increase its chances of receiving foreign direct investment, it needs to know the reasons why its judiciary is perceived as dependent.

This is a drawback from which objective indicators do not suffer. Since they are based on facts, they can be replicated by anybody interested in replicating them. This lends them higher credibility.

Here is a concrete proposal how the current project could add value to the academic and policy debate on how to organize the judiciary. I have argued that, at least in principle, both subjective and objective indicators can reveal relevant information. It would be helpful to identify those objectively verifiable factors that determine perceptions of JI. This could easily be turned into implementable policy advice. Few – if any – surveys have been carried out among court users. It would be great if the ENCJ could change this and inquire into the experiences of court users. Now, you have noticed that I am not talking of perceptions, but of experiences. Until now, many surveys include answers from people who have never used the courts themselves. They are, thus, revealing perceptions that might be formed on the basis of media reports, conversations with friends and family, and so forth. It would surely be interesting to run a survey solely with people who have first-hand experience with courts.[2]

4 Innovate – Don't Duplicate!

The header to this section indicates that the extant project proposal duplicates existing indicators rather than adding something innovative. To substantiate that claim I begin this section by referring to three examples of readily available indicators regarding JI. In the second part of this section, I then sketch two projects with which the ENCJ working group could really add value.

2 Gutmann et al. (2015) have studied the relationship between perception vs. experience regarding corruption and find that they are not as highly correlated as one might expect and further that some basic sociodemographic characteristics can help to explain differences between the two.

Available Indicators

Over the last couple of decades, a very high number of academics and organizations have made indicators on JI available. There is great heterogeneity among them: some focus more on *de jure* than *de facto*, some draw on subjective perceptions whereas others try to code objective information. Since there are so many of them, I will not even try to name them all here but simply choose three as examples.

Linzer and Staton (2015) noticed that many of the available indicators were suffering from at least one flaw: they were only available for a single point in time (or rather few points in time) and they were only available for a rather small number of countries. Linzer and Staton offer a solution to this problem by aggregating in a sophisticated statistical measurement model the data from various sources to cover 200 countries over the time period since 1948. Their measurement model used for uncovering latent JI is able to address temporal dependence in observed and unobserved variables, substantial missing data, and measurement error in observed indicators, as well as conceptual boundedness in the latent quantity. Their indicator captures the level of JI in countries' highest courts, which is used as a proxy for the independence of judges in the whole court system. Their data has recently been updated by Holsinger et al. (2017).

A completely different approach has been pursued by the World Justice Project (WJP). Whereas Linzer and Staton (2015) rely only on secondary data, the WJP relies exclusively on primary data. The primary data on which the index is built are assessments from local residents (1,000 respondents per country) as well as local experts. The current edition covers 113 countries to measure how the rule of law as experienced and perceived by the general public worldwide. Now, the rule of law is much broader than JI and JA, but some of their variables focus on both JI and JA. To make my point, I am including a list of the most relevant variables.[3]

Box 1: JI-relevant variables as documented by the World Justice Project

- The government always obeys the decisions of the high courts, even when they disagree with these decisions
- In practice, the national courts in [contact("country")] are free of political influence in their application of power
- The following question aims at identifying the main problems faced by the criminal courts in [contact(""country"")]. On a scale from 1 to 10 (with 10 being a very serious problem, and 1 being not a serious problem), please tell us how significant are the following problems faced by the criminal courts in the city where you live:- Lack of independence of the judiciary from the government's power
- Based on your experience, out of all the cases in which the government had an interest (as a litigant or third party), in what percentage (%) of them did the government exercise undue influence to affect the outcome of the case?
- In practice, the national courts in [contact("country")] are free of political influence in their application of power
- In practice, the local courts in [contact("country")] are free of political influence in their application of power
- Assume that a government officer makes a decision that is clearly illegal and unfair, and people complain against this decision before the judges. a. Q11A. In practice, how likely is that the judges are able to stop the illegal decision?

Of the countries covered by the ENCJ paper, only Latvia, Lithuania, and Slovakia are not covered by the WJP. On the other hand, the WJP report includes a number of countries not included in the ENCJ paper, namely Albania, Bosnia & Herzegovina, the Czech Republic, Estonia, Georgia, Greece, Moldova, Serbia, Turkey, and Ukraine.[4]

As a last example for readily available indicators of high quality, I want to mention a number of variables contained in the Varieties of Democracy (V-Dem) project. The goal of the project is to capture the many different dimensions of democracy over time. As of today, the dataset covers 201 countries with annual data from 1789 to 2017. V-Dem draws on advanced techniques for aggregating their 450 indicators. One chapter explicitly deals with the judiciary and contains aspects such as the number of judicial purges, whether there were any government attacks on the integrity of the judiciary, whether any court packing was observed, and whether judges are held accountable for their conduct. This dataset is fascinating not only because so many leading social scientists have contributed to it, but also because it has been produced to cover so many years.

Given these momentous and readily available indicators, the ENCJ attempt appears almost dwarfish. This is why the ENCJ should turn elsewhere.

Where to Add Value

Above, I already mentioned that the track record of judicial councils regarding the rule of law as well as the effectiveness of the judiciary seems to be rather problematic. A recent paper by Castillo Ortiz (2017), which is based on a survey carried out among judges by the ENCJ, adds even more doubts. It finds that in some European countries judges have a decidedly negative view on judicial councils. In Spain, for example, more than one third of all respondents claim that their judicial council has not been

3 Botero and Ponce (2011) describe the methodological approach of the WJP in more detail.

4 In a similar fashion, the WJP data allow the derivation of an indicator of JA. A more precise description can be found in Gutmann and Voigt (2018b).

respecting their independence. This is definitely neither the only nor the first paper finding that judicial councils can be a bane for judicial independence. It deserves particular mention here because it is based on data collected by the ENCJ.[5]

These findings should be alarming for the ENCJ. Although they should be alarming, they are not the last word on judicial councils. Most of the available studies rely on a rather small number of jurisdictions covered. The term judicial council is very broad and many different types are covered by the generic term. In their early contribution, Garoupa and Ginsburg (2009) propose to look at their composition (how many judges, how many politicians, how many lawyers etc.), the way in which they are appointed, their size, and their competences asking whether they have only administrative functions or also competences regarding the appointment, transfer, and disciplinary sanctions of judges. Bobek and Kosar (2014) propose to distinguish three emanations in Europe alone, namely a judicial council model, a courts service model, and a hybrid one.

It is not unlikely that particular traits of the organizational structure of judicial councils are responsible for most of their disadvantages. But this is merely a conjecture. It would be very important to know whether such a conjecture can be confirmed empirically. Such a project would need to comprise more judicial councils than those represented in the ENCJ. So I suggest that the ENCJ cooperate with other councils to inquire into organizational traits conducive to JI and JA.

Over the last decade or so, the influence of prosecutors has grown immensely in many countries. With regard to criminal cases, it is them who decide whether a case ever ends up in court. They are, hence, agenda-setters for judges, and they have been referred to as the 'judge before the judge' and 'judge by another name' (Weigend 2012, 378, 389). Prosecutors formulate charges, conduct the prosecution and argue the case in court. In order to take the strain off overloaded court systems, many jurisdictions have shifted powers and responsibilities from judges to prosecutors. As a result, some scholars consider prosecutors to be potentially the most powerful actors in the criminal justice system (Jehle and Wade 2006; Weigend 2012, 383–9). In a report entitled "The Disappearing Trial", the NGO Fair Trials International (2017) offers information on the degree to which trial waver systems – a generic term for what is known as plea bargaining in the U.S. – are used today. Here is the percentage of cases for a number of European countries: Bosnia & Herzegovina 41%, Estonia 64%, Georgia 88%, Poland 43%, and Spain 46%.

In an early study, van Aaken et al. (2010) showed that the *de facto* independence of prosecutors is strongly correlated with corruption levels: the more independent the prosecutors, the lower the perceived level of corruption. It has even been argued that for politicians who are interested in reaching political goals via the judiciary, putting pressure on prosecutors – and, thus, tinkering with their independence – could be more attractive than trying to influence judges, simply because the latter would arouse a lot more opposition (Voigt and Wulf 2017). In sum, then, the *de facto* independence of prosecutors seems highly relevant for realizing the rule of law. Given its increasing relevance, it is amazing how little we know about it. There are many indicators on offer depicting JI, some regarding JA and prosecutorial independence , but none dealing with prosecutorial accountability. This is an important gap and it would be wonderful if the ENCJ decided to take on this important job possibly in cooperation with the International Association of Prosecutors or some other suitable organization.

5 Conclusion

Both judicial independence and judicial accountability are important. It is good that they receive considerable scholarly attention and have done so over the last 15 years. Several indicators purporting to measure them and to make them comparable across countries have been made available. Due to the wealth of already existing indicators, there is little value to adding yet another one. This comment argues that ENCJ supported research should focus on more pressing issues. Three such issues were named. They are (1) carrying out surveys among court users, (2) measuring organizational traits of judicial councils, and (3) developing an indicator depicting prosecutorial accountability.

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