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## Abstract

The European Network of Councils for the judiciary defined indicators and gathered data to assess the formal safeguards for independence of the judiciary in twenty European countries. It also conducted a survey among judges about their perception of judicial independence. Distinguishing between old and new democracies, statistical analysis of the data show a strong correlation between perceptions of judges and those of citizens for the old democracies and a weaker but still sizeable correlation for the new democracies. Regression analyses for the two groups of countries reveal that in the old democracies the improper allocation of cases, altering working conditions due to changes in pay, pensions and retirement age and (the threat of) claims of personal liability are the three aspects that have the largest impact on perceived independence, while in the new democracies improper appointments, inappropriate pressure and media influence are most important. The connection between perceived independence and formal safeguards is weak. It is found, however, that the formal legal position of the judiciary is important in new democracies, while in old democracies the funding of the judiciary plays a role. Formal safeguards regarding case allocation have positive effects on perceived independence with both groups of countries.

## 1. Introduction\*

Independence is essential to the functioning of the judiciary and its individual members. “Judicial independence stems from the need for impartial adjudication of all cases, whether criminal, civil or administrative law cases. The judge should not be affected by differences of power between litigating parties. Protection of the citizen against the power of the government of the state is obviously central. But the issue is broader. The judge must be incorruptible and able, in a proper case, to decide cases in ways that contravenes both media and public opinion.”(ENCJ 2014, p. 10) Obviously, independence is a multi-faceted concept. On the one hand, it is the right of judges not to be interfered with: judges must be allowed to be independent, and many legal instruments and documents stipulate which formal safeguards are required to that end. A judiciary or a judge that meets these requirements is an independent judiciary or judge. In this sense independence is a construct based on formal rules. On the other hand judges should behave, handle and decide cases in an independent manner. His or her decisions and other behavior show whether a judge is independent in practice. These actions are observed - directly or indirectly through the media - by groups in society, such as citizens, court users and judges themselves, who all arrive at an assessment of actual independence. The European Network of Councils for the judiciary (ENCJ) has defined the formal requirements or safeguards which it terms ‘objective independence’, and made these measurable. The ENCJ has also defined perceived independence, to which it refers as ‘subjective independence’, using existing data sources about the perceptions in society. In addition, it has conducted a survey among European judges about their perceptions of their own - and their colleagues - independence to fill in an important knowledge gap. This is the first time European judges have been asked about their perception of their independence.

The ENCJ reports (ENCJ, 2014 and 2015) document and explain the indicators and present the data<sup>1</sup>. In these reports the data are not analyzed. The ENCJ objective was to get an assessment of the actual state of affairs of judicial independence in Europe. This provides Councils for the judiciary and, in their absence, other governing bodies of judiciaries with insights in their strengths and weaknesses and thereby with targets for improvement. We use the data to gain a deeper understanding of various ways to approach judicial independence and the main determinants of independence by a statistical analysis presented here. We try to answer three questions in particular. First, do perceptions of independence differ between citizens and judges? Second, which are the important determinants of independence, as perceived by judges in judicial practice? And third, what is the relationship, if any, between perceived independence and formal safeguards of independence?

Section 2 gives an overview of the empirical research on judicial independence, while section 3 provides a short description of the measuring system developed by the ENCJ. Section 4 analyses the perceptions of judicial independence held by citizens and judges at country level. As the survey among judges provides much detail, the relative importance for judges of various aspects of independence in judicial practice are analyzed. This analysis is based on individual data. Section 5 focuses on the relationship

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<sup>1</sup> The first and third mentioned authors were involved in the work of the ENCJ on independence and accountability as project coordinator and project secretary respectively.

between formal safeguards of independence and perceptions of independence. This analysis is on country level. Section 6 presents a further analysis of the determinants of the perception of judicial independence by individual judges in their respective countries. The analysis combines the survey results about the perceptions of various aspects of independence in judicial practice and the indicators of formal safeguards. This is a multilevel analysis combining individual data and the data on formal safeguards at country level. Section 7 concludes.

## **2 Empirical research on judicial independence**

There is a body of literature about measures of formal (de jure) independence and actual (de facto) independence of judges or the judiciary and the mutual relations between these measures. Measuring independence, both de jure and de facto, is not without problems. Rios-Figueroa and Staton (2012) summarize the literature in this field. The measures actually used vary wildly. 'De jure independence' is usually measured by indicators of formal safeguards laid down by constitutions, laws and other formal rules (e.g. Keith 2002; La Porta et al. 2004). Institutions like fixed tenure, multilateral appointment procedures, budgetary autonomy, and judicial councils are generally thought to provide the judges insulation from undue pressure. Consequently, such factors are assumed to influence behavior and promote judicial autonomy.

De facto independence is often conceptualized as judges not responding to undue pressures to resolve cases in particular ways. In a second interpretation it is key that their decisions are enforced in practice even when political actors would rather not comply (Rios-Figueroa and Staton, 2012). Both concepts are not easy to operationalize. Direct observation and analysis of decisions are cumbersome and may be misleading. Decision-making may appear autonomous when there is case selection and removal of controversial cases from the courts. So alternative approaches to measure de facto independence have been developed. We discuss three.

The first type of approach is to measure (proxies of) *actual conduct of actors in society* as a reflection of de facto independence of the judiciary. Indicators generally relate to actual constraints on executive authorities: some studies use data of the Polity databases, developed by Gurr (1990). These contain country data on the level of democracy and the extent of checks and constraints on the executive and other data in the same sphere. Others use the information in US country reports about the state of democracy and human rights in various countries (Howard en Carey 2004; Cingranelli and Richards 2008). More indirectly, Clague et al. (1999) use the ratio of non-currency money to the total supply of money as a measure of the trust within society in judicial institutions that enforce contractual obligations of the banking industry. The second type of approach is based on perceptions of judicial impartiality as a proxy of judicial autonomy or on perceptions of judicial independence itself. These perceptions are derived from questionnaires among people who have experience with the courts like lawyers and firm executives. The World Economic Forum data (Global Competitiveness Report) are based on this approach. Another source is public opinion data, e.g. the European Barometer.

Hayo en Voigt (2005) agree that perceptions about the independence of the courts are an important element determining behavior in societies. However, they argue that the norms of what an ideally independent judiciary would look like will most likely be different in different parts of the world. As a result, data obtained by polls are not easily comparable. Therefore they choose for a third type of approach. They, like a number of other authors, approach 'de facto independence' by focussing on indicators based on 'objective' information about the actual processes within and functioning of the judiciary. This information is gathered by experts. They focus in the first place on the position of judges in the highest court (the court of last resort) in a country. Indicators are the average length of tenure of these judges, deviations from legal rules in this area, changes in the number of judges and in the legal foundations regarding the highest court in general and the degree of implementation of decisions of the court. Additional measures are the development of the income of judges and court budgets. However, the relevance of these indicators for the actual independence of the judge remains open to question.

Another issue addressed in literature is the link between (indicators of) de jure and de facto independence. Hayo and Voigt (2005) try to 'explain' their measure of de facto independence in a cross section model of countries. They conclude that de facto independence is partly dependent on 'de jure independence', but also on factors such as the confidence of the public, extent of democratization, degree of press freedom and cultural factors, like religious beliefs of the population. Melton and Ginsburg (2014) conclude that rules governing the selection and removal of judges are the only de jure protections that actually enhance judicial independence in practice and that they work conjunctively. Some other studies find that de facto independence and de jure independence are quite different phenomena. Rios-Figueroa and Staton (2012) conclude that Indicators of de jure and de facto independence are at best weakly correlated and that in some cases, these are even negatively related. They also find that different de jure indicators are not strongly correlated with each other. The correlations between the various indicators of de facto independence are, according to these authors, reasonably strong, despite their difference in content. Also studies of specific countries indicate that both concepts of independence have weak links. In Romania the de jure independence increased without substantial effects on de facto independence (Mendelski 2011). In Venezuela it was the other way round (Taylor 2014).

We conclude that, while the concepts of de jure and de facto independence have received wide recognition, the conceptualization and operationalization of both are complicated, and in most studies are of an ad-hoc nature. Also, the indicators about de jure independence are generally not strongly connected to the host of legal instruments and documents that define the formal safeguards of independence.

As will be discussed in the next section, the ENCJ has developed a set of indicators that encompasses formal safeguards and perceptions within society. The indicators about perceptions were recently extended by a survey among judges of Europe that gives insight into the perceptions of judges about aspects of independence. Importantly, independence is seen as a multi-dimensional phenomenon. In terms of the literature discussed above, the indicators about formal safeguards capture de jure independence. Our measure of de facto independence of judges is based on the perceptions of judges

themselves, as derived from the ENCJ survey. To establish their representativeness, we compare these perceptions with the perceptions of others in society. The relation between these measures of de jure and de facto independence is an important issue in this article.

The objection raised in the literature that the norms of independence may differ among parts of the world seems less relevant as all countries in our data set are European. Nevertheless cultural differences and differences in political systems may be important, as emphasized by Hayo and Voigt. In the recent history of European states there are important differences in democratic tradition. Some countries have a long democratic tradition, while others have experienced a more recent transition to democracy. Both, the norms about judicial independence and the actual processes that affect independence in judicial practice may differ between these ‘old’ and ‘new’ democracies. Therefore, the countries that took part in the survey were divided in two groups with a different recent history: those that were a democracy all the time from the Second World War until now and those that became democracies later. The analyses are presented separately for the two groups.<sup>2</sup>

### 3. Indicators of formal safeguards and perceived independence

The ENCJ has developed a measuring system for the independence of the EU judicial systems in combination with their accountability. This system consists of performance indicators and associated scoring rules. In the view of the ENCJ independence and accountability are normatively connected. In the words of the ENCJ, “Accountability is a prerequisite for independence. Independence is granted by society. A judiciary that does not want to be accountable to society and has no eye for the needs in society will not gain the trust of society and will endanger its independence in the short or long run. Accountability without independence reduces the judiciary to a government agency.” (ENCJ, 2015 p 15) In this paper we focus on independence. Some aspects covered by the indicators have to do with independence as well as accountability. The allocation of cases is an important example. A transparent and objective mechanism is important for the accountability of the judiciary, but it also protects judges against manipulation. It is therefore incorporated in the analyses to come.

The ENCJ indicators concern formal safeguards for independence as well as perceived independence. They deal also with formal accountability. The indicators are listed in Table 1.

**Table 1. Overview of indicators**

Formal safeguards of independence	Perceived independence	Formal accountability
<ul style="list-style-type: none"> <li>• Legal basis of independence</li> <li>• Organizational autonomy</li> <li>• Funding</li> <li>• Management of court system</li> </ul>	<ul style="list-style-type: none"> <li>• Independence as perceived by citizens</li> <li>• Trust in judiciary, relative to trust in other state powers by citizens</li> </ul>	<ul style="list-style-type: none"> <li>• Allocation of cases</li> <li>• Complaints procedure</li> <li>• Periodic reporting by the judiciary</li> </ul>

<sup>2</sup> The ‘new democracies’ are the participating countries which were (a part of) communist countries in Eastern Europe, and Spain and Portugal. Statistical tests show that the estimated relations for Spain and Portugal are more similar to those of the other new democracies than to those of the old ones. See footnote 14.

<ul style="list-style-type: none"> <li>• Human resource decisions about judges</li> <li>• Non-transferability of judges</li> <li>• Internal independence</li> </ul>	<p>in general</p> <ul style="list-style-type: none"> <li>• Judicial corruption as perceived by citizens in general</li> <li>• Independence as perceived by court users</li> <li>• Independence as perceived by judges</li> </ul>	<ul style="list-style-type: none"> <li>• Relations with the press</li> <li>• External review</li> <li>• Code of Judicial ethics</li> <li>• Withdrawal and recusal</li> <li>• Admissibility of external functions and disclosure of external functions and financial interests</li> <li>• Understandable procedures</li> </ul>
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The indicators generally consist of sub-indicators (see Appendix 1), and these sub-indicators are scored by using scoring rules. The scoring rules are based on a normative assessment of what is good and bad practice. The following underlying principles were applied by the ENCJ:

1. “With respect to all formal safeguards, the key issue concerns the ease with which such safeguards can be removed or altered. A safeguard embedded in a constitution offers more protection than one contained in normal legislation. Legislative safeguards are more effective than those contained in subordinate legislation, general jurisprudence or tradition.
2. Judicial self-government, balanced by accountability, is desirable. Where other state powers have the authority to make decisions about the judiciary, decisions based on objective criteria are preferred to discretionary decisions.
3. Responses based upon transparent rules are preferred to ad hoc reactions to particular situations.
4. Judicial decisions and procedures, including complaints procedures, should all preferably be formalised, public and transparent.
5. Transparency requires active dissemination of information, rather than simply making information theoretically available.” (ENCJ 2015 p 16-17).

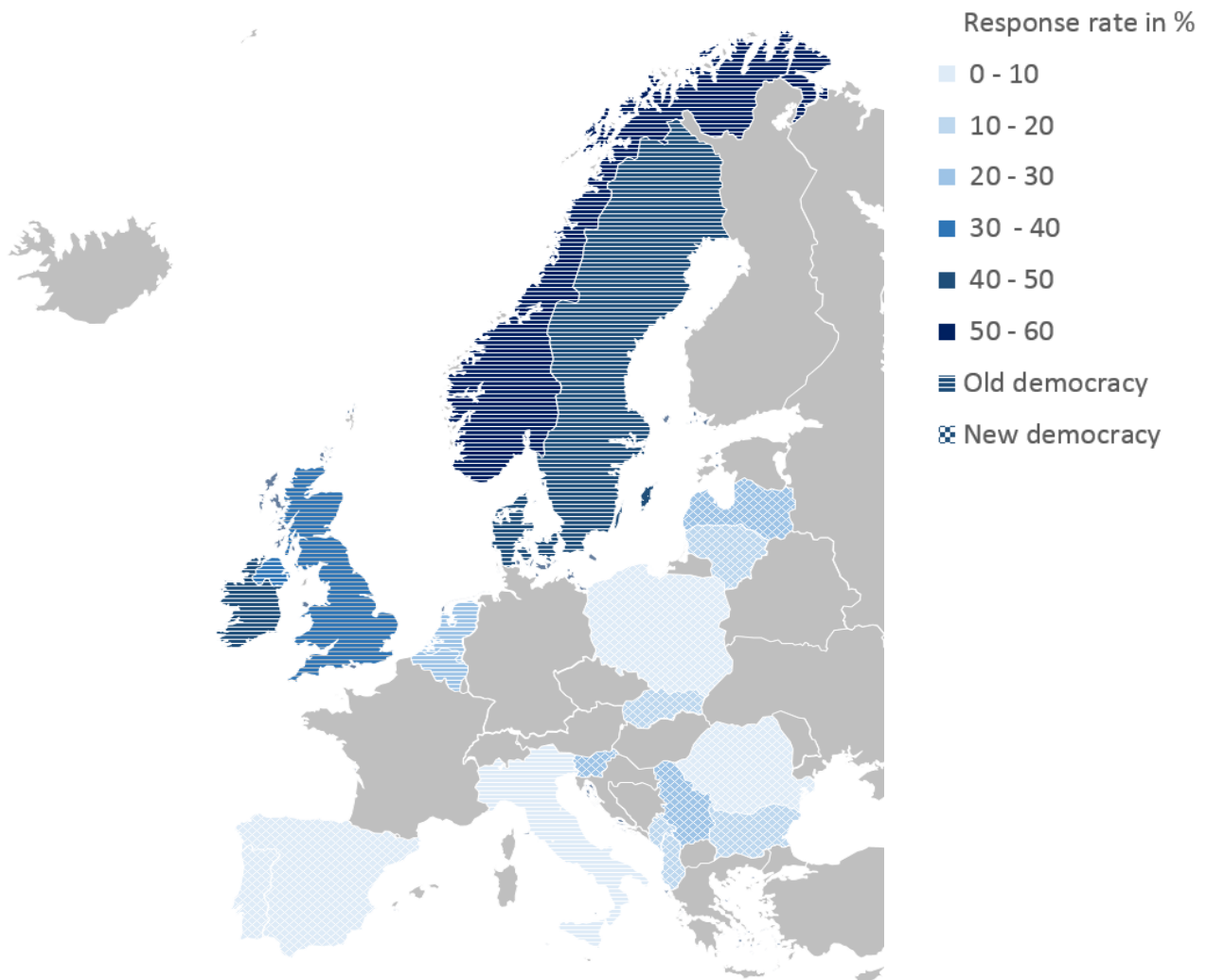
The full description of the sub-indicators and the scoring rules are given in Appendix B and C of the 2015 ENCJ report (ENCJ, 2015 p 113-133) The indicators for formal independence and accountability were scored by the Councils of the judiciary or, in their absence, the relevant governing bodies, such as ministries of Justice.<sup>3</sup> As the indicators are about formal arrangements and some other factual matters, any knowledgeable observer can verify the scorings. The same method was used for two of the indicators about perceived independence, as for these indicators international data were not available and national sources, when available, had to be used. Again, the scorings can be verified by any observer. For the other indicators of perceived independence international data sets were used.

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<sup>3</sup> In addition an expert group saw to it that the scoring rules were applied in a consistent and uniform manner, and it checked the plausibility of the scorings. In case of doubt the scorings were discussed with the country involved and within the full project team, consisting of all participating countries.

With respect to judicial independence as perceived by judges themselves no data were available to the ENCJ, and it conducted an internet based survey among the professional judges of Europe.<sup>4</sup> Also, a pilot survey was conducted among lay judges. Differences between professional and lay judges were small (ENCJ, 2015), and the perceptions of lay judges are not considered here. The method of the survey among professional judges is described in the 2015 ENCJ report. The survey consisted of two closely connected questions about perceived independence in general and of questions about a range of aspects of independence, and the answers allow an in-depth analysis of the perceptions of judges, also in connection with the formal safeguards.

**Figure 1 ENCJ survey among judges: participating countries and response rate**



#### 4. Perceptions of judicial independence

##### 4.1 Perceived independence by judges

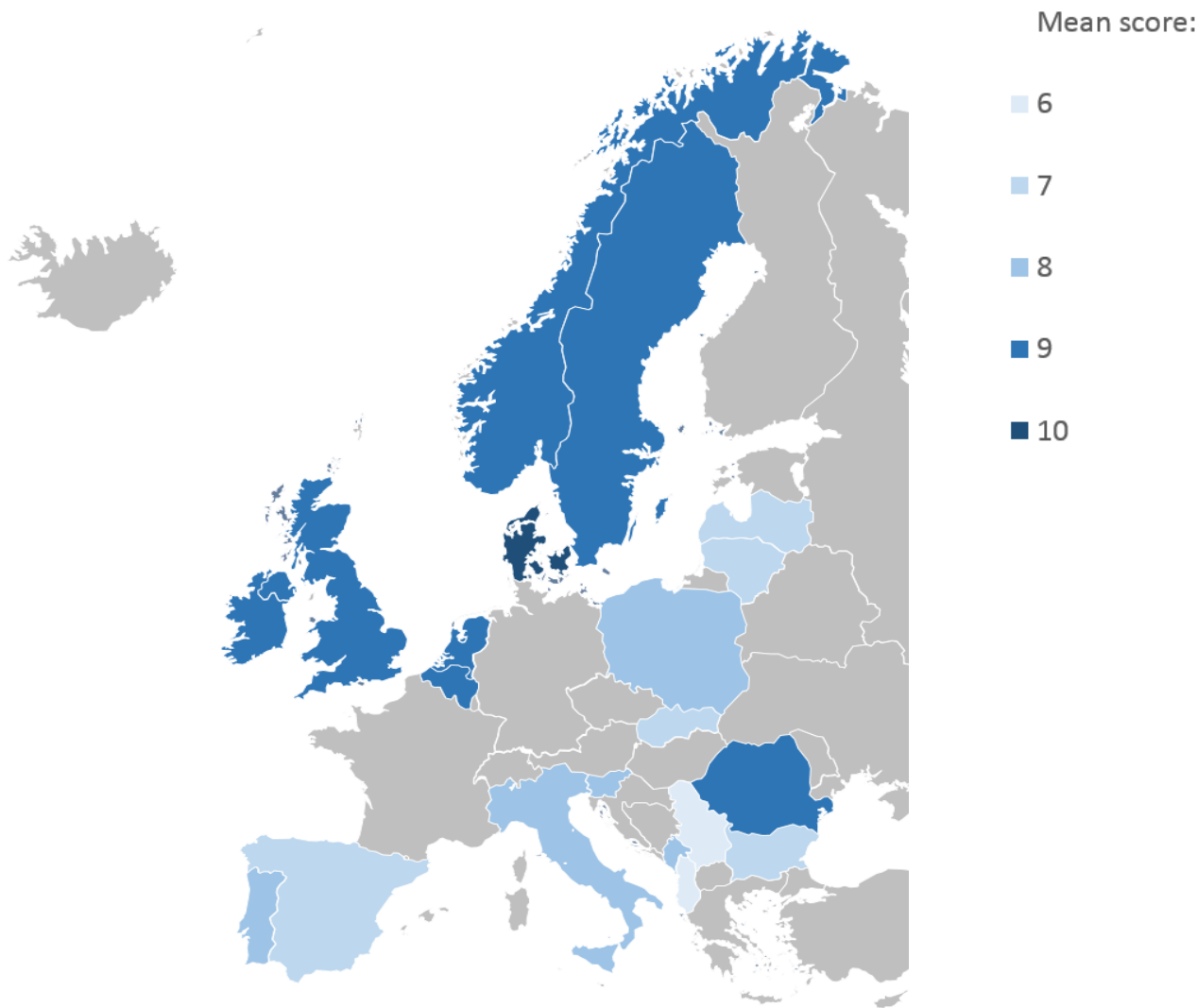
<sup>4</sup> About the perceptions of the users of the courts also very few (national) data are available. It is, however, much more complicated to remedy this situation than the lack of data about the perceptions of judges.



5,878 judges participated in the survey. Figure 1 gives an overview of the 20 participating countries and the response rate among the judges who received the survey in these countries. The countries are ranked from low to high response rates. Because in the United Kingdom three different parts (England and Wales, Scotland and Northern Ireland) are distinguished, because of mutual differences in legal institutions, the analysis encompasses 22 entities, which are denoted hereafter as ‘countries’.<sup>5</sup>

Though the instruction with the survey stressed that the answers given were confidential and this was implemented in the procedure, the response rate in countries has a positive correlation with the perceived independence of judges ( $r=0.64$ ;  $N=22$ ). The minimal number of responding judges in a country was 29; the minimal response rate was 3 percent and the maximum 57 per cent. The average response rate in old democracies was clearly higher than in the new ones: 20 and 10 per cent respectively.

**Figure 2 Mean scores ‘independence of the professional judges in my country’**

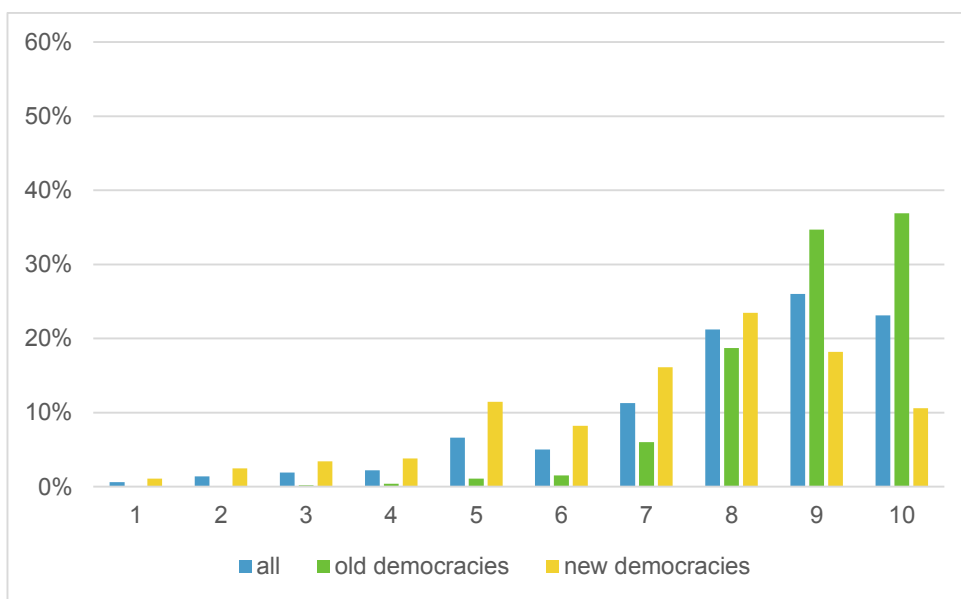


<sup>5</sup> For all of these countries the whole set of indicators is available (in total 25 countries participated in the development of the set of indicators).

In the survey respondents were asked to assess the degree of judicial independence in two ways: for them personally and for the professional judges in their own country in general. Both are expressed in a score ranging from 0 ('not independent at all') to 10 ('highest possible degree of independence'). Figure 2 presents the mean results at the level of the participating countries regarding the independence of the professional judges in general. See Table 2 for questions and results.

The scores of perceived personal independence and the perceived independence of judges in general in the country strongly correlate ( $r = 0.91$  at the level of 22 countries and  $0.71$  at the level of 5,878 individual cases). As judges do not work in isolation, this correlation is no surprise. Perhaps it is also not surprising that the mean score of their personal independence is significantly higher than that of judges in general (on country level  $8.8$  versus  $8.1$ ).<sup>6</sup> Results show that the size of the gap between both scores at country level increases as the perceived degree of independence of the judges in general decreases.<sup>7</sup> Figures 3a and 3b present the results at the level of individual respondents.

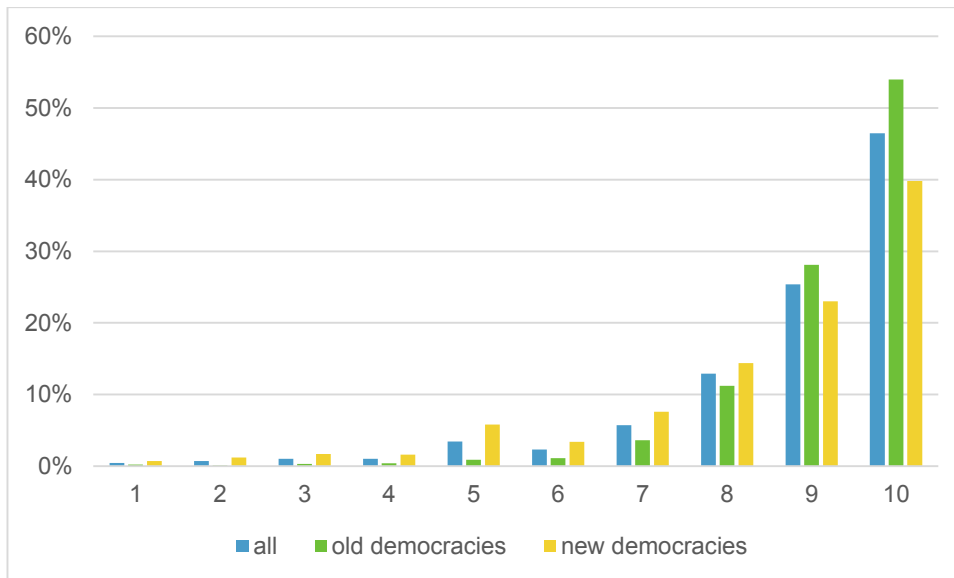
**Figure 3a Scores relating to 'independence of the professional judges in my country'**



**Figure 3b Scores relating to 'my personal independence as a judge'**

<sup>6</sup> Only judges in England/Wales do not perceive their personal independence on the average to be greater than that of the judges in general. In the total sample of 5,878 judges, 250 judges perceived their own independence as less than that of all judges in their country. 2,716 respondents perceived their own independence to be greater than that of their colleagues in the country.

<sup>7</sup> Regressing Q13 (mean country score on independence of judges in the country) on Q14 (mean country score on own independence) gives:  $Q13 = -5,7(***) + 1,56(***) * Q14$ ;  $N=22$ ;  $R^2 = 0.83$ . This means that a score of Q14 = 10 (maximum) is related to a score of Q13 = 9.9, whereas a score of Q14 = 8 is related to a score of Q13 = 6.8.



Both in old and new democracies the most frequent score with personal independence is 10: over 50 per cent and 40 per cent respectively. Scores below 5 are rarely given. The frequency of the score of 10 is clearly lower for the independence of ‘professional judges in my country’. In the old democracies it is just over 35 per cent; in the new democracies it is only about 10 per cent. In the new democracies 22 per cent of the respondents assign scores of 5 or lower, while in the old ones this is only 2 per cent.

#### 4.2 The perceptions of judges and citizens compared

The ENCJ set of indicators contains an indicator about judicial independence as perceived by citizens. The Pearson correlation between this indicator and perceived independence by judges is quite high: 0.85 (N=22). This indicator of perceived independence by citizens is an average of three separate data sets. The correlation with these data sets separately is also high: 0.88 (N=22) with judicial independence in the Global Competitiveness Report of the World Economic Forum and 0.84 (N=17) with the impartiality of the criminal law system measured by the Rule of Law Index. Finally, the correlations with the European Barometer percentages of respondents that rate the independence of criminal, civil and administrative courts and judges as (fairly) good are 0.77, 0.72 and 0.73 (N=19).

The perceived independence of judges is according to all indicators higher in the old democracies than in the new ones. For example the ENCJ indicator of independence as perceived by citizens is on the average 7.8 in the old democracies and 4.5 in the new ones. The results of the survey among judges shows a similar result, as we saw already. The correlation between the perceptions of independence by judges on the one hand and citizens on the other hand is lower in the new than in the old democracies. The correlation between the ENCJ indicator of independence as perceived by citizens and the results of the survey among judges is 0.77 in the old democracies (N=10) and 0.49 in the new democracies (N=12).

It can be concluded that the surveys of perceived judicial independence among judges and among (subsets of) the population yield fairly comparable results. Thus, judges assess their actual independence similarly as others in society. In new democracies the perceptions of judges and citizens are less in agreement. Whether this difference can be attributed fully to a difference in perspective between judges and the rest of society in these countries or whether selective response among judges also plays a role

can not be ascertained. The response rate of the judges in the survey was on the average lower in the new democracies than in the old ones. Despite guarantees of anonymity, doubts about their liberty to respond sincerely may have played a role.

The general consistency of perceptions adds relevance to the answers of judges to the questions about divers aspects of judicial independence in the ENCJ survey. It should be noted that while citizens in general have the same opinion as judges, this does not imply that this is the case for all groups within society.

#### 4.3 Perceived independence by judges and aspects of independence

As evidenced by the indicators, independence is multi-faceted, and it is of interest to establish which aspects are particularly important for judges. The analysis of the answers of the individual respondents in the survey among judges gives an impression. Table 2 presents an overview of the percentage of respondents who (strongly) agree on various statements about aspects of independence. Also, the correlation between these answers and the overall scores of independence given by the individual respondents (N=5,878) is presented.<sup>8</sup> The statements relate to direct experiences and perceptions of the judges about aspects of independence in judicial practice. In addition some questions are about the perception of the respondents of the respect of various stakeholders for their independence. We will return to these questions specifically in the next section. Finally respondents gave scores for their perception of the independence of the judges in their country in general and their own independence on a scale of 1 to 10 (questions 13 and 14 respectively). These were already used in the previous section.

The first column presents the questions. The bold terms in brackets are short labels given to the questions in the rest of this article. These labels were not given in the survey. Results and statistics are presented for old and new democracies separately.

**Table 2. Questions and statements of survey among judges and some statistics, old and new democracies**

	Score on a scale of 0 – 10 <sup>9</sup>		Correlation with score 'independence judge'	
Question	old	new	old	new
<b>Overall perceptions of independence</b>				
The professional judges in my country are (not) independent ( <b>independence judge</b> ):	8.9	7.1	1.00	1.00
As a judge I feel (not) independent ( <b>independence myself</b> )	9.2	8.4	0.69	0.70
<b>Perceptions of aspects of independence</b>	Percentage agree / strongly agree		Correlation with score 'independence judge'	
During the last two years I have been under inappropriate pressure to take a decision in a case or part of a case in a specific way ( <b>inappropriate pressure</b> ) .	3	9	-0.38	-0.46
In my country I believe that during the last two years individual judges have accepted	3	16	-0.33	-0.33

<sup>8</sup> These results are based on the data of individual respondents. These results differ from the total or mean results per country.

<sup>9</sup> 0 is "not independent at all" and 10 is "the highest possible degree of independence".

bribes as an inducement to decide case(s) in a specific way ( <b>accepted bribes</b> ) .				
During the last two years I have been affected by a threat of, or actual, disciplinary or other action because of how I have decided a case ( <b>affected by disciplinary action</b> ).	4	10	-0.33	-0.43
During the last two years my decisions or actions have been directly affected by a claim, or a threat of a claim, for personal liability ( <b>affected by claim</b> ).	5	9	-0.36	-0.45
I believe during the last two years <b>cases</b> have been allocated to judges other than in accordance with established rules or procedures in order to influence the outcome of the particular case ( <b>improper allocation cases</b> ).	3	12	-0.47	-0.47
I believe judges in my country have been appointed other than on the basis of ability and experience during the last two years ( <b>improper appointments</b> ).	12	39	-0.39	-0.48
I believe judges in my country have been promoted other than on the basis of ability and experience during the last two years ( <b>improper promotions</b> ).	19	47	-0.48	-0.47
I believe that in my country decisions or actions of individual judges have, during the last two years, been directly affected by the actual, or anticipated, actions of the media (i. e. press, television or radio) ( <b>decisions affected by media</b> ).	10	33	-0.44	-0.49
I believe that in my country decisions or actions of individual judges have, during the last two years, been directly affected by the actual, or anticipated, actions using social media (for example, Facebook, Twitter or LinkedIn) ( <b>decisions affected by social media</b> ).	3	10	-0.43	-0.45
I believe that changes which occurred in my working conditions in relation to the following domains directly affected my independence (multiple answers possible) ( <b>changing working conditions</b> ):	21	39	-0.41	-0.39
- Pay	9	26	-0.35	-0.39
- Pensions	9	15	-0.26	-0.30
- Retirement age	5	15	-0.28	-0.31
- Caseload	13	29	-0.39	-0.36
- Court resources	16	25	-0.38	-0.38
- I was moved to another function, section or court	2	7	-0.20	-0.29
During the last two years I have had to take decisions in accordance with guidelines developed by judges of my rank ( <b>guidelines peers</b> ).	25	21	-0.22	-0.27
During the last two years the management of my court has exerted pressure on me to	4	5	-0.36	-0.41

decide individual cases in a particular way ( <b>case pressure management</b> ).				
During the last two years the management of my court has exerted pressure on me to decide individual cases within a particular time ( <b>time pressure management</b> ).	35	28	-0.22	-0.29

The aspects mentioned most frequently in the survey in both groups of countries are working conditions and improper appointments and promotions. In the new democracies the percentage of respondents that (strongly) agree is approximately twice as high (around 40 per cent) as in the old ones (around 12 to 20 per cent). The impact of the media on decisions is also frequently mentioned in the new democracies, whereas pressure of management to conclude cases swiftly is frequently mentioned in the old democracies. Least frequently mentioned in the old democracies are the acceptance of bribes, inappropriate pressure, and decisions affected by social media (3 per cent). The scores on these items are also relatively low in the new democracies, but lie on a higher level than in the old democracies.

The sources of inappropriate pressure (not reported in the Table) are according to judges in the old democracies most often court management (30 per cent of the reported sources of inappropriate pressure) and the parties (24 per cent). In the new democracies it is also court management and the parties (both 21 per cent) and in addition the media (also 21 per cent). All aspects show a negative correlation with the score on the perceived independence of judges in general (independence judges). The correlations are generally higher (in absolute value) in the new democracies than in the old ones.

The Pearson correlations between the aspects are almost always positive (see Table A2.1 Appendix 2). This implies that the aspects coincide to a certain extent. However, only for a few indicators this correlation is high, i.e. over 70 per cent. That is only the case with the items about improper appointments and promotions (IAP, IPR) and with decisions affected by media and by social media (DM, DSM).

#### 4.4 Resistance against judicial independence

The survey also contains broad questions whether the respondent believes that his independence as a judge is respected by the other state powers, the leaders of the judiciary and other key actors (see Table 3). By itself (lack of) perceived respect does not affect independence. It may lead to interference with the judiciary as covered by the questions that address aspects of independence directly. As all of these aspects are included in the above analysis, it is not meaningful to include the Questions about respect in that analysis as well.

Still, perceived respect is interesting as a measure of the overall environment in which judges are working. A large majority of responding judges believes that their independence is respected by others within the judiciary: over 80 percent in the old democracies and 70 to 80 per cent in the new ones. However, only half (old democracies) and 40 percent (new democracies) of the responding judges believe that the government or the parliament respect their independence. The respect of the media is still less: in the new democracies only a quarter of the judges believes this respect is present, in the old democracies this is 40 to 50 per cent.

According to the judges, the environment in the new democracies is much less conducive than in the old democracies. While the pattern of the answers in both groups of countries is the same, respect is always lower and the correlation with overall independence is generally higher, indicating a higher impact. The low respect of the (social) media for the judiciary is striking, but also that the correlation with overall independence is relatively low, and not different from that for the old democracies. Obviously, judiciaries have to overcome much more resistance in new than in old democracies. In these circumstances formal safeguards possibly play a different role than when respect is high: in new democracies these safeguards may be important to counterbalance the lack of respect in society. We discuss this further in the next sections. In the new democracies the correlation of overall independence with the respect by leading bodies of the judiciary is very high, and points to the key role of internal mechanisms to protect independence.

**Table 3. Statements in the survey about respect for judicial independence; old and new democracies**

Statements	Percentage agree / strongly agree		Correlation with score 'independence judiciary'	
	old	new	old	new
During the last two years I believe that my independence as a judge has been respected by:				
- Government	55	41	0.33	0.38
- Parliament	51	42	0.33	0.35
- Court Management (including the president of the court)	84	81	0.30	0.42
- Council for the judiciary	86	74	0.33	0.47
- Supreme Court	92	85	0.21	0.41
- Constitutional Court	89	73	0.20	0.37
- Association of Judges	89	85	0.30	0.33
- Media (i.e. press, television or radio)	48	26	0.28	0.27
- Social Media (for example Facebook, Twitter or LinkedIn)	42	26	0.23	0.23

## 5. Formal safeguards and perceived independence

So far we discussed perceptions of judicial independence. We now turn to the connection between formal safeguards of independence, as measured by the Indicators developed by the ENCJ (see section3), and perceived independence by judges. In agreement with the research discussed in section 2, superficial observation of the judicial systems of Europe seems to indicate that connections between indicators of formal safeguards ('de jure independence') and perceived independence of judges (as our measure of 'de facto independence') are far from obvious. The rather informal judicial systems of North-West Europe experience high levels of perceived independence, while in other parts of Europe more formalized systems do not always go together with high levels of perceived independence. We formulate three straightforward hypotheses. One hypothesis is that a high level of formal safeguards generally leads to a high level of perceived independence by judges, and a low level of safeguards to a low level of perceived independence.

A second hypothesis is that no connections exist between both phenomena. The existence of formal arrangements may say little about their practical application, especially when these arrangements are forced upon countries in the context of, for instance, entry negotiations of the EU. Such safeguards may have no practical impact, and serve merely as window dressing. Conversely, the lack of formal arrangements does not imply that the division of state powers cannot be strictly adhered to.

A third hypothesis would be a negative connection between both phenomena. Safeguards are introduced, because judges are not independent. When independence is not at stake in practice, there is no need for such measures. If these safeguards have no or little effect on (perceived) independence, a negative relation will result. A less radical hypothesis would be that not enough time has elapsed yet to allow the formal arrangements to have had practical impact, for judges to observe change and to believe change to be structural. This could essentially apply to the new democracies.

Table 4 shows the correlations between the indicators of formal safeguards and the general perception of judges of their independence for the total of the 22 countries and for the old and new democracies separately.

**Table 4. Indicators about formal safeguards and their correlation with perceived independence, total and old and new democracies**

Indicator	Average score (%)			Correlation with 'independence judges' score		
	Total	old	new	total	old	new
Legal basis of independence	68	62	74	-0.42	-0.85	+0.41
Funding of the judiciary	52	59	47	+0.27	+0.79	-0.20
Human Resource decisions	74	65	81	-0.26	-0.13	+0.33
Non transferability of judges	81	75	86	-0.33	-0.11	-0.18
Internal independence	79	82	77	+0.24	+0.34	+0.13
Allocation of cases	70	58	79	-0.50	-0.14	+0.12
Organizational autonomy	76	75	76	+0.10	+0.07	+0.28
Court management	62	63	61	+0.24	+0.64	+0.24

For all countries together four of these correlations are negative but not very large, lending some modest support to the third hypothesis. Negative correlations are found for the indicators with respect to legal basis, human resource decisions, non-transferability of judges and allocation of cases. Four other indicators show positive correlation, though they are even smaller: funding of the judiciary, internal independence, organizational autonomy and court management.

There are substantial differences between old and new democracies. The old democracies have on average fewer arrangements in place than the new ones with respect to legal basis, human resource decisions, non-transferability of judges and allocation of cases. With regard to funding of the judiciary and internal independence it is the other way round. For organizational autonomy and court management the differences are on average very small.

'Legal basis' concerns the formal position of the judiciary (see Appendix 1 for more details), including whether and by which instrument it's independence is guaranteed (in the constitution, law or by a constitutional court), and it is the foundation of all other safeguards, covered by the indicators. With



respect to this indicator the underlying mechanisms are very different in old and new democracies. While in the old democracies the correlation is negative, in the new democracies it is positive, indicating that in the new democracies that have arranged formal matters better perceived independence is higher. Thus, at this smaller scale the first hypothesis seems to be valid, and it would make sense to invest in formal institutions. The strong positive correlation in the old democracies suggests that funding is an important issue that affects the independence as perceived by judges, while this is not the case in the new democracies.

We have examined whether a country that has arranged one aspect of the formal safeguards well has done so for other aspects as well. The Pearson correlations between the objective indicators (not in this Table; see Appendix 2 Table A2.2) show that this is in general not the case. The correlations are often negative, and positive correlations are never over 70 per cent, with one exception. Both in the old and the new democracies the correlation between arrangements of funding and court management are over 70 per cent. It must be concluded that much diversity exists in the extent to which countries have made arrangements for various aspects of independence.

We will continue our analysis of the effects of formal safeguards on perceived independence in two ways. The existence of formal safeguards may directly influence the diverse aspects of independence in judicial practice that judges were asked their opinion about in the survey. This analysis is presented in the rest of this section. Also, formal safeguards may influence perceived independence in other ways, not measured by the aspects asked about in the survey. This analysis is presented in the next section.

Some of the aspects of independence (see Table 2) are possibly linked with the specific safeguards described in Table 4 and in more detail in Appendix 1. Table 5 depicts the relations analyzed.

**Table 5. Indicators of formal safeguards and related perceptions aspects of independence (labels as in Table 2)**

Indicator	Survey
Legal basis of independence	Inappropriate pressure: by government, parliament, (social) media
Legal basis of independence: sub-indicator salaries	Changing working conditions due to pay, pensions, retirement age
Funding of the judiciary	Changing working conditions due to caseload, court resources
Human resource decisions	Affected by disciplinary action Improper appointments and improper promotions
Non-transferability	Changing working conditions because I was moved to another function, section or court
Internal independence	Inappropriate pressure: by other judges, court management, Council, Supreme Court, Constitutional Court Changing working conditions due to caseload Guidelines peers Case pressure management Time pressure management

Allocation of cases	Improper allocation cases
Relations with the press	Decisions affected by media Decisions affected by social media

For the new democracies we cannot trace a significant influence of the formal rules on the aspects of independence outlined above at country level. For the old democracies in two cases a significant relation is found (see Table 6):

- 1) between the formal rules regarding human resources decisions and the perception of judges about the quality of the appointment procedures
- 2) between the formal rules regarding non transferability of judges and the percentage of judges saying they were transferred to another place within the judiciary and that this transfer affected their independence.

**Table 6. Relations between perceptions of aspects of independence and formal safeguards <sup>a</sup>**

	<b>'old democracies'</b>	
Variable	Percentage 'no improper appointments'	Percentage 'no transfer affecting independence'
constant	31.7	8.4
Human recourse decisions indicator	6.0*	
Non transferability indicator		2.5*
R2	0.49	0.41
N	10	10

<sup>a</sup> \* - significant at 5% level, \*\* significant at 1% level, \*\*\* significant at 0.1

These findings - or better the lack thereof – seem to support the second hypothesis formulated above about the possible absence of relations between formal safeguards and perceived independence, but we still have to allow for other connections at the system level.

## **6. Determinants of perceived independence**

### **6.1 Regression analysis**

The question remains what the main determinants are of judicial independence, as perceived by the judges in the survey. The multiple regression analysis in this section focuses directly on the determinants of perceived independence. Two questions are simultaneously addressed. The first one is related to the practices asked about in the survey: which are the most important aspects of independence, as perceived by judges? And the second question is: have formal safeguards of independence additional influence which are not covered by the aspects in the survey?

Table 7 relates the individual scores given in the survey with two types of variables in a multiple regression analysis at different levels:

- 1) The individual perceptions of aspects of independence as listed in Table 2. These variables are coded: 2 for 'strongly disagree', 1 for 'disagree', 0 for 'not sure', -1 for 'agree' and -2 for 'strongly agree'. All statements in the survey were formulated to detract from independence. Thus, agreement of the respondent with a statement about an aspect implies a negative perception of that aspect, and the expected sign of all variables is positive. Because all variables are coded in the same way, the effects can be compared. In the survey statements about six different types of working conditions are included. Those related to 1) pay and pension and 2) pension and retirement age show strong correlations (over 70 per cent) and it is clear that these issues are intertwined. Therefore, these are combined in one variable. This is also the case with working conditions regarding caseload and court resources.
- 2) Variables at country level. We present the results of two specifications. In the *first* variant country specific dummy variables are used to catch all differences between countries which are not in the analysis.<sup>10</sup> In the *second* variant the formal indicators developed by the ENCJ are used to catch the effect of formal arrangements in different countries. We saw above that the aspects included in the survey cannot be linked directly to the formal indicators, with only two exceptions for the old democracies: the appointment process, which can be linked to the human resources decision indicator and the frequency of transfers within the judiciary, which can be linked to rules about non transferability. However, formal arrangements may influence the judiciary in other ways that are not measured directly by the perceptions about the related aspects. For example, if there is 'inappropriate pressure' (first statement of the survey), the actual response of the judge to this pressure may depend on the formal legal safeguards that protect his position. Note that these indicators are all on a country level and differ in this respect from the perceptions of aspects of independence that are measured at the individual level. This specification, therefore, requires a multilevel analysis. Because of their construction the effects of these variables on a country level are mutually comparable, but not comparable with the effects of the variables mentioned under 1. As all indicators are defined such that a higher level of protection leads to a higher score, the signs of all variables are expected to be positive.

If we would use all of these indicators, there would be eight variables (see Table 4). This number is too large compared to the number of countries to enable us to estimate them all freely.<sup>11</sup> In addition, it should be noted that for both groups of countries the presence of formal arrangements regarding funding correlates strongly with those regarding court management and that the same is the case with arrangements for human resource decisions and organizational autonomy. As a result, it is not possible to estimate meaningfully separate effects of all these indicators. Therefore, three of the indicators which address the relation between government and judiciary were included in the specification. These concern the area of law (legal basis), funding and HR decisions. As to the formal indicators with respect to aspects within the judiciary, the indicator about internal independence was included. We added each of the other four formal indicators individually to examine whether these gave significant and meaningful extra

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<sup>10</sup> In terms of multilevel models this is a model with random intercepts and fixed slopes.

<sup>11</sup> For the 10 old democracies and with 5 country variables there are 5 degrees of freedom; for 12 new democracies and with 5 country variables there are 7 degrees of freedom.

information. This was only the case with the indicator regarding the allocation of cases, which was, therefore, incorporated in the model.

**Table 7 Determinants of perceived independence of the judge <sup>a</sup>**

	old democracies			new democracies		
Variable	variant 1	variant 2	variation <sub>b</sub>	variant 1	variant 2	variation <sub>b</sub>
Inappropriate pressure	0.16***	0.17***	0.11	0.26***	0.25***	0.26
accepted bribes	0.04	0.04	0.03	0.17***	0.20***	0.22
Affected by disciplinary action	0.03	0.03	0.02	0.11**	0.10**	0.11
Affected by a claim	0.18***	0.19***	0.14	0.19***	0.20***	0.21
Improper allocation cases	0.23***	0.25***	0.19	0.14***	0.15***	0.17
Improper appointments	0.09***	0.07*	0.07	0.15***	0.22***	0.28
Improper promotions	0.12***	0.11***	0.13	0.15***	0.13**	0.16
Decisions affected by media	0.09**	0.07*	0.07	0.26***	0.23***	0.24
Decisions affected by social media	0.12***	0.14***	0.11	0.19***	0.22***	0.21
Changing working conditions regarding:						
- pay, pensions, retirement age	0.16***	0.15***	0.18	0.14***	0.14***	0.21
- caseload/court resources	0.06**	0.05**	0.07	0.10***	0.07*	0.10
- I was moved	0.02	0.03	0.02	0.01	0.06	0.06
Guidelines peers	0.06***	0.04**	0.06	0.03	0.03	0.04
Case pressure management	0.13***	0.12***	0.09	0.15***	0.13**	0.11
Time pressure management	0.04**	0.05***	0.07	0.09***	0.08***	0.12
<b>Formal safeguards</b>						
Legal base		-0.05	-0.05		0.21**	0.14
Funding		0.06 *	0.10		-0.01	-0.02
HR decisions		0.03	0.05		0.08*	0.09
Internal independence		0.08	0.06		-0.01	-0.02
Allocation cases		0.05 *	0.08		0.10 *	0.10
R2	0.46	0.45		0.51	0.49	
N	2,778	2,778		3,100	3,100	

<sup>a</sup> \* - significant at 5% level, \*\* significant at 1% level, \*\*\* significant at 0.1% level.

<sup>b</sup> This column gives an indication of the variation in the perceived independence which can be attributed to the related variable in variant 2. In this measure both the absolute effect (given in the former column) and the standard deviation of this variable in the survey are combined.

The two variants of the model do not differ much in explanatory power and have similar parameters of the variables that they have in common. The second variant has a marginally lower  $R^2$ , but this is an artifact of the larger number of explaining variables in the first variant (country specific constants) than

in the second variant, and the use in the second variant of country data. Consequently, we will focus on the second variant to discuss the results. It is worth noting that the estimated parameters and effects of the variables are quite robust for the exact variant chosen.<sup>12</sup>

The outcomes for the old and new democracies differ qualitatively and quantitatively<sup>13</sup>. For the old democracies most aspect variables have a significant effect on perceived independence. Important exceptions are the acceptance of bribes, the (threat of) disciplinary action and changing working conditions due to transfers. The three variables that have the largest impact on independence - in terms of the variation in perceived independence attributed to them - are the improper allocation of cases, changing working conditions due to pay, pensions and retirement age and (the threat) of claims of personal liability. As to the formal safeguards only funding and case allocation are significant.

For the new democracies also nearly all aspect variables are significant. There are only two exceptions: changing working conditions due to transfers and guidelines of peers. The three variables that have the largest impact are improper appointments, inappropriate pressure and media influence. The acceptance of bribes is also an important issue in the new democracies. These variables are all different from those for the old democracies. As to the formal safeguards, legal basis, human resource decisions and case allocation are significant. Apart from case allocation, also in the respect the pattern is quite different among both groups of countries.

In section 5 the potential relationship between formal safeguards and perceived independence was discussed and three hypotheses were formulated. On the basis of the multi-level regression some conclusions can be drawn. First, the relationship is not uniform over all European countries. There is a big difference between old and new democracies. In the old democracies the formal legal position of the judiciary and judge do not seem to be related to perceived independence. Funding of the judiciary plays a role. In the new democracies the formal legal position of the judiciary is positively related to perceived independence. Interestingly, the funding of the judiciary does not seem to play a role in these countries. One could suggest that with the legal basis more fundamental matters are at stake in the new democracies. In both groups of countries case allocation is related to perceived independence.

### **6.3 More about corruption**

The extent to which judges accept bribes according to the results of the survey merits some further scrutiny, as this seems only to be an issue in the new democracies. The ENCJ indicators of perceived independence also include an indicator of judicial corruption. This indicator is about the perceptions of the population. For this indicator data from the EU Anti-Corruption report 2014 have been used. The

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<sup>12</sup> This is not only shown by the similarities between the estimates in both variants, presented in Table 5. When a fixed intercept model is used, instead of a random intercept model (variant 1), there are no strong differences either.

<sup>13</sup> We checked whether the allotment of Spain and Portugal to the 'new democracies' is also statistically supported. Both countries have a background which differs from that of the former communist countries. A test shows however that the data of Spain and Portugal fit better to that of the new democracies than to that of the old ones. A Chow test on the statistical difference between relations (without the formal indicators) shows that Spain and Portugal are different from the old democracies:  $F(27, 3266) = 3.79$ , but do not differ from the former communist new democracies:  $F(27, 3046) = 1.11$ . The 5% and 1% probability levels are in both cases 1.49 and 1.75 respectively.

correlation between this measure and the percentage of judges who respond that there is no bribery within the judiciary is 0.76 (N=22). The correlation of this variable in the survey with ‘no corruption’ measures of the Rule of Law index is even higher: 0.91 (N=22).<sup>14</sup> Differentiating between old and new democracies this correlation is 0.97 (N=10) and 0.86 (N=12) respectively. It can be concluded that the perceptions of judges and those of others in society about judicial corruption are in agreement.

A simple analysis of the relation between (the absence of) bribery as measured in the survey on the one hand and the gross salaries of judges and the average gross salary in the country on the other hand was made. The data on salaries are from CEPEJ (2014) and relate to the year 2012.<sup>15</sup> Table 8 presents the relation between these variables.

**Table 8 Determinants of perception of bribes accepted by judges (percentage disagree/strongly disagree) <sup>a</sup>**

Variable	
Constant	26**
Gross annual salary of judges (thousands of euros)	0.31*
Gross annual salary – national average (thousands of euros)	0.84*
R <sup>2</sup>	0.70
N	22
Durbin-Watson	2.1

<sup>a</sup> \* - significant at 5% level, \*\* significant at 1% level, \*\*\* significant at 0.1% level.

<sup>b</sup> Data sorted on gross annual salary of judges.

The Table shows that – given the average gross annual salary in a country – a higher salary of judges coincides with less bribery. The interpretation may be straightforward: the higher regular incomes are, the less attractive the acceptance of bribes is. Given the salary of a judge, bribery is less when a society is more affluent, approximated by gross average salary. In countries which are less affluent corruption may be a more common practice in all walks of life, and the judiciary may not be an exception. This simple analysis confirms the differentiated outcomes with respect to the relation between independence and corruption.

## 7. Conclusions

The ENCJ defined indicators and gathered data to assess the state of affairs regarding the independence of the judiciary in Europe. It also conducted a detailed survey about this topic among judges in Europe. We use these data here to gain a deeper understanding of different approaches and related indicators about independence and their mutual interaction by means of a statistical analysis. We distinguish between formal independence in the sense of institutional safeguards (de jure independence) and perceived independence (de facto independence). Twenty countries (twentytwo entities) were included in the analysis.

<sup>14</sup> The indicator is: ‘no corruption in the judiciary’ (2.2), published in: World Justice Project, *Rule of Law Index 2015*.

<sup>15</sup> See: European Commission for the Efficiency of Justice (CEPEJ), *Report on ‘European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice*, p.301, Table 11.9.

We explored three questions. *First*, do perceptions of independence differ between citizens and judges? If citizens and judges have similar perceptions at the general level, the detailed views of judges that have become available through the survey of the ENCJ have broad significance. *Second*, which aspects of judicial practice do judges consider to be particularly important for their independence? And *third*, what is the relationship, if any, between perceived independence and formal safeguards of independence?

Before turning to these three questions, it has to be noted that theoretical considerations and empirical results in the research literature make it plausible that the mechanisms influencing perceived independence are not the same in all countries, and depend on the democratic tradition countries have. We, therefore, distinguish between 'old' and 'new' democracies. The chosen delineation of the groups is supported by statistical analysis.

As to the *first* question, the analysis on the level of countries shows a strong correlation between perceptions of judges and citizens for the old democracies and a weaker but still sizeable correlation for the new democracies. Thus, surveys among (subsets of) the population and the survey among judges yield comparable results.

The answer to the *second* question is more strongly differentiated between old and new democracies. Regression analyses for the two groups of countries reveal that in the old democracies the improper allocation of cases, altering working conditions due to changes in pay, pensions and retirement age and (the threat of) claims of personal liability are the three aspects that have the largest impact on perceived independence, while the acceptance of bribes, the (threat of) disciplinary action and changing working conditions due to transfers do not have any significant effects on perceived independence. In the new democracies improper appointments, inappropriate pressure and media influence are most important, while changing working conditions due to transfers and guidelines of peers are insignificant. Not surprisingly the concerns of judges in the old democracies are more mundane than in the new democracies.

The *third* question is about the relationship, if any, between perceived independence and formal safeguards of independence. We split this question into two parts. The first part concerns at detailed level the relationship between the perceptions about aspects of independence and the formal safeguards that are associated with these aspects. For the new democracies no significant influence at country level is found. For the old democracies a significant relation is found in two cases: one is between the formal rules regarding human resources decisions and the perception of judges about the quality of the appointment procedures. The other significant effect is found between the formal rules regarding non-transferability of judges and the frequency of judges saying they were transferred to another place within the judiciary which affected their independence. The second part of the third question is: if we add the indicators of formal safeguards to the regression analyses highlighted above, do the indicators have additional (country-specific) effects on perceived independence? For the old democracies only the indicators about funding and case allocation are significant. For the new democracies, three indicators, legal base, human resource decisions and case allocation have significant influence. Apart from case allocation, the pattern differs quite strongly between old and new democracies.

With respect to the relationship between formal safeguards and perceived independence, we formulated three hypotheses. One hypothesis is that a high level of formal safeguards generally leads to a high level of perceived independence by judges, and a low level of safeguards to a low level of perceived independence. The second hypothesis is that no connections exist between the levels of safeguards and independence. The existence of formal arrangements may say little about their practical application, especially when these arrangements are forced upon countries in the context of, for instance, entry negotiations of the EU. Conversely, the lack of formal arrangements does not imply that the division of state powers cannot be strictly adhered to. The third hypothesis postulates a negative connection between both concepts. Safeguards are introduced, because judges are not independent. When independence is not at stake in practice, there is no need for such measures. This hypothesis requires that the safeguards have no effect (yet) on independence or at least on perceived independence. Our analysis shows that in the old democracies the formal legal position of the judiciary and judge are not related to perceived independence. Funding of the judiciary does play a role. In the new democracies the formal legal position of the judiciary is positively related to perceived independence. Interestingly, the funding of the judiciary does not play a role in these countries. We, therefore, find a combination of hypotheses 1 and 2. An important finding is that a solid legal foundation of the judiciary stimulates independence in the new democracies.

The results give rise to another observation. The perceptions of judges about the independence of the judiciary are, both in old and new democracies, influenced among other by working conditions regarding pay and pension. It seems that judges use a rather extensive concept of independence, on the verge of being self-serving. This may be the case especially in the old democracies. On the other hand, salary levels play a role in the occurrence of judicial corruption which in turn has an impact on perceived independence in the new democracies. This is shown by our statistical analysis of the relation between the perception by judges of judges accepting bribes on the one hand and their salaries and salary levels in general on the other hand. This perception about bribery of judges is also strongly correlated with the perceptions in society about judicial corruption.

Another issue that needs some reflection is whether independence is always a positive phenomenon. Some of the indicators relate to matters in which independence clashes with other desirables such as the uniform application of the law and the timely conclusion of trials. These topics were included in the survey among judges. With regard to the uniform application of the law the issue presented to the judges was whether or not they had to take decisions in accordance with guidelines developed by judges of their own rank. Regarding timeliness, the issue was pressure from the management of the court to decide individual cases within a particular time. The issue of peer guidelines proves to be important for judges from the perspective of independence in the old democracies and pressure of management about timeliness is important for the judges in both groups of countries, as the associated variables are quite significant in the regression analyses. Both phenomena occur a lot, and even more so in the old than in the new democracies (see Table 2). Both issues concern internal independence, and are about the way judges relate to their peers and to their management. From the perspective of a society aiming at effective courts a less extensive interpretation of internal independence, in particular, might be desirable.



To conclude, we have shown that perceived independence is a meaningful yardstick of actual (de facto) independence of judges, as citizens and judges have consistent views in general and the differentiated perceptions of judges allow in-depth analysis. It may come as a disappointment to legal scholars that formal safeguards do not correlate more strongly with perceptions of (aspects of) independence. Still, in the new democracies the legal position of the judiciary, in particular, is important for perceived independence. This provides support for the policies of the European Commission in its negotiations with new or candidate members. Foremost, it must be recognized that it is insufficient to focus only on establishing formal safeguards. While this may sound trivial, it is essential that these safeguards come to life and are incorporated in day-to-day practice.

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## APPENDICES

### Appendix 1 ENCJ Indicators and sub-indicators of independence and accountability

#### INDICATORS OF THE OBJECTIVE INDEPENDENCE OF THE JUDICIARY AS A WHOLE

1. Legal basis of independence, with the following sub-indicators:
  - Formal guarantees of the independence of the judiciary;
  - Formal assurances that judges are bound only by the law;
  - Formal methods for the determination of judges' salaries;
  - Formal mechanisms for the adjustment of judges' salaries;
  - Formal guarantees for involvement of judges in the development of legal and judicial reform.
2. Organisational autonomy of the judiciary, with the following sub-indicators where there is a Council for the judiciary or equivalent independent body:
  - Formal position of the Council for the judiciary;
  - Compliance with ENCJ guidelines;
  - Responsibilities of the Council.

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

  - Influence of judges on decisions.
3. Funding of the judiciary, with the following sub-indicators:
  - Budgetary arrangements;
  - Funding system;
  - Resolution of conflicts about budgets;
  - Sufficiency of actual budgets.
4. Management of the court system.
  - Management responsibility of the courts.

## INDICATORS OF THE OBJECTIVE INDEPENDENCE OF THE INDIVIDUAL JUDGE

5. Human resource decisions about judges, with the following sub-indicators:
  - Selection, appointment and dismissal of judges and court presidents;
  - Selection, appointment and dismissal of Supreme Courts judges and the President of the Supreme Court;
  - Compliance with ENCJ guidelines about the appointment of judges;
  - Evaluation, promotion, disciplinary measures and training of judges;
  - Compliance with ENCJ guidelines about the promotion of judges.
6. Non-transferability of judges, with the following sub-indicators:
  - Formal guarantee of irremovability of judges;
  - Arrangements for the transfer of judges without their consent.
7. Internal independence, with the following sub-indicators:
  - Influence by higher ranked judges;
  - Use and status of guidelines;
  - Influence by the management of the courts.

## INDICATORS OF THE SUBJECTIVE INDEPENDENCE OF THE JUDICIARY AND THE INDIVIDUAL JUDGE

8. Independence as perceived by citizens in general;
  - Eurobarometer 2013, average across areas of law (Q5.2. Q6.2 and Q7.2);
  - Global competitiveness report 2013-2014 (item 1.06);
  - World Justice Rule of Law Index 2014 (item 1.2).
9. Trust in judiciary, relative to trust in other state powers by citizens in general;
  - National surveys.
10. Judicial corruption as perceived by citizens in general;
  - Eurobarometer Special Surveys: EB79.1 Corruption:  
[http://ec.europa.eu/public\\_opinion/archives/eb\\_special\\_399\\_380\\_en.htm](http://ec.europa.eu/public_opinion/archives/eb_special_399_380_en.htm)
11. Independence as perceived by courts users at all levels;
  - National surveys.
12. Independence as perceived by judges themselves;
  - ENCJ survey.

## INDICATORS OF THE OBJECTIVE ACCOUNTABILITY OF THE JUDICIARY AS A WHOLE

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

- Existence of a transparent mechanism for the allocation of cases;
  - Content of the mechanism for the allocation of cases.
2. Complaints procedure, with the following sub-indicators:
    - Availability of a complaints procedure;
    - External participation in the complaints procedure;
    - Scope of the complaints procedure;
    - Appeal against a decision on a complaint;
    - Number of complaints.
  3. Periodic reporting by the judiciary, with the following sub-indicators:
    - Availability of annual reports;
    - Scope of the annual reports;
    - Benchmarking of the courts.
  4. Relations with the press, with the following sub-indicators:
    - Explanation of judicial decisions to the media;
    - Availability of press guidelines;
    - Broadcasting of court cases.
  5. External review, with the following sub-indicators:
    - Use of external review;
    - Responsibility for external review.

#### INDICATORS OF THE OBJECTIVE ACCOUNTABILITY OF THE INDIVIDUAL JUDGE

6. Code of judicial ethics, with the following sub-indicators:
  - Availability of a code of judicial ethics.
7. Withdrawal and recusal, with the following sub-indicators:
  - Voluntary withdrawal;
  - Breach of an obligation to withdraw;
  - Request for recusal;
  - Deciding authority;
  - Appeal against a decision on a request for recusal.
8. Admissibility of external functions and disclosure of external functions and financial interests, with the following sub-indicators:
  - Policy on admissibility of external functions;
  - Availability of a (public) register of external functions of judges;
  - Availability of a (public) register of financial interests of judges.
9. Understandable procedures, with the following sub-indicators:
  - Duty of judges to make proceedings intelligible to the parties;
  - Training of judges.

Source: ENCJ (2015), Independence and accountability of the judiciary and of the prosecution; Performance indicators 2015, pp 19-21.

## Appendix 2 Pearson correlations

**Table A2.1 Correlations aspects of independence in survey**

Items correspond with those in Table 2. So IP stands for inappropriate pressure. CWPPR relate to the questions about changing working conditions with respect to pay, pensions and retirement age, CWCC with respect to case load and court resources and CWT with respect to transfers.

old democracies (N=2778)

Correlation Matrix												
CWT	IP GP	AB CPM	AD TPM	AC	IAC	IAP	IPR	DM	DSM	CWPPR	CWCC	
IP	1.000000	0.240749	0.460071	0.340815	0.367127	0.235806	0.297060	0.307321	0.303783	0.175562	0.248003	
0.165754	0.182757	0.420668	0.189869									
AB	0.240749	1.000000	0.283383	0.476051	0.405449	0.159921	0.368863	0.328126	0.276182	0.114172	0.259620	
0.168282	0.094893	0.129553	-0.053854									
AD	0.460071	0.283383	1.000000	0.494824	0.322474	0.194948	0.260276	0.225133	0.238574	0.203771	0.232715	
0.176910	0.144048	0.297898	0.093112									
AC	0.340815	0.476051	0.494824	1.000000	0.284672	0.149051	0.300117	0.245270	0.230770	0.190817	0.268761	
0.127686	0.140618	0.180941	0.052143									
IAC	0.367127	0.405449	0.322474	0.284672	1.000000	0.377345	0.428054	0.411577	0.412929	0.204894	0.286976	
0.169451	0.161482	0.347474	0.160440									
IAP	0.235806	0.159921	0.194948	0.149051	0.377345	1.000000	0.714454	0.400298	0.389337	0.252798	0.253685	
0.098979	0.096778	0.262214	0.162949									
IPR	0.297060	0.368863	0.260276	0.300117	0.428054	0.714454	1.000000	0.480109	0.432362	0.277305	0.344444	
0.152188	0.160847	0.274586	0.149450									
DM	0.307321	0.328126	0.225133	0.245270	0.411577	0.400298	0.480109	1.000000	0.760091	0.190392	0.296600	
0.118314	0.172699	0.272306	0.169769									
DSM	0.303783	0.276182	0.238574	0.230770	0.412929	0.389337	0.432362	0.760091	1.000000	0.174623	0.248211	
0.124574	0.158650	0.298621	0.163277									
CWPPR	0.175562	0.114172	0.203771	0.190817	0.204894	0.252798	0.277305	0.190392	0.174623	1.000000	0.629676	
0.303539	0.129201	0.225880	0.167557									
CWCC	0.248003	0.259620	0.232715	0.268761	0.286976	0.253685	0.344444	0.296600	0.248211	0.629676	1.000000	
0.315609	0.194552	0.283536	0.183625									
CWT	0.165754	0.168282	0.176910	0.127686	0.169451	0.098979	0.152188	0.118314	0.124574	0.303539	0.315609	
1.000000	0.105322	0.165234	0.068480									
GP	0.182757	0.094893	0.144048	0.140618	0.161482	0.096778	0.160847	0.172699	0.158650	0.129201	0.194552	
0.105322	1.000000	0.306185	0.303686									
CPM	0.420668	0.129553	0.297898	0.180941	0.347474	0.262214	0.274586	0.272306	0.298621	0.225880	0.283536	
0.165234	0.306185	1.000000	0.345184									
TPM	0.189869	-0.053854	0.093112	0.052143	0.160440	0.162949	0.149450	0.169769	0.163277	0.167557	0.183625	
0.068480	0.303686	0.345184	1.000000									

new democracies (N=3100)

Correlation Matrix												
CWT	IP GP	AB CPM	AD TPM	AC	IAC	IAP	IPR	DM	DSM	CWPPR	CWCC	
IP	1.000000	0.251090	0.559427	0.493756	0.406499	0.282781	0.296826	0.340618	0.288687	0.246875	0.270797	
0.210853	0.255173	0.533387	0.274707									
AB	0.251090	1.000000	0.229869	0.195638	0.369171	0.263604	0.216761	0.356502	0.351961	0.066729	0.064017	
0.163739	0.236264	0.178688	0.024098									
AD	0.559427	0.229869	1.000000	0.603868	0.358845	0.281085	0.308938	0.352385	0.308927	0.266381	0.282648	
0.210316	0.216638	0.433470	0.262387									
AC	0.493756	0.195638	0.603868	1.000000	0.403696	0.307450	0.300888	0.357503	0.331464	0.295732	0.332758	
0.230935	0.219136	0.421542	0.243627									
IAC	0.406499	0.369171	0.358845	0.403696	1.000000	0.463097	0.456342	0.408183	0.372074	0.269848	0.271555	
0.235530	0.247713	0.421797	0.267875									
IAP	0.282781	0.263604	0.281085	0.307450	0.463097	1.000000	0.784348	0.435589	0.388921	0.301368	0.303385	
0.174738	0.204336	0.291983	0.198303									
IPR	0.296826	0.216761	0.308938	0.300888	0.456342	0.784348	1.000000	0.438363	0.374693	0.320451	0.321918	
0.164374	0.178231	0.306146	0.262731									

DM	0.340618	0.356502	0.352385	0.357503	0.408183	0.435589	0.438363	1.000000	0.677238	0.281215	0.278063
0.198608	0.240763	0.261353	0.174563								
DSM	0.288687	0.351961	0.308927	0.331464	0.372074	0.388921	0.374693	0.677238	1.000000	0.251243	0.240425
0.214349	0.248336	0.230490	0.106831								
CWPPR	0.246875	0.066729	0.266381	0.295732	0.269848	0.301368	0.320451	0.281215	0.251243	1.000000	0.740901
0.404758	0.174075	0.249691	0.216493								
CWCC	0.270797	0.064017	0.282648	0.332758	0.271555	0.303385	0.321918	0.278063	0.240425	0.740901	1.000000
0.410952	0.164521	0.283829	0.286842								
CWT	0.210853	0.163739	0.210316	0.230935	0.235530	0.174738	0.164374	0.198608	0.214349	0.404758	0.410952
1.000000	0.220952	0.252602	0.149883								
GP	0.255173	0.236264	0.216638	0.219136	0.247713	0.204336	0.178231	0.240763	0.248336	0.174075	0.164521
0.220952	1.000000	0.324023	0.206835								
CPM	0.533387	0.178688	0.433470	0.421542	0.421797	0.291983	0.306146	0.261353	0.230490	0.249691	0.283829
0.252602	0.324023	1.000000	0.415680								
TPM	0.274707	0.024098	0.262387	0.243627	0.267875	0.198303	0.262731	0.174563	0.106831	0.216493	0.286842
0.149883	0.206835	0.415680	1.000000								

**Table A2.2 Correlations indicators formal safeguards**

old democracies (N=10)

Correlation Matrix

	LEGALBASE	FUNDINGS	HRMDEC	NONTRANS	INTINDEP	ALLOCASES	COUNCILFJ	COURTMANAG
LEGALBASE	1.000000	-0.555380	0.270894	0.177289	-0.518476	0.152449	-0.045751	-0.490762
FUNDINGS	-0.555380	1.000000	-0.159155	0.283953	0.409686	-0.349939	-0.015184	0.787985
HRMDEC	0.270894	-0.159155	1.000000	0.504467	-0.138800	0.231053	0.549878	-0.365833
NONTRANS	0.177289	0.283953	0.504467	1.000000	0.525441	-0.273214	0.532249	0.286752
INTINDEP	-0.518476	0.409686	-0.138800	0.525441	1.000000	-0.442629	0.448322	0.488541
ALLOCASES	0.152449	-0.349939	0.231053	-0.273214	-0.442629	1.000000	-0.064080	-0.522403
COUNCILFJ	-0.045751	-0.015184	0.549878	0.532249	0.448322	-0.064080	1.000000	0.047151
COURTMAN	-0.490762	0.787985	-0.365833	0.286752	0.488541	-0.522403	0.047151	1.000000

new democracies (N=12)

Correlation Matrix

	LEGALBASE	FUNDINGS	HRMDEC	NONTRANS	INTINDEP	ALLOCASES	COUNCILFJ	COURTMANAG
LEGALBASE	1.000000	-0.304306	0.006643	-0.093029	-0.382127	0.088229	0.397716	0.213900
FUNDINGS	-0.304306	1.000000	-0.271935	-0.150450	0.061329	-0.003449	-0.130951	0.742995
HRMDEC	0.006643	-0.271935	1.000000	0.265830	0.666265	-0.064855	0.461486	-0.201687
NONTRANS	-0.093029	-0.150450	0.265830	1.000000	-0.067808	0.392639	0.409985	-0.269217
INTINDEP	-0.382127	0.061329	0.666265	-0.067808	1.000000	-0.095937	0.312545	0.031937
ALLOCASES	0.088229	-0.003449	-0.064855	0.392639	-0.095937	1.000000	0.600416	0.161083
COUNCILFJ	0.397716	-0.130951	0.461486	0.409985	0.312545	0.600416	1.000000	0.157817
COURTMANAG	0.213900	0.742995	-0.201687	-0.269217	0.031937	0.161083	0.157817	1.000000