



Introduction

Abstract The central question that this book will try to answer is whether there is a lack of alignment and—in the extreme—a disconnect between the judiciary and society in countries of Europe (EU and UK). This central question is developed into six sub questions. The sub questions focus on perceptions of judicial independence by various actors, their respect for independence and the trust of the general public in the judiciary.

Keywords Judicial independence · Perceptions · Trust

No state can do without a judiciary, but that does not mean that the judiciary is aligned with the population and appreciated by it. It is generally believed that a high degree of judicial independence is necessary for people to appreciate and trust the courts. After all, the fair and effective resolution of disputes requires an independent and impartial adjudicator, irrespective of the parties and interests involved. In turn, trust is seen as necessary for courts to be able to function, if only to incite people to bring their disputes to court, to cooperate with the court and to accept judgments willingly. The causal relationship between judicial independence, trust and reliance on the courts puts sharp focus on judicial independence as it is perceived by the population and all segments thereof. Courts

may be fully independent, but if the population does not recognize this independence, the causal relationship is disrupted.

At the same time, it must be recognized that judiciaries are under pressure from many sides, whether from parties and lawyers or media and politics. In particular when judgments are feared not to turn out the desired outcome, litigants—whether or not they subscribe to the need for independence in general—have an incentive to try and influence court decisions in their favour. They do so appropriately, but also inappropriately, the latter to the detriment of independence. Governments or parliaments may not want to surrender important decisions to review by an independent judiciary, and may attempt to keep some level of control over the courts. There are many ways to inappropriately influence the judiciary, and ultimately its judgments might be ignored.

The relative vulnerability of the judiciary in withstanding pressure and fulfilling its role has been stressed often. The classic reference is to Hamilton, who argued that the judiciary is the weakest of the three state powers: judges only make decisions in disputes that are put to them, and the judiciary itself does not implement or enforce the decisions (Hamilton 2009 [1788]). In addition, the judiciary's functioning can be frustrated by the other state powers in many ways, for instance by reducing access to the courts by raising legal or financial barriers, by reducing the funding of the judiciary and by exploiting their role in appointments of judges and members of governing bodies such as councils for the judiciary. The other state powers have the practical means to make or break the judiciary. The degree of respect for the independence of the judiciary by relevant private and public actors is therefore an important factor for the level of independence in a concrete situation. An actor's respect for independence reflects the legitimacy of the judiciary, but also the willingness of this actor to support the rule of law, even when it is not in his or her direct interest.

Independence of the courts, in combination with the permanent threats to undermine it, requires judiciaries to be organized separately from public and private interests, and in particular from the other branches of the state. This necessary separation creates an autonomous environment with strong professional culture and traditions, expressed in professional and ethical standards. The downside is the risk of lack of alignment and even a disconnect with society. Judges who are complacent among themselves, may miss incentives to connect with parties and to keep up with society.

Lack of alignment will show in different perceptions of independence by judges and other groups in society. Of course, perceptions will always differ among the general public and diverse groups such as companies, court users, lawyers and judges, given their different roles, experience and culture. Alignment is, therefore, a matter of degree. It should also be recognized that the perceptions of independence by the general public are influenced by other factors than direct experience. Reporting in the media and political discourse play a role as well. For instance, in the shift in some countries in Eastern Europe towards an authoritarian state or a—so called—illiberal democracy, the independence of the judiciary functions as a barrier, leading to concerted efforts of governments and state controlled media to discredit the judiciary among the population. The larger the lack of alignment between judges and citizens, the easier it becomes for governments to curtail the independence of the judiciary and to diminish the rule of law, but also the more difficult the daily functioning of the courts becomes.

Is lack of alignment a real problem? When asked, the judges of Europe evaluate the independence of the judges in their country positively. On a scale of 0 to 10, averages per country range from a moderate 6.5 in Latvia to a very high 9.8 in Denmark, with an average across countries of 8.5 for 25 countries in 2019 (all these and other figures mentioned in this introduction will be discussed in later chapters). So, judges do not perceive a lack of independence. If you ask lawyers for their opinion, however, their assessment of the independence of the judiciary is substantially less positive. That is the conclusion in all countries that took part in both the lawyers survey and the survey among professional judges. The range is between 5.2 in Hungary to 9.0 in the UK with an average of 6.7, considerably lower than the average of the judges. The Eurobarometer survey among citizens shows even lower scores than the ones given by lawyers. The Eurobarometer range is between 3.7 and 7.3, with an average of 5.4. Apart from the question which perceptions are closer to ‘real’ (de facto) independence, these findings point to different perspectives of judges and society. Lack of alignment seems apparent between the two.

Weak alignment is also manifest in the extent judges say their independence is respected by the other state powers, government and parliament, and by the media and social media. A broad variation exists among the member states of the EU, with negative extremes—unsurprisingly—in Poland (72% of the judges did not feel respected by the government and

62% by the media in 2017), but also in Romania (58 and 53% in 2019) and the UK (43 and 52% in 2019).

It could be argued that these findings are not very important, when trust in the judiciary among the general public is high. Whatever the merit of this argument, this proves not to be the case. Firstly, the opinion of citizens about judicial independence is closely connected with their trust in the justice system. This is reflected in the correlation between trust and perceived independence, as will be discussed. In essence, trust in the judiciary seems to equal trust in the independence of the judiciary. Secondly, the percentage of respondents that tend to trust the justice/legal system varies widely from 17% in Croatia to 86% in Finland, with a cross country average of 52% in June 2019, according to a regular public opinion survey of the European Commission. Trust is an issue in many countries. On the positive side, in most countries trust in the judiciary is higher than that in government and parliament. Across countries, the difference between trust in the judiciary and each of the two other powers is close to 15% point. Lack of alignment with society is not only an issue for the judiciary, but also for government and parliament.

How do we interpret these findings? Multiple explanations of the differences in perceived independence are possible. In one scenario, judges are complacent and over-confident about their independence, and the assessments of the other groups reflect the true state of independence more accurately. The perception of many judges of lack of respect by the other state powers, could then be a reflection of over-accentuating the role of the judiciary in society. In this scenario, the judiciary is inward-looking and self-protective, a closed community that sets its own standards. In another scenario, opinions of citizens and business and to some extent lawyers are unavoidably shaped by the fact that most court cases have winners and losers. Losses are accentuated, and blamed on judges that are thought not to be impartial and independent. Opinion in society is affected by critical reporting of such and other cases by the (social) media, in some countries in combination with or driven by negative opinions of governments and parliaments that do not subscribe to current constitutional principles and may not want to abide with these principles. In this scenario, the judiciary performs well within the context provided by the other state powers, but this is not recognized by the population.

To explore the relative merit of these two scenarios, this book discusses perceptions of independence, respect for independence and trust, in the

countries of the EU and the UK. The **central question** is addressed **whether there is in Europe a lack of alignment and—in the extreme—a disconnect of judiciary and society and, if so, what causes this**. This is primarily done by analysing the data from surveys. This analysis is made possible by the recent surveys of the European Network of Councils of the Judiciary among (lay) judges and in co-operation with the Council of Bars and Law Societies of Europe (CCBE) among lawyers in Europe. This data is combined with the outcomes of surveys of the European Commission among the general public and among companies. To answer the central question, the following sub-questions are addressed for the countries that are covered by the surveys.

1. How do the perceptions of judicial independence by judges, lawyers, court users and citizens and companies compare? As to the general public and companies, a follow-up question is whether characteristics of the respondents play a role. Taking into account the limited availability of data about the parties in court procedures, how do these parties experience independence? (Chapter 3)
2. Can the perceptions of lay judges who as citizens have direct experience at the bench, and bridge the gap between judges and society, throw light on the factors that determine the perceptions of citizens? In particular, how do professional and lay judges interact, and how does this affect perceptions? (Chapter 4)
3. How do judges experience the respect for their independence by the categories of actors they interact with: (1) court users: parties, lawyers and prosecutors, (2) the political system, consisting of government, parliament and the (social) media and (3) the internal leadership of the judiciary, provided by the highest courts and by the governance institutions of the judiciary? (Chapter 5)
4. Given the relationship between perceived independence and trust in the judiciary by the public and given the generally higher trust in the judiciary than in the other state powers, how can this differential trust be understood? Does the multi-level governance structure of the EU, also with respect to the judiciary, play a role? (Chapter 6).
5. In view of all data, can it be concluded that a lack of alignment and, in the extreme, a disconnect exists between judiciary and society, in the European Union in general and/or in specific countries? And what can be concluded about its causes and effects? Are there

indications of the stability of the equilibrium of the state powers?
(Chapter 7)

6. Have these findings implications for the functioning of the judiciary in a democracy? (Chapter 7)

To set the scene, Chapter 2 discusses the main theoretical and empirical findings in the literature pertinent to these issues, and their implications for the design of this study.

This study has limitations. The most important limitation is the lack of differentiation of respondents in the surveys used. It is likely that citizens with different social and cultural backgrounds experience judicial procedures differently and also perceive judicial independence differently. Especially, court user surveys could throw more light on these differences in the future. Another limitation is the focus on descriptive statistics, as there is a wealth of data to present and analyse. The implication is that to a large extent explanation and causality have to left to a later occasion.

REFERENCE

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