

Introduction

Judicial Integrity

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Traditional separation of powers theories assumed that governmental despotism will be prevented by dividing the branches of government which will check one another. Modern governments function with unexpected complicity among these branches. Sometimes one of the branches becomes overwhelming. Other governmental structures, however, tend to mitigate these tendencies to domination. Among other structures courts have achieved considerable autonomy *vis-à-vis* the traditional political branches of power. They tend to maintain considerable distance from political parties in the name of professionalism and expertise. The conditions and criteria of independence are not clear, and even less clear are the conditions of institutional integrity. Integrity here means that the institution (and its members) act within the normative framework of the rule of law, both without undue external influence as well as without becoming the slaves of institutional self-interest that undermines the social function of the institution.

Independence (including depolitization) of public institutions is of particular practical relevance in the post-Communist countries where political partisanship penetrated institutions under the single party system. Institutional integrity, particularly in the context of administration of justice, became a

precondition for accession to the European Union. Given this practical challenge the present volume¹ is centered around three key areas of institutional integrity, primarily within the administration of justice:

First, in a broader theoretical-interdisciplinary context the criteria of institutional independence are discussed.

The second major issue is the relation of neutralized institutions to branches of government with reference to accountability.

Thirdly, comparative experience regarding judicial independence is discussed to determine techniques to enhance integrity.

Beginning in 1989 legal scholars and policy analysts were presented with a unique opportunity in Central and Eastern Europe. It has rarely happened in history that scholars could actively take part in the laying down of the foundations of a legal system, and by doing so, test the two to three hundred year-old western legal principles and traditions regarding the judiciary. Yet exactly this happened after the collapse of the Soviet empire. In 1989 and 1990 throughout Central and Eastern Europe, new constitutional-state founding processes began. Although there existed written constitutions in these countries during Communism, almost none of the basic constitutional principles were taken seriously. Western legal scholars and their eastern colleagues together with politicians and legislators started to work on drafting new constitutions—or amending old ones—and adopting new basic laws. A number of essays in this volume discuss one or another aspect of this process, concentrating on reform of the judiciary.² However, as other essays indicate, this was not a process of simple adaptation; from the very beginning a hidden reevaluation of the classic principles was involved. A shifting balance in reform goals and changes in the emphasis of different principles emerged. The importance of accountability is now recognized alongside the independence of the judiciary; “two sides of the coin” (Blankenburg) were minted at the same time—at least at the conceptional level.³

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1. The chapters of this book are based on papers presented at the 9th Annual Conference on *The Individual vs the State* of the Central European University Budapest, May 4–5, 2001. The Open Society Institute has provided generous funding.
 2. See chapters 5, 8, 9, 10 and 11 (Lech Garlicki, Erhard Blankenburg, Peter H. Solomon, Attila Rácz, and Károly Bárd).
 3. In chapters 7, 8 and 9 Di Federico, Blankenburg and Solomon deal with this question of “duality,” but we can see the same tendency in Peter H. Russell and David M. O’Brien (eds.), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*, Charlottesville, Virginia and London: University Press of Virginia (2001), or in USAID, *Guidance for Promoting Judicial Independence and Impartiality*, Technical Publication Series, Washington (2002).

Independent judiciaries practically did not exist in the former socialist countries. Rácz demonstrates, however, that the independence of judges was explicitly recognized in the Soviet Union by the 1936 Federal Constitution. The Soviet Constitution stated that judges are independent and subjected only to the statutes. But this had no relevance. Rácz quotes a 1940 leading textbook on Soviet State Law by A.I. Denisov, who explained that independence does not separate courts from other organs of the socialist state.

Lack of judicial independence under socialism was not only a consequence of Communist political abuse. Socialist theory completely denied the concept of separation of powers. In fact, the principal concept of Soviet constitutional law was that of the unity of state power. According to this theory, in the socialist state every and all power rests in the “working people” who exercise it through the “leading force of the working class, the Marxist Leninist Party.” Within this understanding, such terms as judicial integrity or independence, impartiality or neutrality carried no meaning. However, the administration of justice was not static during the decades of Communism, and large differences in administration existed among the courts of the different socialist countries. Until around 1956 political oppression was extremely severe in Communist dominated Europe and this was true in the context of the judiciary as well. As Garlicki (Chapter 5) mentions in regard to the Polish situation: “the four decades of Communist rule caused deep and durable damage to the independence of the judiciary, failing, however, to eliminate it completely. A number of factors contributed to this situation: on the one hand, a relatively moderate (at least after 1956) form of the political regime, and on the other, the traditional independence and authority of judges inherited from the period between the world wars. In the post-war period, much of the old legislation retained its force and many judges resumed work, which emphasized continuation and permitted some distance from the Soviet model and practice.” The situation was more or less the same, for example, in Hungary, while in East Germany, Romania, or the Soviet Union such continuities were systematically eliminated. But even in the “happiest barracks in the lager” (Hungary) the constitutional guaranties of judicial independence did not exist. The courts were subordinated to the government, generally to the ministry of justice.

In the socialist system the minister of justice was the main formal channel through which the government exerted more general influence over the courts, as well as, more specifically, over individual judges. The courts were subjected not only to the laws adopted by parliament but also to different decrees, like government decrees on criminal policy and so on. So the courts were simple state organs, and the “judges were generally viewed as func-

tionaries, and few individuals imagined a judge might issue a decision fundamentally at odds with the official political line.”⁴ Individual judges were dependent on both the ministry of justice and immediate superiors. The selection and promotion of judges as well as the disciplinary process were in the hands of the government, though fundamental decisions were taken by the Communist Party that also exercised considerable control over the daily activities of the courts.

After the collapse of the Communist regime, there was a clear need to establish or reestablish an independent judiciary. The establishment of an independent judiciary is well illustrated in Garlicki’s chapter in which he presents four basic points of change in Poland over the last decade. The first stage is the reform of the system of institutions responsible for the functioning of the judiciary. The second one concerns the increase in tasks of the judiciary. The third component of the change concerns the strengthening of the individual position of a judge. The fourth one is related to accountability for the Communist past. The dilemma in all former socialist parties was to what extent one should get rid of compromised judges at a time when the goal was to create institutional independence.

All the chapters of the volume that discuss the transformation of the judiciary after the collapse of Communism point out that there was general agreement among the founders of the new regimes that the judiciary should be independent. At this point we should clarify what the *independence of the judiciary* implies.

1. WHAT IS JUDICIAL INDEPENDENCE?

Independence of the judiciary is meaningful only in the context of judicial functions. However, there are very different blends of the judicial function. In Peter Russell’s view “the judiciary’s essential function derives from two closely related social needs. First, in a civil society we want some of our relations with each other and with our government to be regulated by reasonably well-defined laws setting out mutual rights and duties. Second, when disputes arise about these legal rights and duties, we want a mutually acceptable third-party adjudicator to settle the dispute.”⁵

4. *Monitoring the EU Accession Process: Judicial Independence*, Budapest and New York: Central European University Press (2001) 22.

5. Russell and O’Brien, *op. cit.*, note 3, 9.

The *Monitoring the EU Accession Process Report* states that “the judiciary occupies a unique position in a democratic society. It is called upon to decide disputes that cannot or should not be left to the political branches or private individuals. It upholds the law for all—and so doing, it also safeguards the rights of individuals and minority groups of all types against the excesses of majoritarianism. This sometimes requires judges to confront the interests of the political branches or powerful individuals, but because judges are not democratically elected, they must derive their authority and legitimacy from different sources than do the political branches; one of the most important sources of legitimacy and authority for judges is their independence.”⁶ To which could be added that “of particular importance in a post-Communist society, judicial independence promotes the rule of law by nurturing the development of a constitutional culture, heightening constitutional literacy, and stimulating constitutional dialogue between the branches of government and among the nation’s people.”⁷

According to Eli M. Salzberger (Chapter 3), “the independence of the judiciary is an important component of two doctrines: the separation of powers and the rule of law, which are two essential ingredients in a liberal democracy.” He offers an interesting definition of judicial independence which is worth closer examination. In his view “the general term ‘independence’ comprises three necessary components: the *subject* of independence, the *nature* of independence, and the *object* of independence. Actual independence is the result of a complex interplay among the various levels or components. Governmental behavior to judicial decisions (acceptance of the decisions) plays a crucial role. In a sense this means that separation of powers entails a certain subordination. The obligation to accept judicially confirmed legal mistakes is a high price although the benefit of settling disputes for good is obvious. One could argue that the burden of mistaken or biased judicial rules is mitigated because, irrespective of formal protection of independence, the judiciary is not outside politics. This is the position of Barry Friedman. The insulation of the judiciary is incomplete and it allows for political influences. The interplay is very complex and is not fully understood.

Notwithstanding the elaborateness and even richness of the various definitions, judicial independence remains an elusive term. Friedman (Chapter 4) argues that “a better surrogate might be supremacy. A simple way to think about independence is that a court might be called ‘independent’ when it

6. *op. cit.*, note 4, 23.

7. A.E. Dick Howard, “Judicial Independence in Post-Communist Central and Eastern Europe” in Russell and O’Brien, *op. cit.*, note 3, 89.

obtains at least rough compliance with its orders, and is not punished for issuing them.”

Solomon (Chapter 9) offers a different way out from the difficulties of defining judicial independence. In Solomon’s understanding “judicial independence is a means of encouraging the appearance and reality of impartial adjudication”. Like other contributors to the volume, he emphasizes insulation from external pressures. There seems to be an emerging consensus that internal pressures and bias are preferable to external pressures. In a way independence is not complete but is a special relationship with government.

One may bypass the definitional quagmire of judicial independence by simply defining specific conditions, which would result in an arrangement that one may assume as being sufficient for independence. In *Valente v. The Queen*,⁸ the Canadian Supreme Court identified three mechanisms as “essential to the independence of the judiciary: security of tenure (in the form of life appointments and removal only for cause), decent financing (of both the salaries of judges and the operations of the courts), and an appropriate degree of control by judges of the administration of the courts. The latter refers at a minimum to control case assignment and scheduling; to some, it implies disciplining of judges as well; to others, judicial independence requires that judges have full control of the administration of the courts (something that does not exist in many democracies).” (Solomon)

Unfortunately (for the approach in question) even these varying conditions are not satisfied in many developed democracies that are (mostly rightly) proud of their independent judiciary. In many US states the courts do not operate with a tenure system.⁹ In some Western European countries the minister of justice sometimes has a crucial role in the selection process. Giuseppe Di Federico (Chapter 7) argues that in varying degrees and different ways, the ministries of justice of Western Continental Europe are conceived as part of the checks-and-balances mechanisms intended to ensure

8. 2 S. C. R. 673 (1985).

9. Exposing judges to popular scrutiny through elections is not a practice in the EU-candidate Central and Eastern European countries. In this part of the world probably every lawyer would agree that the popular election of judges would pose a great threat to judicial independence. “The elected judge who faces the prospect of standing for reelection may be unduly influenced by that prospect. Judges often have to decide cases involving the rights of unpopular individuals or groups. A system that requires judges to win popularity contests to retain office take democratic accountability to the point of destroying judicial independence.” (Russell and O’Brien, *op. cit.*, note 3, 16) This position of Russell and O’Brien is likely to be endorsed in Central and Eastern Europe.

court efficiency and accountability, and also to guard against the danger of the corporatist leanings of a bureaucratically recruited judiciary, which, if left to itself, may result in the lowering of professional qualifications.

Bárd's (Chapter 11) comprehensive survey of some of the Central and Eastern European and Baltic Countries indicates that these transition countries moved quickly to satisfy all the formal conditions of independence. Written law, including some constitutional guaranties—and sometimes even in the application of these laws—are on par with the “model” democracies of the world. Moreover, as we can see in Bárd's report, some of the ex-Socialist countries developed a highly sophisticated system for judicial self-selection, for example in Hungary, Slovenia, Poland, Bulgaria, and Lithuania.

It is remarkable that the constitutional guarantees of independence of the judiciary are firmly established in so many post-Communist countries. Blankenburg (Chapter 8), summarizing his findings in five post-Communist countries (Poland, Hungary, the Czech Republic, Slovenia, and Estonia), claims that “there is no doubt about the determination of politicians and government as well of the judges themselves to defend this independence, an element of the separation of powers and the rule of law that they claim as central achievements of the transition from Communism.”

Of course, it may be easier to sustain an independent judiciary once it is established than it is to establish it in the first place. As Friedman (Chapter 4) points out in reference to the US experience, the acceptance of some form of judicial independence is the result of a historical and institutional learning process. But once in place, the institutional safeguards have a life on their own.

The formal commitment to independence does not guarantee that the political independence of judges is actually rewarded by the system. It may simply serve the needs of politicians for non-accountability (see below). Salzberger (Chapter 3) offers an empirical test of independence. The ‘revisionist’ hypothesis is that “no negative correlation would be found between a judge's degree of substantive independence and his/her chances for promotion.”

To test these hypotheses Salzberger reviews data from both the English Court of Appeals and the Israeli Supreme Court. He finds that the data tend to support the revisionist approach. “In both countries, judges who show more independence, by deciding more cases against the government, have better chances for promotion. Judicial independence is rewarded and this may indicate that such independence benefits politicians.” It is remarkable that the finding applies to countries where the constitutionalization of the independence of the judicial branch is “underdeveloped.” It remains a major

research task to see whether the conformism theory is valid in highly corporatist independent judiciaries.

The traditional concerns with judicial independence are somewhat “problem violationist.” The problem of the “political” is neglected—which enables the politicization of the judiciary. As elaborated on by Di Federico (Chapter 7), there is a visible increase in the number of extra-judicial activities undertaken by Italian judges. While in the seventies only one or two judges were elected to Parliament, in 1996 fifty magistrates ran for election with twenty-seven of them winning seats. (Interestingly, this is not unprecedented. The number of magistrates in some nineteenth-century German Parliaments was higher and had a considerable impact on politics.) According to Di Federico, “extra-judicial activities performed on a full- or part-time basis by Italian magistrates in the last thirty years number in the tens of thousands.” This would be impossible in many of the Central and Eastern European transition countries, where judges are even prohibited from joining political parties. The problem of hidden political preferences and their influence on adjudication is, of course, not remedied by such a formal ban.

Furthermore, the constitutionally credible social role of judges cannot be limited to “independence.” Such social credibility in democracy points to a much more complex notion, namely, judicial integrity that results largely from cultural factors. It is here that the real difficulties of the judiciary in the transition countries lie.

Despite the significant progress witnessed in Central and Eastern Europe—and especially among those countries which wish to join the European Union—the independent monitoring conducted by the Open Society Institute identified several serious problems which continue to impair the development of fully independent judiciaries. First among these problems is a “weak commitment to a culture based on the rule of law.” Other issues cited which have yet to be overcome include: “insufficient institutional independence of and material support for the judiciary” and “undue executive interference with the administration of the judiciary.”¹⁰

2. ACCOUNTABILITY

While judicial independence remains to some extent unaccomplished and susceptible to political pressure, and not only in Central and Eastern Europe, considerable criticism is emerging in regard to the social performance of the judiciary. This problem is well known in more consolidated democracies:

10. *op. cit.*, note 4, 21.

there is a growing tension between independence as a judicial performance guarantee and actual performance.¹¹

This concern was voiced in the Central and East European context: “Independence serves important social needs; it is not, properly speaking, an end in itself or a way to secure the professional position of judges for their own benefit, but rather a means to achieve the goals of a just and prosperous society. For this reason, independence needs to be complemented with means to ensure that judges and the judiciary as a whole comport with society’s democratic principles and legitimate interests: even as they are independent, in other words, judges need to be accountable.”¹²

Lack of accountability generally raises concerns in terms of separation of powers: “the judiciary as a corporate body may have excessive control over its own composition, creating a self-perpetuating and self-protecting caste. One concern is, that the removal of traditional external controls may allow the judiciary an unparalleled and possibly abusive freedom in managing its own resources. Another concern is that judges’ ability to interpret laws as they apply them may give them excessive power in reshaping the legal framework according to values and views shared neither by the public, nor by the other branches of government. And a third concern being that institutional mechanisms for defining standards for controlling and correcting judicial behavior are inadequate.”¹³

Where judicial independence exists but judicial accountability is lacking, especially where the courts’ jurisdiction reaches into the political sphere (due partly to increased rights protection), the judicialization of politics may reverse established balances of power to the detriment of democratically accountable branches of power. The question is “how independent a powerful judiciary can be without undermining democracy? Here the liberal principle

11. See Linn Hamnergren, “Judicial Independence and Judicial Accountability: The Shifting Balance in Reform Goals”, in *Guidance for Promoting Judicial Independence and Impartiality*, *op. cit.*, note 3, 149. Hamnergren, at 155 suggests four elements of accountability: “Transparent systems for selection of judges—publicized criteria and discussion of their application. Transparency of internal operations and their subjugation to pre-established rules; budget, use of resources, salaries, assets declarations, standards of behavior and evaluation should be formally set and available for public review. Transparency of judicial decisions—public records of proceedings and publication of sentences. Functioning systems for registering complaints on institutional operations or behavior of individual members.”

12. *op. cit.*, note 4, 18.

13. Hamnergren, *op. cit.*, note 11, 149–150.

of judicial independence runs up against the democratic principle of accountability.”¹⁴

Friedman (Chapter 4) finds the long-standing independence-accountability debate, “almost tedious in its familiarity,” to rest on a false dichotomy. “If a democracy is well functioning, no institution is truly independent. Every institution remains accountable; every institution can be brought to heel.”

Nevertheless, the “lack of accountability problem” is shared by some of the authors of this volume. Di Federico states that analysis of the judicial systems of transition countries of the past, like Italy, Spain, and Portugal, as well as his experiences in the last decade as a consultant for judicial reform in the transition countries of Central and Eastern Europe and Latin America, have made him aware that reformers overemphasize independence to the detriment of accountability and performance.

Blankenburg (Chapter 8) finds that in Central Europe problems arise in terms of everyday organization as soon as the independent status of the judiciary is implemented. One of the problems concerns accountability. To accept that independence does not rule out obligations was difficult in the post-Communist setting. Here the judiciary’s desire for independence was articulated in a very special, defensive, legalistic culture. The continental legal tradition that was the point of reference is based on a *positivist* understanding of law. The role of the judge is to strictly apply codes and statutes. “This may not hold up against a hermeneutic understanding of the process of interpreting legal texts, but as an orientation, positivist theory fulfills an important function: under different regimes, not the least under Communism, it has served as an argument against interference from politburos, political parties, or individual functionaries. Once judges are simply a “function” of the law they cease being responsible agents.” Positivism is both a shelter for the judiciary and an invitation to a bureaucratic, and if I may add, somewhat non-responsive organizational structure. The need for accountability runs against this positivistic ethos.

The problem of lack of accountability related to the rebirth of legal positivism is illustrated by Solomon’s experiences (Chapter 9) in Russia, “a country famous for a dependent judiciary.” Given the new powers of the courts in Russia, there was an increased pressure to receive adequate services from courts. Businessmen and ordinary citizens expected protection against abuse and quick settlement of disputes. These expectations are not met. The growing social discontent with the courts does not help the fragile independence.

14. Peter H. Russell, “Towards a General Theory,” in Russell and O’Brien, *op. cit.*, note 3, 2.

Sociological and business surveys indicate that legal actors perceive judges to be abusing their independence, or at least, that the administration of justice is inefficient. As the reforms failed to introduce a mechanism to make the courts more accountable, there is increasing mistrust and avoidance.¹⁵

It is well known that judges are seldom called to account.¹⁶ Bárd's survey (Chapter 11) revealed the disquieting fact that there are almost no criminal or disciplinary proceedings introduced against dishonest or clearly incompetent judges in the post-Communist countries which he examined. "And if introduced, disciplinary bodies (composed in most countries of fellow judges) are rather reluctant to find judges responsible for offenses. This fact and the lack of transparency of the disciplinary procedures may harm the reputation of the courts and contribute to the public's distrust of the judiciary."

Bárd, in agreement with Blankenburg identifies a problem in the judicial understanding of accountability. Most judges, reasoning in the positivistic tradition see accountability as a menace to the traditional guarantees of independence. They fail to see that substandard performance is real danger in the long run. Monitoring by civil society should be seen as a safeguard of independence.

Independence and accountability are often conceived as two ends of a single dichotomy. Independence represents the aspiration to the rule of law, the notion that adjudication should remain—almost uniquely—separate from politics; while accountability is understood as the aspiration to self-governance, the principle that in a well-functioning democracy no institution should be beyond politics. The long-standing nature of the debate is puzzling, however, because the two principles can often reinforce one another. As some authors of this volume have suggested, depending on the specific mechanisms, accountability may help to further secure the independence of the judiciary. In some instances, accountability is ensured through ordinary legislation; in others it may require constitutional amendment. But rare is the

15. See, among others Marina Dakolias, *Court Performance around the World. A Comparative Perspective*. World Bank Technical Paper No. 430 (July 1999).

16. John A. Ferejohn, Larry D. Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint," 77 *New York University Law Review* 962, 997-1000 (2002). (Given the devices of internal discipline in the United States, very little can be done by the judiciary to curb renegade behavior.) As to Germany, see Rolf Lamprecht, *Vom Mythos der Unabhängigkeit: Über das Dasein und Sosein der deutschen Richter*, Baden-Baden: Nomos (1996) For a comparative analysis, see Norman Dorsen, Michel Rosenfeld, András Sajó, Susanne Baer, *Comparative Constitutionalism*, Thomson-West (2003) ch. 3.

instance in a constitutional democracy when an institution remains entirely beyond the ability of the people to change it.

The currently popular view is that institutions safeguarding judicial independence are well in place in most East Central European countries and concerns should relate more to implementation, or that one should instead focus on the other side of the coin, judicial accountability. Most authors in this volume (including Bárd) do not support such a view, at least not unconditionally. In particular, the view that accession countries have gone too far in guaranteeing independence, has to be rejected. On the contrary, the survey indicates that the organizational reform of the court system and the setting up of the institutional guarantees of judicial independence are still in progress.

3. IMPARTIALITY

Independence and accountability are only instruments of the underlying value of *impartiality*. Paul J. Kelly (Chapter 1) discusses impartiality as a problem of political philosophy. He considers impartiality a constitutional or political virtue. The problem is what happens if there are rival conceptions of the good life. (This is the standard multiculturalist objection.) This objection can be rejected, as long as neutrality is not violated “by privileging any particular controversial conception of the good.” The conditions of impartiality exist as long as the conditions of exit exist. How does this neutral impartiality apply to law and adjudication?

Guy Haarscher (Chapter 2) in his essay deals with the questions of integrity and neutrality of legal institutions as a problem of public virtue. According to Haarscher, the word “neutrality” implies a plurality of meanings or conditions. A neutral state shall not favor ethnic groups or social classes and shall not take a position between different conceptions of the good life. Haarscher’s concern is to what extent the requirements of state neutrality apply to judges. In his view impartiality sets the limits to neutrality. This follows from the functions. “The judge is a recourse. A neutral state, in international matters, is not a recourse at all: it is supposed not to care. To summarize: a liberal state is neutral as far as conflicts of ideas (and generally conflicts that do not involve violence) are concerned. But as an impartial referee, it has to *impose* the respect of the basic ‘rules of the game.’”

Is judicial impartiality a realistic option? Friedman’s paper (Chapter 4) has examined the relationship between an independent judiciary and popular politics: “The idea is that in a democratic regime, no judiciary (or any other institution) is likely to be entirely beyond politics. At most, the judiciary will

be nested within politics in some way that provides relative insulation to the judges.”

Criticism about the lack of accountability cannot be successfully addressed without practical solutions. In his essay, Roderick A. Macdonald (Chapter 6) has argued that “process and purpose are endemic to administrative law and the pursuit of administrative justice.” But the author does not believe that all contexts of diversity are good. Accountability to some extent remains a fuzzy concept, therefore it is easier to advocate it than to implement it in a cost-efficient, rational way. “Non-instrumental accountability means knowing that impartiality only arises when one is able to understand and relativize one’s partiality and knowing that independence can only be achieved by acknowledging interdependence. . . .”

Given these premises, it is not surprising that for Macdonald “accountability to oneself” is the key concern. This, of course, may raise objections from a democratic theory perspective, but such agency centered (‘self-reflective’) understanding is one that has at least its own dynamics. That is, it may increase accountability and responsiveness even without democratic constraints. Given the poor performance of actual democratic supervision of public agencies and also in view of the cost efficiency of self-monitoring, the argument must be taken seriously in democratic theory.

Nevertheless, it is not easy to apply these considerations in the context of the judiciary. Di Federico (Chapter 7) indicates that, among other reasons, “the relation between judicial independence and effective evaluation of professional qualifications in countries where judges are recruited for a specific judicial position from among experienced lawyers is different from that which occurs in countries where judges are recruited from among young graduates on the basis of their theoretical knowledge of the law.” Di Federico argues that “the guarantees of professional qualifications should not be sacrificed in the name of judicial independence (as in Italy), nor should the value of independence be sacrificed by too strict a control over the content of judicial decisions. One of the main functions assigned to the judicial councils of the countries of Central and Eastern Europe is that of protecting both of those values conjointly.”

The following four points are among the primary conclusions drawn by Di Federico in his chapter:

- Professional excellence reinforces judicial independence and makes a judge less prone to external influence.
- The Italian case shows the importance of establishing a detailed code of judicial conduct to better protect the substance and image of judicial independence and to provide an adequate “border maintenance” between

the judiciary and the other powers (legislative and executive).

- Judicial discipline may prove more effective in strengthening judicial accountability when procedures are established to provide avenues of participation for the citizens.
- Organizational and technological modernization of the courts may be important in promoting a functional equilibrium among the values of independence, accountability, and efficiency by rendering fully transparent the inner workings of the court system and less discretionary the evaluation of work performance.

Chapters 7 and 8, written by Di Federico and Blankenburg indicate that the judiciary should remain publicly accountable for its activity, and “that judges have a responsibility to be proactive in disseminating information and generating publicity. Walking a thin line, courts have to retain their independence and at the same time be responsive to public criticism.”

The complexity of the judicial accountability problem is raised in Bárd’s chapter. He discusses the problems of the limited term appointment that is applied to newly appointed judges. Further, career advancement may depend on the court president’s evaluation instead of that of peers. Chapter 10 on Hungarian judicial practices (Rácz) raises questions of accountability as perceived, primarily, by a judiciary cultured in positivism. “According to different opinions it seems to be justified to sanction attempts at interference in the settlement of concrete court cases as separate punishable acts by the Criminal Code. . . . When a panel of the Supreme Court wishes to depart in a matter of principle from a previous sentence (i.e. from a judicial precedent), suspending its concrete procedure, it may ask for a ‘decision in the interest of uniform interpretation of the law.’”

It is not quite clear where the limits of criticism of judicial decisions lie. Rácz, for example, is convinced that it is inadmissible to criticize a sentence that is not yet final. Others might disagree, after all the court has rendered its views; moreover lawyers’ legal arguments are all about influencing courts. Rácz seems to be unhappy about any kind of criticism coming from government—a problem that came up already in the context of separation of powers and insulation. Of course, political criticism may undermine the credibility and authority of law.

4. PROBLEMS OF JUDICIAL INTEGRITY IN POST-COMMUNIST COUNTRIES

Solomon's chapter (9) examines the independence of the judiciary and individual judges in Russia at the start of the millennium. Here institutional features that are taken for granted in the West are still not fully granted. Physical security for judges is just one of the more striking examples.

In less than a decade since Communism, the government of the Russian Federation established some of the bases of judicial independence, most notably appointment of judges to terms without limit and management of judicial careers by the judiciary. As a result, most judges felt more independent than they had ten years earlier. At the same time, systematic underfunding of the courts and the continuation of a highly bureaucratized judiciary assured that judges remained dependent to a degree on both local politicians and their superiors within the judiciary. (It remains to be seen to what extent President Putin's commitment to increased judicial benefits will tip the balance). While making gains in autonomy, the courts in Russia also acquired new power in the form of jurisdiction over commercial disputes, the legality of administrative acts, and the constitutionality of laws. But engagement with such high-stake issues led to new concerns about the accountability of judges, including the capacity of the judiciary to react to judicial misconduct.

Rácz discusses the current challenges to judicial independence in Hungary. He finds that even if legal guarantees are quite comprehensive this does not mean that problems do not arise in relation to judicial independence in everyday practice.

It is currently debated whether it was the right solution to entrust the central administration of the courts entirely, not only in personnel matters, to the National Council of Magistracy instead of the minister of justice, taking into account that as a consequence the financial and staff shortage problems of the judiciary also ceased to be within the sphere of government responsibility. The problem arises more generally, too, of whether it is reasonable to exclude practically all possibilities of institutionalized external control over the functioning of the judiciary. For example, is the opposition—expressed especially by the Supreme Court—to the introduction of constitutional review of Supreme Court decisions well founded? Would such review affect the independence of judges?

Blankenburg indicates that the rule of law and the institutionalization of a truly independent judiciary have been priorities in establishing post-Communist regimes in Central Europe in the 1990s. He finds that EU accession countries made constitutional pre-commitments to judicial inde-

pendence and that the judiciary is particularly sensitive to all attempts at intervention. The emerging model of independence is a collective one. The individual judge is subordinated to the collectively developed judicial positions. In such a model it is particularly important to establish the institutional frame for self-government.

Bárd's chapter (11) is based on reports on Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovenia, and the Slovak Republic, prepared within the framework of the EU Accession Monitoring Program conducted by the Open Society Institute during 2000–2002.

The survey indicates that the process of transforming the judiciary has not been fully concluded in the accession countries; the countries remain positioned between the problems confronting Russia and Hungary. The survey also revealed that in almost all countries there have been attempts by the executive to abuse its existing powers or to regain some of the powers it lost after the political change. The social performance of the judiciary depends not only on independence but on actual performance, too. Litigation increased tremendously in Eastern Europe after the collapse of Communism. Courts settle more and more cases, but the number of incoming and unsettled cases is increasing concurrently. Even if formal independence is recognized the means of effective judicial integrity and performance are not granted in terms of resource allocation.

Judicial integrity is a complex and fluid concept. The achievements that have emerged from the “real-life laboratory” of the post-Socialist transition countries could help us to evaluate long-standing constitutional principles, and, without giving up any real value, there is a need to find a new balance between the elements of these principles.