

## The Shifting Focus of Judicial Reform: from Independence to Capacity

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Over the last decade, most countries of the Central and Eastern European (CEE) region have begun reforming their judicial sectors. In order to consolidate democratic regimes, a series of reforms aimed to install independent courts boasting impartial judges using fair adjudicative procedures. Work is ongoing, and must now be supplemented by increased efficiency in court performance while maintaining accessibility for all.

### **The legacy of the past**

There was much to overcome. To begin with the region's courts were characterised by a steady degradation of the status and reputations of individual judges and judiciaries, a high tolerance for, and frequency of, executive interference in judicial decision-making or control of courts by the executive through administrative structures, extending even to centralised direction of the judiciary itself. In the former socialist regimes, judges were not expected to act as independent decision-makers, but were instead the executors of the will of politicians. The deference and loyalty of judges was valued over their capacity for responsible decision-making. Moreover, lack of support for the principle of separation of powers, honoured in none of the CEE's single-party states, undermined the institutional independence of the judicial branch. Control of most or many judicial functions by the executive, or of the judiciary as a whole, was a common pattern. [\[1\]](#)

Given this background, an understandable goal of early judicial reform was to secure judicial independence. [\[2\]](#) Independence was understood to extend beyond ending improper external influence on judicial decision-making, to strengthening the position of judges and the judiciary in society at large. The idea was to establish a system in which courts, besides resolving disputes between individuals, also monitor other governmental branches and so need to function independently of these branches (institutional independence). [\[3\]](#) In addition, they need to be composed of independent judges (individual independence).

It was soon clear that these tasks would not be easy to achieve. Multiple obstacles blocked the road to successful reforms. [\[4\]](#) First and foremost was the immense resistance of the executive to releasing control over the judiciary. The judiciary was perceived as underdeveloped and lacking the capacity to support and govern itself. Executive influence over financial and budgetary channels ensured that the reality reflected this perception. And where judiciaries gained in strength, calls were heard for increased judicial accountability, warning of the possibilities of abuse of power in the form of excessive judicial discretion.

The Czech Republic provides a good example. In that country, the government initially took steps to secure the independence of the judiciary in the Constitution and other legal instruments, and made a commitment to empower the judiciary institutionally. A judicial reform concept was submitted to Parliament, but did not gain political support because of its emphasis on judicial independence (including the establishment of a Judicial Council) without a similar commitment to judicial accountability. A new reform proposal prepared and presented by a new Minister of Justice, and subsequently passed into law, focused on accountability (both personal and institutional) but made only modest progress in empowering the judiciary.

The notion of an accountable judiciary is sometimes interpreted to mean executive monitoring of the judiciary, and understood to be in conflict with the notion of an independent judiciary. However, as Linn Hamberg points out, there is no need to see accountability and independence as diametric opposites. Judicial accountability need not be viewed as intra-governmental accountability, but as "institutional accounting to political and civil society [as a whole]." [5]

These new problems and demands sparked what could be viewed as a shift in the focus of judicial reform. New issues and complexities fuelled further reforms, as it was acknowledged that a close relationship exists between judicial independence, judicial capacity, and judicial accountability. It is beyond the scope of this paper to explore fully the interaction between these three concepts - in what follows I focus on the relationship between judicial capacity and judicial independence, both individually and institutionally. I try to uncover the most frequent and visible points of contact between these two and outline, in conclusion, the importance of this relationship for judicial reform.

### **Judicial capacity and individual independence**

The notion of individual independence is two-fold. It encompasses both substantive independence, i.e. as an individual decision-maker; and the broader personal independence guaranteed by the terms of office. [6] Classic pillars of personal individual independence include: life tenure following judicial appointment, on condition of good behaviour, terminating only at a set retirement age; adequate remuneration; a prohibition on recall or transfer without consent; and internal independence from judicial superiors and colleagues. The notion of judicial capacity as related to the individual judge refers to his/her competence to perform the judicial function efficiently, independently and impartially.

#### ***(a) Judicial appointment and the judicial career path***

A complex relationship between judicial capacity and individual independence starts at the moment of selection of judicial candidates. It is well-understood that diversity strengthens democratic institutions by rendering them more representative and, thereby, legitimate. One overall goal of any selection process should be to choose candidates from all spheres of life. Of course, they must have the required qualities and qualifications, but there should be no barriers to appointing, for example, former attorneys or former prosecutors as judges. The trend in the region, however, seems to be to give preference to fresh law-school graduates, who are seen as untainted by the former system. However, this may actually undermine judicial independence, as young inexperienced judges may lack self-confidence and be more susceptible to external pressures or to conforming to the internal pressures of an often conservative judicial sector.

Furthermore, a preference for youth does not necessarily enhance judicial capacity, since performance is not a main consideration. Indeed, the criteria for selection and appointment of judges are too often vague, leaving wide space for discretion. This is exacerbated where procedures are outside the reach of any public scrutiny. Clear and objective criteria must be stipulated and transparent procedures introduced to prevent arbitrariness and preferential treatment. The same applies to the promotion of judges to higher courts or to managerial functions of presidents and vice-presidents of the court.

Related problems can be traced to the composition of selection and promotion bodies. The realisation that judges are best equipped to evaluate the qualities and qualifications of

candidates for judicial office would seem to recommend selection bodies composed primarily of judges. Yet such a system could lead to the exclusion of a legitimate public interest in the composition of the judiciary. Perhaps a balance can be struck between expertise and public interest by creating bodies composed of both judges and other legal professionals; ranking candidates; and generating public discussion of the results.

***(b) Judicial office/status of a judge***

Judges have a special status in society. Sometimes, however, insufficient attention is paid to the possibility that judges' business, political or other engagements may lead to undesirable compromises of their reputation. Clear criteria for the involvement of judges in society need to be set and observed by judges, so that the reputation of the judicial office and public trust are preserved.

In this respect, one rather dangerous practice is the routine use of judges for non-judicial functions, e.g. educational (training other judges) or governmental (consulting with governments on the preparation of new legislation, the administration of the judiciary, etc.). Performing these functions while holding judicial office constitutes a clear violation of the principle of separation of powers, and may undermine judicial independence. Furthermore, it may create a negative public perception that the judiciary serves a kind of clerical function and that judges serve government rather than acting as a check on power abuse by the other branches of government.

***(c) Adequate remuneration***

Some countries do not provide judges with adequate remuneration. This, of course, undermines their independence, since judges who cannot secure themselves and their families financially may become corrupt, seeking or accepting certain "favours" in return for preferable decisions. Additionally, if judges receive substantively lower salaries than other legal practitioners, they remain undervalued by society. The best graduates and other high-quality candidates will not be attracted to enter judicial office or may elect to leave it for better-paid positions.

***(d) Judicial training***

Only judges who know the law and how to apply it can properly exercise their judicial function and be truly independent. In the CEE countries, law is constantly changing. Moreover, certain methods of interpretation may not have been previously applied, such as checking for inconsistent and illogical arguments, or establishing unconstitutionality or breaches of international or human rights instruments. In the past judges were not encouraged to think independently or required to explain and justify their decisions. Often the most basic ethical concepts were unknown to judges or unapplied by them.

Judicial training can be influential in reversing these trends and attitudes. Educating judges about innovations in domestic legislation and the ever-increasing influence of European and international legal norms should be among its goals. Many countries in the region have established judicial training centres that help to fill this void. However, most countries still lack a comprehensive concept of continuing legal education for judges or the means to implement one. Lack of capacity in these areas might lead to later pressures on independence.

Even where the concept of continuing legal education for judges is present, a debate continues over who should be in control and how the system should be designed. Naturally, judges should

play an active role in designing training systems, but it is debatable whether control should be left solely to them. If the goal goes beyond education in new laws to actively changing attitudes and exposure to new concepts and approaches, a certain degree of external management may be useful. This should not detract from the possibility of designing a system to cater for the particular needs and demands of judges.

### **Judicial capacity and institutional independence**

Judiciaries in the CEE region face tremendous challenges, posed by rapidly changing legislation, new approaches to the interpretation and application of law, and the influence of European and international law. There are new economic relationships and new types of disputes; there is a different perception of individual rights and growing litigation involving international and human rights standards; there are new social problems (such as corruption, drugs, growing criminality). Sometimes a rather unfair burden of expectation is placed on courts and judges to solve all these problems. If unsuccessful, judiciaries are labelled as inefficient or unable to perform their functions.

The development of judicial institutional capacity is the aspiration to create a judiciary which performs in an efficient and timely manner, operates independently, gains public trust, and serves the public interest. Therefore, it is a joined endeavor involving judiciary, government, and society as a whole.

#### ***(a) Administrative and managerial capacity***

In most CEE countries judiciaries depend for their administration and resources on the executive branch, most often the ministry of justice. In some countries, however, there has been a trend towards the greater involvement of the judiciary in administrative tasks. This is nevertheless stymied by the continuing tendency of the executive to wield control over the judicial branch and a paucity of internal capacity - and even genuine interest - among judges to assume new tasks in the administration and management of courts. [7]

The hesitation of judges to play a greater role in the administration and management of courts may be explained by a lack of managerial skills, heavy workloads, and the meagre material and financial resources available. Judges fear that the executive might give up its control only at the high price of shifting all responsibility for the judicial sector to judges alone. This, of course, is not an acceptable solution. A better approach is gradually to transfer administrative and managerial tasks to courts and judges, with a concomitant increase in resources. Training of judicial functionaries and the general enhancement of self-governing capacity are needed.

#### ***(b) Representation and leadership***

One factor contributing to the weakness of the judicial branch, as compared to the other branches, is a lack of representation. While in some CEE countries judicial associations have already been established, these do not always represent all judges and sometimes remain weakly supported and weakly empowered.

In addition, strong leadership and representation is retarded in a system where executive-appointed court presidents and vice-presidents are simultaneously the colleagues of other judges and their superiors as judicial functionaries. This double function of presidents and vice-presidents also violates the principle of separation of powers, by mixing the judicial and executive role. If delegation of the managerial functions to judges creates these problems,

perhaps a separate class of judicial managers could be introduced. Alternatively, presidents and vice-presidents of the court shall stop performing their judicial functions for their term and devote their time and attention fully to their managerial functions without a threat of possible conflict of interest.

**(c) Financial and material resources**

In spite of significant efforts and occasionally substantial investments, the judicial sector remains typically under-funded. This is partly due to the minor role played by judges in budgeting procedures. Also, the allocation of funds and other resources is often not transparent and usually reflects the ability of specific individuals (such as the minister of justice or individual presidents of courts) to persuade governments of the needs of the sector or of an individual court.

Greater initiative and involvement from judges - and greater acceptance of this involvement from the executive - are needed. Transparent procedures would go far in justifying the allocation of resources. Generally, the adequacy of both funding and the judiciary's material conditions for functioning need the support of the public and politicians alike.

**Importance of judicial independence and judicial capacity for judicial reform**

If judicial reform is to achieve the objective of transforming regional judiciaries into institutions that are not merely independent but also high-performing, the importance of the relationship between independence and capacity must be recognized and respected. Stopping short at the goal of independence may actually complicate the functioning of judiciaries permitted to exercise powers without ethical concerns. Of course, judicial accountability will play a crucial role here. But a commitment to both increased independence and capacity building is vital to the vision of an independent, responsible, efficient and accessible judiciary.

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**Footnotes**

[1] On the impact of the socialist past on regional judiciaries, see Dietrich, M.K., *Legal and Judicial Reform: Voices from Five Countries*, World Bank, 2000, in particular "The Transition Path: From Party Rule to Rule of Law". Online here: [http://www4.worldbank.org/legal/publications/LJR\\_ECA.pdf](http://www4.worldbank.org/legal/publications/LJR_ECA.pdf) .

[2] A comprehensive review of current situation regarding judicial independence in ten EU accession countries is provided in the country studies prepared by the OSI EU Accession Monitoring Program. Online here: <http://www.eumap.org/reports/content/20> .

[3] See Shetreet, S. "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges" in Shetreet, S. and Dechenes, J. (eds.), *Judicial Independence: Contemporary Debate*, Martinus Nijhoff, 1985, pp.594-598. According to Shetreet: "a modern conception of judicial independence cannot be confined to the individual judge ... but must include collective independence of the judiciary as a whole." (p. 599). I refer to this "collective independence" with the term "institutional independence".

[4] See Rekosh, E. "Emerging Lessons from Reform Efforts in Eastern Europe and Eurasia", in *Guidance for Promoting Judicial Independence and Impartiality*, Office of Democracy and Governance, Technical Publication series, January 2002. Online



here: <http://www.usaid.gov/democracy/pdfs/pnacm007.pdf> . Hereafter "ODG". On Russia see Solomon, P.J. and Foglesong, T.S., *Courts in Transition in Russia: The Challenge of Judicial Reform*, Westview Press, 2000.

[5] Hammergren, L., "Judicial Independence and Accountability: The shifting Balance in Reform Goals" in ODG, *supra* note 4, p. 150.

[6] See e.g. Shetreet, *supra* note 2 at 598. He defines the substantive independence of a judge as "that in making of judicial decisions and exercising other official duties" and equates personal independence with the security of office and tenure.

[7] For support for the argument that a strong connection exists between court management and administration, judicial independence, and judicial capacity see Davis, W., "The role of Court Administration in Strengthening Judicial Independence and Impartiality" in ODG, *supra* note 4.