Ramona Coman, Cristina Dallara (eds.), *Handbook on Judicial Politics*

INSTITUTUL EUROPEAN
Romania, Iaşi, str. Grigore Ghica Vodă nr. 13,
cod 700469, O.P.1, C.P. 161
euroedit@hotmail.com
www.euroinst.ro

CIP Description of the National Library of Romania
Handbook on judicial politics / ed.: Ramona Coman, Cristina Dallara; postf.: Francesca Zannotti. – Iaşi: Institutul European, 2010
ISBN 978-973-611-713-8

I. Coman, Ramona (ed.)
II. Dallara, Cristina (ed.)
III. Zannotti, Francesca (postf.)
32

PRINTED IN ROMANIA

Ramona Coman, Cristina Dallara (eds.)

Handbook on judicial politics

Foreword by Giuseppe Di Federico
Afterword by Francesca Zannotti

INSTITUTUL EUROPEAN
2010

Table of contents

Acknowledgements / 7

Notes on the contributors / 9

Foreword. **Political relevance, independence and accountability of the judiciary** / 15
Giuseppe Di Federico

Chapter 1 **Introduction: overview of the argument and the plan of the book** / 29
Ramona Coman and Cristina Dallara

Part one
Setting the topic: politics of the judicial reforms

Chapter 2 **The politics of the judicial reforms** / 41
Carlo Guarnieri

Chapter 3 **Independence and accountability of the public prosecutor** / 61
Giuseppe Di Federico

Chapter 4 **The governance of the judicial systems in Europe** / 89
Patrizia Pederzoli and Daniela Piana

of judges and prosecutors in Europe: Austria, France, Germany, Italy, Netherlands and Spain, Lo Scarabeo, Bologna, 2005. This book can be consulted and printed directly from the website of IRSIG-CNR: www.irsig.cnr.it

Di Federico, G., "Independence and Accountability of the Judiciary in Italy. The Experience of a Former Transitional Country in a Comparative Perspective", in Sajò A. (ed.), *Judicial Integrity*, Koninklijke Brill N.V., Leiden, 2004, pp. 181-205. The full text of this article can be consulted and printed from the website: www.irsig.cnr.it

Friedman, L., *Total Justice*, Russell Sage Foundation, New York, 1985.

Malleson, K., *The New Judiciary. The Effects of Expansion and Activism*, Dartmouth Publishing Co., Aldershot, 1999.

Riedel, J., "Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany", G. Di Federico (ed.), *Recruitment, professional evaluation and career of judges and prosecutors in Europe: Austria, France, Germany, Italy, Netherlands and Spain,* Lo Scarabeo, Bologna, 2005, pp. 69-126.

Tate, N. and Vallinder, T. (eds.), *The Global Expansion of Judicial Power,* New York University Press, 1995.

Chapter 1

Introduction: overview of the argument and the plan of the book

Ramona Coman and Cristina Dallara

After the Second World War, Western democracies have strengthened the guarantees of independence of the judicial institutions. Judicial impartiality through strong guarantees of independence became the main trait of constitutionalism. The consolidation of judicial independence and the enhancement of the principle of accountability have become the focal point of a debate stressing the need of transformation of the judicial systems. Significant reforms of the institutional setting of the judicial institutions have been undertaken all over the world. Opened in the 1950s, this debate focused on the relationship between the political and judicial powers which is still a major issue both in terms of political agenda and academic research. Judicial institutions are changing and with them European democracies. Political systems are changing, as well as the judicial cultures. New and old democracies are facing the same challenges. Launched, implemented or undermined, judicial reforms are a particular complex issue in terms of policy solutions and policy evaluation.

This greater political relevance acquired by the judicial power could not be neglected. The new features of the judicial institutions are presented as the result or as a consequence of the expansion of the judicial power "at the expense of the politicians and/or administrators" (Tate and Vallinder, 1995: 13). The "judicialization of politics" is one of the most significant trends in late-twentieth and early-twenty-first century government (Tate and Vallinder, 1995: 5). This expansion of the judicial power has become a common trait of

both consolidated and nascent democracies. The "infusion of judicial decision-making and of courtlike procedures into political arenas where they were not previously involved" (Tate and Vallinder, 1995) concerns not only constitutional judges but also ordinary judges. Judges are increasingly making decisions with significant political implications. They are increasingly assuming a central role in political controversies (Guarnieri and Pederzoli, 2001). As domestic governments sometimes avoid adopting unpopular measures, there is an ever-increasing need for citizens to resort to judges for the protection of their rights. Judges have therefore not only to decide on political matters, such as the legality of some political parties (Henderson 2007), but also on questions related to private life. They are frequently asked by public opinion and the media to go beyond their constitutionally prescribed duties in order to find solutions for specific social needs, to create new constitutional rights, to amend the existing ones, to restore confidence in domestic institutions and to protect values within the society. This growing demand for justice entrusts judges to solve problems that other institutions are unable or unwilling to deal with effectively (Guarnieri and Pederzoli 2001). Judges progressively become central actors in the democratic political systems.

Judicial reforms have come to the forefront of the political debate in most of the European countries. Making judges accountable as well as well as independent stands at the core of these new transformations. Improving the quality of justice is equally an aim to be reached. But how? What strategy should be used to consolidate the impartiality of judges through strong guarantees of independence? What strategy should be used to enhance the accountability through disciplinary, administrative and criminal responsibility? What strategy should be used to improve the day to day working of the courts and the degree of public trust? What strategy should be used to improve the efficiency of the administration of justice? Concerned by these questions, many international organisations have elaborated reports with guidelines and principles to be followed in the domestic processes of judicial reforms. However, the questions

at the heart of these processes are not as clear as they seem to be. In addition, "independence", "accountability", "quality of justice" and "judicial administration" are frequently evoked at a domestic level by both political and judicial actors in order to promote or to prevent reforms. They seem to be durably embedded in the political agenda of various European democracies. Scholars analysing judicial reforms in Europe (Guarnieri and Pederzoli 2001; Fabri 2006) have proposed a useful classification of judicial reforms that could help the reader to discern the complexity of the issue.

According to Fabri (2006), judicial reforms can be classified in four many policy areas: *governance policies, structural policies, procedural policies* and *managerial policies*. The first type of policy – *governance policies* – includes all the reforms aimed at changing the governance of the judiciary. These policies usually address the power, competences and structure of the Ministry of Justice, the establishment, the power, competences and structure of the Judicial Councils and the relationship between them. The second type – *structural policies* – aims at creating or modifying the number and the location of judicial offices and the tasks they perform. A diffuse example of these policies is the rationalization or unification of courts on national territory. Instead, *procedural policies* are related to the changes in criminal and civil procedure. They imply juridical modifications to the rules governing criminal and civil laws. Finally, *managerial policies* concern all these initiatives, which have diffused in Europe in the last ten years, aimed at introducing the evaluation and assessment of the way in which judges and courts work. A particular chapter of the book will cover, with a more or less strict focus, almost all of the four policy areas mentioned here.

Judges and prosecutors are often critical about these polices as they often see them as a threat to the "consecrated" value of judicial independence. Judicial independence seems to be a household word, but it is still "one of the least understood concepts in the field of political science and law" (Larkins, 1996: 607). In spite of the almost universal consensus concerning its normative value (Larkins, 1996: 607), judicial

independence remains a fuzzy concept as it is not implemented in the same way across the world. Judicial systems in Europe are nowadays subject to two other processes that question their legitimacy as well as their effectiveness: the first concerns internal accountability mechanisms (recruitment, appointment and career); the second regards external accountability, toward the political institutions and users of the legal system (Piana, 2009). Since the 90s, concepts like accountability, responsebility and discipline have started to diffuse also in relation to the judicial systems following the path opened by the *New Public Management* philosophy. Judicial accountability is becoming, together with the always-present "judicial independence", the key topic at stake when one speaks about judicial reforms in Europe. The main dilemma is how to bring together adequate guarantees of judicial independence with the need for more accountability and efficiency from the judicial institutions?

Any watcher of television news or reader of print media would say that judicial reforms promoted in order to enhance impartial, predictable, accessible and efficient judicial systems are on the political agenda of many European democracies. At the European level, a particular attention has been paid to the new member states, especially to the way the judicial institutions functions in Romania and Bulgaria. The reforms in these two countries have been highly mediatised both at the domestic and at European level. The reforms in Romania and in Bulgaria have been qualified as being hard, long and difficult. However, when we place the Romanian or the Bulgarian case in a comparative perspective, what we discover is that these reforms are not "easier" and "short" anywhere and that they provoke debate at the domestic level all over the world. For example, in 2009, the French President Nicolas Sarkozy was planning a wide ranging reform of the judiciary aimed at eliminating the role of the "examining magistrate". He emphasised the need to reform the criminal procedure and announced the transformation of the "juge d'instruction" into "juge de l'instruction" (*Le Figaro*, "Réforme de la justice, les Français partagés", 1st of January 2009). The French daily *Le*

Monde made known that under these provisions "all investigations will be carried out by the public prosecutor's office, which reports directly to the Ministry of Justice". Journalists and magistrates focused on the measures proposed by the French President expressing their worries about the "dangerous political influences that the legal process could be subject to". The president of one of the French associations of magistrates explained these new ideas of reform as a political "revenge against the investigations conducted by the examining magistrates in the 1980s and 1990s, which revealed several cases of political corruption". From his point of view, this reform, presented by the President of the Republic as worthy of the 21th century, put an end to the independence of the judiciary by placing the institution under political control (*Nouvel Observateur*, "Malaise dans la justice", 10 March 2009).

There is another country where the judiciary is a constant issue of political debate. In Italy, where the guarantees of independence of judges and prosecutors have been progressively consolidated, judicial reform is a permanent matter of concern for both judicial and political actors. Since Silvio Berlusconi became the President of the Council of Ministers, the proposals of reform have grown in number. In the last two years, justice has become the most sensitive issue at stake in the political agenda mainly due the permanent conflict between President Berlusconi and the "judges" that he accuses of representing a sort of political party aimed at carrying out a *coup d'état* against his government[10]. In 2009-2010 some new important reforms concerning the judicial systems were discussed and partially approved: the reform of the civil procedure, some changes concerning criminal procedure and finally, the so-called *processo breve* law aimed at establishing a fixed length of six years for all the civil and criminal trials (with some exceptions for specific trials such as

[10] Every day, Italian newspapers publish articles containing Berlusconi's declarations against judges and prosecutors. See for example, "Berlusconi, nuovo attacco ai magistrati. «Contro partito giudici cambiamo Carta»", *Il Corriere*, December 10th 2009.

the mafia ones). The last one was the most disputed law, because once applied it would lead to the interruption of many trials currently in progress. This situation created once again a very sharp conflict among parties, institutions and the civil society around a judicial issue.

In Belgium too the relationship between the media, justice and politics represented a topical issue. In 2009, some cases of political and economic corruption opened a large debate about the separation of powers and the independence of the judiciary among the main political and judicial actors, also involving lawyers, political scientists and columnists.

This book is an attempt to clarify some issues related to judicial reforms. It is designed as a basic introduction to this complex field of inquiry addressed to political and social scientists, sociologists, legal scholars, students, journalists, policy makers and ordinary citizens interested not only in understanding more about judicial reforms but also in placing these domestic issues in a comparative perspective. The book does not cover domestic case studies, but principles and issues at stake clarified by scholars with a vast experience in the field. Our aim is not only to clarify the main terms used in the debates related to these reforms by judicial or political actors and journalists, but also to replace them in a comparative perspective. The comparative perspective is not the method on which this book is based, but it is used by some of the contributors in order to illustrate the transnational character of some issues, the various meanings attributed to the same principles and the difficulties some countries have faced after the implementation of some reforms. We conceived this volume as a handbook addressed to any citizen interested in understanding contemporary political debates, to politicians and judicial actors confronted with the elaboration and the implementation of reforms guided by new European standards, to political scientists, sociologists, lawyers and any other researchers for whom the relationship between the media, politics and justice represents a field of inquiry. The contributions are provided by the best specialists on this topic. They all have a tradition in research and comparative

knowledge of the judicial reforms in Europe. Conceived in this way, the book speaks to debates in political science, sociology of law, public law and comparative politics regarding the transformation of the judicial institutions in the European states, the definition, implementation and the limits of the judicial independence, judicial behaviour and discipline, administration of justice and the way in which the judicial role should be conceived within these processes.

Written for a broader audience, this book gathers together nine chapters, organized in three main parts. The first part of the book aims at setting the topic, the politics of the judicial reforms and their corollaries. The second part offers an in depth analysis on a series of issues at stake in the European democracies: the judicial discipline, the quality of justice and the ICT in the judicial administration. The third and last part of the book puts together three chapters aimed at proposing a renewed research agenda in the understanding of the European judicial reforms and issues from three different perspectives: judicial administration, political science and European studies.

This book will begin by outlining the topic and focusing on what it is at stake when judicial reforms are put on the political agenda. Chapter 1, provided by Carlo Guarnieri, offers an in depth analysis of the "politics of judicial reform". The first part of the chapter pays particular attention to the clarification of the main concepts related to judicial governance: adjudication, judicial impartiality and independence. The second part focuses on the American and the European approaches to reform judicial institutions. The concept of independence has been used with reference to judges and prosecutors as if the concept had the same meaning and implications for both and neglecting the fact that the functions they perform are different. Therefore, while the first chapter is devoted to the reforms concerning judges within judicial systems, the second one, provided by Giuseppe Di Federico, discusses the two faces of the same coin – independence and accountability – with regard to public prosecutors in three different national contexts: England, France and Italy. According to this author, "the objective of improving the accountability and efficiency of public prosecutors through

regulation of their activities and at the same time of rendering the decisions of political agencies in matters of criminal initiative in a more transparent way remains, however, one of the most complex tasks for those who might wish to concern themselves with judicial reforms in a democracy". Chapter 3 deals with the "governance of judicial systems in Europe". Patrizia Pederzoli and Daniela Piana offer to the reader a comparative map of the institutional settings established by the Member States of the European Union in charge of governing judges and prosecutors (Judicial councils, Court services or equivalent bodies). The authors highlight the changes occurring in this field and the persistence of domestic traditions. As it will be shown, judicial governance in Europe still takes on a variety of institutional settings, but some common features can be identified, "which are likely to have far-reaching effects in the relationship between the courts and politics" in terms of judicial hierarchy, the judicial/executive relationship and legal professions.

The second part of the volume covers three crucial questions: judicial discipline, efficiency of justice and the role of the ICT in judicial administration. In this respect, the chapter written by Daniela Cavallini analyses the reforms aimed at introducing disciplinary and ethic codes in four European countries: Italy, Germany, France and Romania. The author highlights the differences among the approaches chosen by each country and the problems related to the concrete application of these codes. Francesco Contini and Davide Carnevali have proposed an overview of the approaches applied in the emerging landscape of quality in courts. They first of all discuss three ways in which quality is evaluated and eventually promoted. At the end they offer to the readers some reasons why it is so difficult to improve it and even sketch a constructive proposal to solve some of the issues at stake. Marco Velicogna presents an overview of the ICT innovation phenomenon in the European Justice sector. This chapter seeks to provide an empirically derived account of the strategic ICT innovation approaches utilized by (47) European countries (in 49 judicial systems) and of the uses of the ICT within the

courts and for judicial data interchange. Such examples will help the reader gain a more realistic view of the different uses of information and communication technologies in several European justice systems.

The final part of the book aims at presenting three contributions focusing on new topics related to the study of judicial politics. Marco Fabri describes the past, present and future of the judicial administration studies; Ramona Coman and Daniela Piana analyse the crucial link between media, justice and politics; finally, the editors of this volume, Ramona Coman and Cristina Dallara, present an overview of the past and present research concerning judicial institutions in the framework of the Europeanization of public policies.

References

Fabri, M., *Amministrare la giustizia. Governance, organizzazione, sistemi informativi*, CLUEB, Bologna, 2006.

Guarnieri, C., and Pederzoli, P., *The Power of Judges. A Comparative Study of Courts and Democracy*, Oxford, Oxford University Press, 2001, 245 p.

Larkins, C., « Judicial Independence and Democratization: A Theoretical and Conceptual Analysis », *The American Journal of Comparative Law*, Vol. 44, n° 4, 1996, pp. 605-626.

Piana, D., "The Power Knocks at the Courts' Back Door. Two Waves of Postcommunist Judicial Reforms", *Comparative Political Studies*, Vol. 42, n° 6, 2009, pp. 816-840.

Tate, C. N. and Vallinder, T. (eds.), *The Global Expansion of Judicial Power*, New York University Press, New York, London, 1995, p. 556.