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Independence Without Accountability: The Harmful Consequences of EU Policy Toward Central and Eastern European Entrants

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ARTICLE

INDEPENDENCE WITHOUT ACCOUNTABILITY: THE HARMFUL CONSEQUENCES OF EU POLICY TOWARD CENTRAL AND EASTERN EUROPEAN ENTRANTS

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ABSTRACT

In the name of judicial independence, a concept whose name is nearly magical in its capacity to draw reflexive devotion, the European Union (“the Union”) and Council of Europe¹ have used their bargaining power to impose nearly uniform structural systems on the most recent entrants with little regard for their own individual legal cultures and social conditions. This strategy ignores the reality that nations with the most successful systems of judicial independence, including those of “old Europe,” reached their own judicial

* In 2006, I wrote a paper called *The Administrative Judiciary’s Independence Myth*, 41 Wake Forest L. Rev. 1191 (2006), in which I argued that administrative law judges (“ALJs”) are not independent in the usual, structural sense. I noted that ALJs have some attributes in common with civil law judges, whose job is to apply rather than make law, as common law judges do. Since 2006, I have had the opportunity to work on various ethics issues with developing judiciaries in Kosovo, Indonesia, Ukraine, and Slovakia. Naturally, I have learned more about civil law judging than I could ever have learned by reading about it. These experiences have caused me to revisit issues of judicial independence and impartiality in the context of European court systems and those that are developing using a mixture of continental European, UK, and US models. Thanks to Luke Graham for excellent research and editorial assistance.

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1. In this Article we discuss the policies of the Council of Europe, which should not be confused with the European Council or the Council of the European Union, which are two of the seven core institutions of the European Union. The Council of Europe is an international organization aiming to uphold human rights, democracy, and rule of law in Europe. It is distinct from the European Union and has more member states than the European Union, although its organizational scope and competences are far narrower than those of the Union.

independence equilibrium points by their own individual paths, some of which are not remotely similar to the others. Nonetheless, all have had success with judicial independence. Imposing lock-step systems has had unfortunate results on some of the new members of the Union. Much can be learned as the Union considers its relationships with membership aspirants, such as Ukraine and others.

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I. THE MEANING AND PURPOSE OF JUDICIAL
INDEPENDENCE

Scholars often disagree about the quintessential meaning and significance of judicial independence and accountability. To avoid any confusion at the beginning of this Article, it may be helpful to say what the Article is and is not about. Sometimes it is the best to say at the beginning “ceci n’est pas une pipe.”² This Article will not be about the manner and form of judicial decision-making³ or about the capacity and propriety of a judge considering extra-legal norms.⁴ It will be about the contours of the concept of judicial independence and the specific consequences of judicial independence systems that ill-fit their country’s legal culture and that lack commensurate measures of judicial accountability.

First, the precise meaning and limitations of judicial independence will be discussed. Second, a few systems of judicial independence, some successful and some less so, will be described. Third, some legal history of Central and Eastern Europe (“CEE”), especially Slovakia, will be discussed to set the stage for problems that ensued as a result of EU-pressed systems. Fourth, the system pressed on nearly all EU aspirants after 2000 will be explained. Fifth, some of the dangers that have been realized in Slovakia will be described. In the end, we encourage the European Union to be more flexible in helping to design judicial independence systems in future post-communist aspirant countries that better account for local conditions and legal cultures, as well as adopt a flexible approach to current post-communist members when they make needed adjustments to their judicial independence systems.

2. Rene Magritte, *The Treachery of Images* (1928).

3. For interest on this topic, see Lawrence Alexander, *Legal Theory and Judicial Accountability: A Comment on Seidman*, 61 S. CAL. L. REV. 1601 (1987) (inquiring into whether the judge is independent and accountable to decide the case in a morally correct way: “what I would say about judicial accountability, the institutional structure of the judiciary, and the judicial selection process and criteria is the following: the ultimate problem of law is the conflict between getting things settled and getting things settled in a morally correct way. All other current debates—such as the debate over the legitimacy of judicial review in a democracy and the ancillary debate over interpretive methodology, judicial selection, and tenure—boil down to the question of how to resolve this conflict.”).

4. If interested in this issue, see RONALD DWORKIN, *LAW’S EMPIRE* (1988); AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2008); ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (1985); JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979).

To understand judicial independence and accountability, we have to consider how the other branches of state power can influence decision making of particular judges or how the other branches of state power can influence the judiciary as a whole, including the process of choosing of new judges, setting or diminishing the salaries of judges, or the disciplinary proceedings of judges.

Like most carefully defined concepts, judicial independence exists as a matter of degree. In the narrow (and more precise) sense, independence is about insulation from interference by the electorate and by the elected legislative and executive branches with a judge's decision making. Thought of this way, some judges are more independent than others. The phrase "judicial independence" has gained such an aura that its mere invocation is enough to end some conversations about it: no debate is countenanced of the possibility that there can be *too much* judicial independence. But there can indeed be too much judicial independence, and in the absence of sufficient accountability, the consequences can be grave.

There is indeed a "right amount of judicial independence," as we were taught decades ago by Owen Fiss in his work on emerging democracies in Latin America.⁵ The existence of judicial accountability in correct measures is no threat to judicial independence. Accountability comes, for example, in the form of well-crafted and fairly enforced judicial codes of conduct, clear standards for judicial explanation of decision rationales, and various reasonable checks on judicial selection and finances by other branches of government.

Impartiality as a judicial trait is often confused with independence. Impartiality is about fair-minded, neutral decision-making. Independence is created primarily by structural aspects of government to ensure that state actors are deterred from influencing impartial judicial decision-making. Impartiality is created primarily by the structure of the dispute resolution process. All judges are in systems that foster impartiality; some judges are in structures that foster independence, and independence is a matter of degree, always to be balanced by the right amount of accountability. Independence is a subset of impartiality, isolating only those influences that come from the electorate or the political process or the other branches of government. The independence subset is not necessary to the role of

5. Owen Fiss, *The Right Degree of Independence*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 55 (Irwin P. Stotzky ed., 1993).

judge (consider US administrative law judges who are meant to be impartial but not independent), but is a highly desirable attribute if the judge is meant to check the other branches.

Impartiality is the broader concept, an ability to resolve a dispute free of any inappropriate influence, including influence by state actors. Independence is only about influence or fear of influence by state actors. Many threats to impartiality exist that are not properly classified as independence issues.

Is independence a fundamental attribute of a judge? There are competing definitions and classifications regarding independence, and even cooperating institutions do not offer a common treatment of the concept. In Europe, this somewhat confusing mixture of definitions and the systems they generate is clearly visible. On the one hand, levels of independence are classified by consultative organizations of the Council of Europe (“CoE”) called Consultative Council of European Judges (“CCJE”) on statutory, functional and financial bases.⁶ By another institution, European Commission for the Efficiency of Justice (“CEPEJ”), independence is discussed in terms of being internal and external.⁷ Still another classification system of independence by the European Network of Councils of the Judiciary (“ENCJ”), the consultative institution of the European Commission, exists on the basis of objective independence of the judiciary as a whole, including objective independence of the individual judge and subjective independence.⁸ And these contrasting systems for describing independence in Europe have produced a wide range of judicial independence systems across the pre-2000 members of the European Union.

In the end, what is independence in the judicial sense?⁹ Properly understood, judicial independence is a wonderful thing—an essential

6. *Magna Carta of Judges*, CONSULTATIVE COUNCIL OF EUR. JUDGES (Nov. 17, 2010), <https://rm.coe.int/16807482c6> [<https://perma.cc/MP6Q-A7DT>].

7. Committee of Ministers, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities* (Nov. 17, 2010).

8. EUROPEAN NETWORK OF COUNCILS OF THE JUDICIARY, INDEPENDENCE, ACCOUNTABILITY AND QUALITY OF THE JUDICIARY (2016-2017), available at https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_ia_ga_adopt_ed_ga_13_6.pdf [<https://perma.cc/VTH5-VVWM>].

9. See generally Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980); Stephen B. Burbank, *What Do We Mean By “Judicial Independence”?*, 64

thing for a just and prosperous nation. Abused, or improperly understood, “judicial independence” is a tool of corruption and injustice.

It is critical to see what judicial independence is and what it is not. Judicial independence is meant to empower judges to be just. Judicial independence prevents the government from placing its thumb on one side of the scales of justice. It prevents the government from interfering with a judge’s impartial decision of a case according to the law and the facts. But judicial independence is not permission for judges to engage in wrongdoing. It is not a defense to the requirement of making transparent decisions. It is not an impregnable force-field that prevents judges from being accountable for the quality and integrity of their judicial work.

Judges in even the most independent systems in the world are charged with crimes when they break the law, when they decide cases not on the law and the facts but to favor the interests of themselves, their friends, their family, or their colleagues. Judicial independence is not permission to be unlawful, nor is it permission to engage in arbitrary decision-making behind the gloss of legal forms.

Judicial independence belongs to the people of a nation, both litigants and non-litigants, not to the judges. Judicial independence allows the judges to act in impartial ways to do justice for the people and businesses of a nation. It is not property of the judges themselves, but rather an instrumental concept that favors justice and fair application of the law. Independence is the right of the people towards the government. Independence and accountability are preconditions for trust from the population. When the judiciary is not independent, it can lead to an assumption that when legislative or executive power harms an individual, the judiciary does not have the power to save the individual from these interests. If there is too much independence without sufficient accountability, undesirable consequences could lead to mistrust in the judiciary because of lack of transparency and blindness of whose interest is fulfilled by judicial action. The role of judicial independence is to guarantee for all who will become a party before a court, that the decision of the court will not be influenced by

OHIO ST. L.J. 323 (2003); Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153 (2003).

state powers through the leverage of the appointment or election, control of compensation, or assignment of the case to a biased judge.

Unaccountable independence can have damaging consequences as serious as those resulting from a lack of independence from other powers or entities. Unaccountable independence fosters secrecy and lack of transparency within a judiciary. Secrecy and lack of transparency unsurprisingly cause public distrust of the judiciary.

Properly understood, judicial independence gives people faith in justice and confidence in judges. It allows people to know that the government will not decide disputes; the law will. It allows people and businesses to know that judges are not owned by anyone, that judges owe no higher duty than the duty they owe to justice.

Only in a nation where justice is trusted can people and businesses act with confidence and live their lives knowing that the law will resolve the inevitable disputes that arise. When people and businesses believe in justice, they invest in the future and everyone benefits.

Without properly understood judicial independence, society flounders. People and businesses resolve disputes in dark rooms behind closed doors, sometimes by unlawful arrangements. If judges are not to be trusted, people think, why should I depend on the law? Why should I play by the rules? In such a society, all suffer the consequences. Taxes go uncollected and the needy suffer, roads are poor, public projects are stymied.

When reliance on judicial rulings is low, lawyers try to hedge extensively and outsource many functions of the judiciary outside of the court system. There are at least two types of cost attached to this: (1) real costs, related to the fact that some of the most reputable law firms in such a system regularly advise their clients to opt for arbitration courts to avoid unpredictable and biased decisions. This means that costs for even minor business disputes are significantly higher than they would otherwise be; and (2) sunk-costs attached to the fact that decisions may be unpredictable, biased, lengthy, or unprofessional.

Independence is not a blank check or free pass for a judge to act how she pleases. It needs to be balanced by accountability. It is a mistake to imagine the relation of the independence and accountability as a spectrum such that on the left end would be independence and on the right end would be accountability. Such a view would produce results such as independence being at 100% and accountability at 0%, or independence being at 25%, and accountability at 75%. The relation

of accountability and independence is different. Accountability and independence do not lay on opposite sides of a spectrum. Instead it is more appropriate to imagine it as a coin, where on one side is an appropriate amount of independence and on the other there is essentially the same amount of accountability. Without having equally balancing sides to a single coin, the judiciary, the public cannot believe in justice. The public sees judges who do as they please and hide their improper motives and act behind a shield of judicial independence.

A critical problem is the absence of objective criteria by which accountability may be measured by the public. Since judges are generally not meant to be politically accountable (except, for example, in some US states where they are elected), the public has little information or capacity by which they may hold judges accountable. There are two structural devices that offer the best options for holding judges accountable. First, clear codes of conduct, fairly enforced, charges under which may be initiated by any member of the public hold some promise of increasing accountability. Second, accountability can be significantly enhanced by a legal requirement or culture that commands judges to clearly and thoroughly explain their decisions in writings that are easily accessible to any member of the public.

To conceptualize judicial independence further, we must distinguish between judicial independence on the level of decision making of individual cases and judicial independence on the level of the whole judiciary and court structure. The former must be understood as a value in itself, an elementary precondition of fair trial and democratic regimes. It implies freedom to decide cases independently, but also to behave independently of any state power.¹⁰ It requires judges to objectively apply the law to the facts of the case. The latter, on the other hand, has a more instrumental and mechanistic nature; we refer to structural independence as a means to support and strengthen the formal independence. Structures prevent the executive power or other powerful actors from encroaching the judiciary and attempting to influence individual cases.

It is normally understood that this threat to independence comes from outside of the judiciary; the judiciary was treated as an object of attacks and threats. These risks have been seen in efforts to support the

10. Maria Popova, *POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE* (2012); Samuel Spáč, *By the Judges, For the Judges: The Study of Judicial Selection in Slovakia* (2017) (unpublished dissertation, Comenius University).

judiciary by strengthening its independence from potentially-interfering state actors. In practical terms, these efforts traditionally represented a transfer of powers from ministries or other state organs to the judiciary. Yet, in the countries this Article focuses on, little attention was paid to the possibility that the judiciary itself may very well include leading, powerful actors threatening the independence of individual courts or judges. The judiciary is not an inanimate object but consists of judges with their own minds and interests. A judiciary may show tendencies to use its own powers for its own benefit in situations where the composition of the branch is rather homogenous, its internal structures and members are interrelated and interdependent more on each other than on the outside actors, i.e., showing signs of structural independence, but internal dependence. As a result of this framework threats to independence can “result from the interplay between capacity and willingness of powerful actors to threaten independence, and resistance of judicial actors to such actions,” where the powerful actors may include leading judges or groups of judges.¹¹ The extent to which a judiciary is independent is thus contingent not only on the strength of threats and attacks from outside, but also on the resistance manifested by the judiciary. A judiciary is therefore an actor in its own right; to some extent it *chooses* to be independent, and how to resist threats both from without and within.

II. LONG-STANDING SYSTEMS OF JUDICIAL INDEPENDENCE ARE NOT ONE-SIZE FITS ALL

In nations where judicial independence is properly understood and followed, justice is not perfect, but it is expected. Failures of justice and corruption are unusual even though they do happen. Decisions are made with which some people disagree, and some number of decisions may even be incorrectly decided. Independent judges are not punished for honest mistakes or for making a decision in a difficult case with which some disagree. But they are expected to resist threats to their independence so that they may decide cases fairly based on only law and fact.

11. Spáč, *supra* note 10, at 127.

A. *UNITED STATES*

Even the most independent US judges, which are judges under Article III of the US Constitution (“Article III judges”), are not completely and literally independent.¹² A significant group of judges who deliver an enormous amount of justice are not meant to be independent at all.¹³ Despite these less-than-thorough markers of independence, the US judiciary is widely regarded as the gold standard for judicial independence. “Independence” literally means the absence of dependence, which is to say complete autonomy and insusceptibility to external guidance, influence, or control. If we think of judicial independence in literal terms, however, federal judges are not “independent,” at least not as dictionaries define the word. They are not autonomous, because Congress retains ultimate control over their budget, jurisdiction, structure, size, administration, and rulemaking. Moreover, they are susceptible to outside influence; if judges engage in behavior (on or off the bench) that the political branches characterize as criminal, they may be prosecuted and imprisoned; if they make politically unacceptable decisions, the President and Senate may decline to appoint them to higher judicial office; if they commit “high crimes and misdemeanors,” they may be impeached and removed from office; if they make decisions with which higher courts disagree, their decisions may be reversed; and if they engage in behavior that judicial councils regard as misconduct, they may be disciplined.¹⁴

“Federal judges are thereby rendered autonomous in the limited sense that they have an enforceable monopoly over ‘the judicial power,’ and are insulated from two discrete forms of influence or control, namely, threats to their tenure and salary”¹⁵; that is what makes Article III judges independent. Why are they not completely independent? The answer is that “increased judicial independence is not always better.”¹⁶ Judicial independence is not an end in itself; it is

12. See, e.g., Burbank, *supra* note 9, at 326–27; Terri Peretti, *A Normative Appraisal of Social Scientific Knowledge Regarding Judicial Independence*, 64 OHIO ST. L.J. 349, 349 (2003) (claiming that “[e]vidence abounds that American judges possess only a modest amount of independence”).

13. James Moliterno, *The Administrative Judiciary’s Independence Myth*, 41 WAKE FOREST L. REV. 1191 (2006).

14. Geyh, *supra* note 9, at 159.

15. *Id.*

16. Frank B. Cross, *Thoughts on Goldilocks and Judicial Independence*, 64 OHIO ST. L.J. 195, 195 (2003); Fiss, *supra* note 9.

a means to an end.¹⁷ It ought to be curtailed when it ceases to be conducive to that end.¹⁸

What, then, is the purpose, the end served, of Article III judicial independence? While in part, independence enhances impartiality, that enhancement is far from the primary purpose of independence. Most fundamentally, independence “preserve[s] the integrity of the judiciary as a separate branch of government.”¹⁹ To be most useful, individual judges should be able to decide cases without being influenced by anything other than the facts and the law, and the judiciary should function as a third branch of government and check the other two. However, at the same time the judiciary must be restrained from running amok and doing whatever it wants. So guarantees of judicial tenure and salary should exist, but not guarantees that the entire judiciary will be free from any checks from the other branches. The best balance employs elements of both independence and accountability in the formulation of our federal judiciary. But to make the judicial checks on the other branches meaningful, the Article III balance is decidedly tilted toward independence and away from accountability.

These formal accountability checks on the courts are almost never used, even though they are technically available to Congress,²⁰ perhaps because Congress does not want to interfere with judicial independence, perhaps for fear of partisan tit-for-tat. There is, therefore, a definite “tension” between independence and

17. See Burbank, *supra* note 13, at 323.

18. See Geyh, *supra* note 13, at 163 n.29 (“[T]hat judicial independence is not an end in itself, but an instrumental value that serves another end.”)

19. *Id.* at 162; see also John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 962 (2002) (arguing that the end of independence and accountability is “a well-functioning system of adjudication”); Cross, *supra* note 20 (explaining that judicial independence is “freedom from control by the other political branches of government”); Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 DENV. U. L. REV. 65, 65 (2001) (explaining that judicial independence enables courts to “serve as an institutional check on the legislative and executive branches and that judicial independence is essential for the judiciary to protect the rule of law”) (footnotes omitted); Irving Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 691 (1980) (explaining that the Supreme Court’s definition of judicial independence has stated as its purpose keeping the judiciary “free from undue interference by the President or Congress”); and Irving Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 713 (1979).

20. Geyh, *supra* note 13, at 164.

accountability. How can we resolve this tension, keeping judges accountable to the other branches while not beholden to them?

The political branches struck a constitutional balance over time between judicial accountability and independence.²¹ This balance, which is represented by customary independence, can be altered by the political branches.²² Similarly, the courts may alter the scope of doctrinal independence.²³ Though doctrinal independence and customary independence are bound to constitutional norms, functional independence is “shaped by the vagaries of any given day’s public policy.”²⁴ This customary independence is not, of course, inviolable. However, methods of constraining the judiciary which have traditionally been considered antithetical to judicial independence are presumptively unconstitutional according to this scheme. Essentially, Geyh argued that Congress has refrained from interfering with this “customary independence” because it has so interpreted the Constitution as to make such interference unconstitutional. Congress is, by so doing, exercising self-restraint,²⁵ just as courts occasionally do.

Article III judges, as members of courts made up of several judges (e.g., the Supreme Court, the courts of appeal, and the district court panels), are themselves the product of a combination of executive and legislative choice.²⁶ The selection and confirmation process is a real but modest detraction from judicial independence. Although each individual Article III judge may be almost entirely insulated from legislative and executive oversight once confirmed (there remains only the impeachment threat), even they are less than perfectly independent. They remain as members of courts the composition of which will be influenced by future appointments. Even seeming lone ranger district court judges have changing panels of future appellate courts to which to look forward. Nonetheless, Article III judges possess the greatest measure of independence of any American judges.

21. *Id.* at 165.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL & HISTORICAL ANALYSIS* 141 (2003) (discussing the 1999 choreographed exchange between President Clinton and Senator Orrin Hatch, where Senator Hatch agreed to move pending judicial nominations through the confirmation process as long as the president kept Senator Hatch’s preferred candidate’s name moving through the nomination process).

Where does this leave accountability, however, if Congress has progressively abandoned the constitutionally permitted methods of curbing the courts? Perhaps it lies entirely in the appointment process. The appointment process is the only constitutional restraint on the judiciary that Congress has shown itself willing to exercise; every other method (e.g., adjusting court size, reducing court budgets, and impeachment for unfavorable decisions) has been gradually abandoned, forming the “customary” independence of Article III courts. Therefore, the appointment process stands as the only remaining check on Article III independence, which ensures the judiciary’s integrity as a third branch of government, allowing it to serve as a check on the two others, and which also guarantees its own accountability.²⁷

But the formal accountability systems are not actually the chief form of judicial accountability in US-style systems. Instead, a large measure of accountability derives from the tradition of explaining judicial decisions thoroughly, in writing, and in documents that are easily accessible to the legal community, the media, and indeed any member of the public. The process of explanation of rationale connects judicial decisions with public discourse. First, the judge who must explain her decision is a judge who will decide more carefully and with greater focus on accuracy. Second, the legal community, especially the academic legal community, can engage the quality and reasoning of decisions that are explained in writing. Third, the media and the general public, sometimes informed by media, are enabled to apply and express the public will regarding the rationale and reasoning of the judge. In ordinary life, people are more likely to accept and respect a decision that affects them if the decision-maker has been willing to explain himself. Some credit is given to the good-will of a decision-maker (an employment supervisor, a parent, a legal authority) when an explanation accompanies a decision. People may still disagree with the decision, but they pay greater respect to it when it is thoroughly explained. This form of accountability is tangible and a well-engrained part of the US culture, applying to both federal and state judges, including administrative judges.

27. Whether or not reducing congressional control of the judiciary entirely to the appointment process does in fact maintain judicial accountability is not at issue here; we are only concerned with the principles behind the facts, not the facts themselves.

Some would say that this judicial decision-making attribute is uniquely a common law system one. But that is not accurate. Civil codes describing the document to be produced by a deciding judge articulate the necessity of a “reasoning” or “rationale” section in the judgment document. Too often, this section is treated in a highly formalistic way, with a simple rendition of the governing articles of the code that were applied by the judge. But there is nothing that would prevent civil law judges from actually providing written reasoning or rationale in such a section of their judgments. Doing so would enhance both accountability and, over time, public trust.

Many state court judges have a high degree of independence from the legislative and executive, but less than that of Article III judges. State judges lack life tenure and perfect protection against compensation reduction. State court judicial selection and renewal processes result in structures less friendly to independence than those of Article III judges. Elected state judges have significant independence from the legislative and executive but must answer to the electorate and have a lower measure of independence from the people as a result. To be sure, in many states, terms are long²⁸ and re-election processes so substantially favor incumbents that this reduction from life tenure may in practice be modest. But it exists to some measure in all instances. Given the new freedom to campaign in judicial elections,²⁹ independence from the electorate is likely to diminish further for elected judges. Appointed state judges begin with some form of the same input from the other branches, like Article III judges, but their renewal processes substantially decrease their once-appointed independence. These judges must stand for reappointment by either the executive or the legislative branches periodically and risk termination when they act in ways that displease the branch that considers their renewal. While appointed judges are less beholden to the electorate than elected judges, they remain just a step removed: the branch that renews judges is itself subject to the winds of electoral change.

28. See Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1156 (1993); Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1435 (2003); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 630 (1981). For information on state judicial term limits, see 37 THE BOOK OF THE STATES 318-21, tbl. 5.6 (2005) (including examples of long terms for state judges such as 14-year initial terms for trial level judges in New York, 12-year terms in Delaware, and 10-year terms in Pennsylvania).

29. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

There are two sets of system attributes that support independence. One is structural and the other relational. Both are necessary ingredients of success independence systems.

One set is structural. Federal judges are selected through a process that involves both of the other branches; they have life tenure; and their salary cannot be reduced. However, state judges live in a system that is less structurally friendly to independence. Many are elected; some are selected by legislatures; most are closer to the political process for one reason or another; and their court budgets are subject to local political contests. When these structural attributes are present, as they are in the federal judicial system, they tend to foster independence from interference by the other branches.

The other set is largely relational rather than structural. Judges are insulated from most *ex parte* communication; they are not to be the recipient of extravagant gifts; and they must monitor their outside interests. These rules are largely meant to foster judicial independence from inappropriate influence by the parties to litigation or others interested in the outcome of litigation. This set of attributes might more accurately be said to foster impartiality more than they foster independence.

In some sense, independence is a personal trait. Structures can foster it or not. On some level, however, judges are or are not independent because of their personal qualities. State judges might act independently of political influence from the other branches and of the electorate, even though structures do not lend support to such conduct. Such judges run the risk of being ex-judges, and when that occurs, the structures have won. In any event, even judges of independent spirit and inclination are not independent in the judicial sense when their decisions are subject to direct, *de novo* review.

Independence is not an essential attribute of judging. While many state court judges may function with high levels of independence, structures to foster high levels of independence are not in place in most states. One can only conclude that state government founders did not regard judicial independence with the same regard as did federal government founders. Independence, at least the structural independence from interference from the other branches, is most important when the judiciary is expected to function in a counter-majoritarian manner.

Therefore, even within the United States, judges function with impartiality and quality even though the systems for ensuring their

independence vary quite substantially between federal and state judges. Systems also differ widely from state to state at that level. Judicial independence systems are not one-size fits all, even within the United States

B. Judicial Independence in Western Europe and “Old” European Union Member States

Several international organizations have developed standards to help states understand what it means for a judicial system to be independent.³⁰ The standards produced by these international organizations focus on certain structural characteristics.³¹ They consider, for example, the degree of separation between the judiciary and the other branches of government, the judiciary’s involvement in its own administrative oversight, and the amount of individual authority judges have to decide cases freely.³²

Although international standards are helpful in analyzing the independence of a state’s judiciary, applying general standards across Europe should be done with caution. Judicial independence is practiced differently across the continent because its development is heavily influenced by each state’s unique cultural and legal history.³³ It is therefore helpful to discuss judicial independence by taking a look at how the concept has developed regionally instead of looking at Europe as a whole. Particularly, how judicial independence has played out in Western Europe and other European Union member states as compared to its development in CEE.

There are different models of safeguarding judicial independence across Europe.³⁴ For example, in Spain, there is the judicial council,

30. OPEN SOCIETY INSTITUTE, *MONITORING THE EU ACCESSION PROCESS: JUDICIAL INDEPENDENCE* 17, 26–31 (Cent. Eur. Univ. Press 2001) (citing several sources of standards of judicial independence including the EU, ECHR jurisprudence and other international organizations).

31. *Id.* at 27.

32. *Id.*

33. John Adenitire, *Judicial Independence in Europe: The Swedish, Italian and German Perspectives* 3 (2012) (unpublished manuscript).

34. As CoE mentions, “The aim of this Opinion is to identify the core elements in relation to the general mission, composition and functions of the Council for the Judiciary with a view to strengthening democracy and to protecting the independence of the judiciary. The Opinion does not present a detailed description of principles for the composition or the functions of the Council for the Judiciary, neither does it create a single model for the Council for the Judiciary

which is independent to a large extent, not entirely unlike those currently in CEE. The Spanish judiciary is seen as somewhat isolated from the rest of the state.³⁵ By contrast, the German model features more control by the Ministry of Justice.³⁶ In general, member states in the south adopted judicial councils that have powers over appointment and evaluation of judges. Northern member states tend to have judicial councils that have power over budgets and management of the judiciary. In essence, the CoE proposed a model for new entrants that would combine the Southern European model with the Northern European model.³⁷ Combining the functions created exceptionally powerful judicial councils in post-communist EU entrants.

Judicial independence was adopted among “old” EU member states as a response to historical and cultural events that changed the states’ outlook on the role of the judiciary. In some states, judicial independence developed as a reaction to the increasing role law was playing as a tool to limit government power.³⁸ For example, England, in response to James II’s attempts to remove judges and intimidate bishops, increased the independence of the judiciary by preventing Parliament from removing judges without good cause.³⁹ In other Western European countries, the idea of judicial independence developed as a reaction to previous totalitarian rule. Both Spain and

in Europe.” See also CCJE, Opinion no.10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society (adopted 21-23 November 2007).

35. Mauro Cappelletti, *Who Watches the Watchmen? A Comparative Study of Judicial Responsibility*, in *JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE* 550, 556 (Shimon Shetreet & Jules Deschênes eds., 1985) (“The result is a system of what I would call, exaggerating somewhat perhaps, individual anarchy: not only is the judiciary, to a large extent, a corps séparé, but even every individual judge is almost like a monad which has its own separate existence, largely aloof from internal, as well as external, controls. To be sure, this system might still be less fearful than one of dependency from the political power; it is not, however, necessarily less damaging.”); See also Michal Bobek, *The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries*, 14 *EUR. PUB. L.* 99 (2008) [hereinafter Bobek, *The Fortress of Judicial Independence*].

36. Michal Bobek & David Kosař, “Euro-products” and Institutional Reform, in *CENTRAL EUROPEAN JUDGES UNDER THE EUROPEAN INFLUENCE: THE TRANSFORMATIVE POWER OF EU REVISITED* 183 (Michal Bobek ed., 2015).

37. CCJE, Opinion no. 10 ¶ 46.

38. Anja Seibert-Fohr, European Comparatives on the Rule of Law and Independent Courts 2 (Nov. 9, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1652598> [<https://perma.cc/DG49-Z425>].

39. Robert Stevens, *The Independence of the Judiciary: The Case of England*, 72 *CAL. L. REV.* 597, 599 (1999).

Italy, for example, developed strong, autonomous judiciaries after the fall of fascism in Italy and the end of Francisco Franco's reign in Spain.⁴⁰

The differences in the origin of judicial independence have produced varying judicial structures and degrees of independence across Europe. Although each judicial system found in Western Europe is different, they each face the same challenges that attempting to maintain an independent judiciary presents. A common problem among these states is finding a proper balance between independence and accountability. Other states struggle with maintaining separation between the judiciary and other political branches.

Three examples follow. Each system example is based on historical differences in legal culture and governance systems. Collectively, the examples demonstrate that there is no single formula for judicial independence and successful systems must be designed with local factors in mind.

1. Judicial Independence in Sweden

In Sweden, the requirement of an independent judiciary is codified in their constitution: "Neither the Parliament, nor a public authority, may determine how a court of law shall adjudicate an individual case or otherwise apply a rule of law in a particular case. Nor may any other public authority determine how judicial responsibilities shall be distributed among individual judges."⁴¹

In order to maintain independence, threats of violence to public officials and bribery are criminalized.⁴² Sweden's Constitution secures tenure of permanent salaried judges. These judges may only be removed if they reach the age of retirement or "are shown to be manifestly unfit to hold office"⁴³ Sweden has balanced the need for independence with judicial accountability through a number of mechanisms. For example, judges are not immune from civil or criminal liability and can be prosecuted for taking bribes.⁴⁴

40. Bobek, *The Fortress of Judicial Independence*, *supra* note 35.

41. REGERINGSFORMEN (RF) [CONSTITUTION] 11:3 (Swed.).

42. Adenitire, *supra* note 33, at 7.

43. *Id.*

44. *Id.*

Although the Swedish judiciary does maintain a degree of independence, their judicial structure leaves them vulnerable to political and executive influence. The executive branch controls the appointment of judges to permanent positions. As a result, associate judges often work in governmental departments to increase their chances of being appointed to a permanent position.⁴⁵ Further, because there is no established independent legal service for the government, permanent judges are brought in to provide legal advice to the executive branch, clearly blurring the separation between the judiciary and the executive.⁴⁶

Sweden's judicial structure is also vulnerable to undue political influence. In Sweden, judicial panels are made up a mix between lay judges and permanent judges.⁴⁷ In all criminal cases and family law cases, for example, the panel of judges consists of three lay judges and one permanent judge, each having one vote.⁴⁸ Lay judges are elected by political parties and serve a term of four years. The fact that political representatives and judges sit on the same panel to adjudicate cases greatly undermines the judiciary's independence from politics.

2. Judicial Independence in Italy

Italy's judiciary is extremely independent, perhaps to a fault. Italy's Constitution states that "[t]he judiciary . . . [constitutes an] autonomous and independent . . ." branch of government not subject to any other.⁴⁹ Among civil law countries, Italy is ranked as one of the highest in terms of protections established to ensure judicial independence.⁵⁰ In order to ensure judicial autonomy, the judicial system is exclusively run by an independent judicial council called the *Consiglio Superiore della Magistratura* ("CSM"). Similar councils are found in France, Spain, and Portugal. The CSM is made up of judges and has complete managerial control over the employment,

45. *Id.* at 8.

46. *Id.*

47. *Id.* at 9 (If the case is taken to the Court of Appeal, the panel is comprised of three permanent judges and two lay judges).

48. *Id.*

49. Art. 104(1) Costituzione [Cost.] (It.).

50. Giuseppe Di Federico, *Independence and Accountability of the Judiciary in Italy: The Experience of a Former Transitional Country in a Comparative Perspective*, JUD. INTEGRITY 2 (Andras Sayo ed.) (This is a modified version of the original article.).

assignments, and discipline of judges and prosecutors.⁵¹ Accountability is reached in the same ways it is reached in Sweden. Italian judges can be held criminally and civilly liable but cannot be punished for their interpretations of the law.⁵²

Italy has a strong, independent judiciary, but this independence has been achieved at the cost of efficiency and accountability.⁵³ To increase judicial independence, evaluations of a judge's performance have been eliminated.⁵⁴ The CSM has also put policies in place to minimize outside supervision of judges.⁵⁵ As a result of this lack of oversight, Italy's judicial system is highly inefficient. In fact, Italy has received by far the most monetary sanctions for failing to conclude judicial proceedings in a reasonable time.⁵⁶ Italy is therefore a prime example of a state that has revised their judicial structure in a way that concentrates on judicial independence but disregards programs that favor accountability.⁵⁷

3. Judicial Independence in England

England has what some consider the "hallmarks" of an independent judiciary.⁵⁸ Judges in England are afforded "security of tenure, fiscal independence, impartiality and freedom from executive [power]."⁵⁹ Unlike other countries in Europe, England's judicial independence seems to be held in place by natural forces. For example, the Lord Chancellor is not only the Head of the Judiciary but a politician who serves in a major executive department.⁶⁰ However, this relationship does not appear to be problematic. Also, judicial impartiality seems to be maintained simply by "[t]he formality of English law, a relatively small bar, a divided profession, and the orality of English courtroom procedure."⁶¹

51. See Adenitire, *supra* note 33, at 14.

52. *Id.* at 15.

53. Seibert-Fohr, *supra* note 38, at 9.

54. Di Federico, *supra* note 50, at 9.

55. *Id.* at 10.

56. *Id.*

57. See *id.* at 9-10.

58. Stevens, *supra* note 39, at 599.

59. *Id.*

60. *Id.* at 605-06.

61. *Id.* at 604.

On a structural level, the English judiciary is not a co-equal branch of government, as is the case in the United States.⁶² The English Constitution states that the judiciary is subordinate to Parliament.⁶³ Parliament has the ability to make or end law and no future court decision can change an existing law.⁶⁴ This type of relationship between Parliament and the judiciary may limit the decision-making ability of the judiciary.⁶⁵ On its face, this type of structure appears to be similar to the structure found in communist countries, where the government takes most if not all of the decision-making power away from the judiciary.⁶⁶ However, in classic Parliamentary systems, as in England and France, this dominant relationship does not exist. Members of Parliament are popularly elected and contribute a range of opinions, eliminating the risk that the judiciary is only attempting to please a single party.⁶⁷

Despite England's success at maintaining an independent judiciary, they also have encountered several problems. In recent years, there has been pressure on the government to create a more accountable judicial system.⁶⁸ An increase in the demand for accountability has been a result of increasing prevalence of judicial review and judicial interference. There has also been a concern over the lack of women and minorities in the judiciary, leading to allegations of bias appointment procedures and a lack of impartiality.⁶⁹ As a result of these allegations, radical reforms have taken place in England over the past decade. Reforms included an act which abolished the Lord Chancellor position and created a Judicial Appointments Commission which appoints judges solely on the basis of merit.⁷⁰

62. *Id.* at 608.

63. Cristina E. Parau, *Beyond Judicial Independence: What Kind of Judiciary is Emerging in Post-Communist Eastern Europe?* 4–5 (Dec. 10, 2009), available at <http://ssrn.com/abstract=1523285> [<https://perma.cc/J6MU-DVGE>].

64. *Parliamentary Sovereignty*, WWW.PARLIAMENT.UK <http://www.parliament.uk/about/how/sovereignty/> [<https://perma.cc/ZA8N-6VTA>].

65. Parau, *supra* note 63, at 7.

66. *Id.*

67. *Id.* at 8.

68. Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103, 116 (2009).

69. *Id.* at 117.

70. *Id.*

C. China

China presents a contrasting example. Exploring its system assists in two ways. This exploration enhances understanding of judicial independence itself. And second, it illustrates the likely motivations of the European Union and CoE when considering the judicial independence system, it would insist upon for post-communist aspirants in CEE.

In China, there is essentially no judicial independence from state actors. The same was true in the Soviet Union and to varying degrees in the communist times in CEE.⁷¹ The lack of judicial independence results from the application of law: both the law on judges and the law on advocates assigns the highest duty of the lawyer or judge to the state, in essence to the Communist Party of China.⁷² Most judges, even judges of the high courts, are not law-trained, but instead are state actors who have risen through Party ranks or former military officers. Their primary function is not to get the law right or do justice in a broad meaning of that word, but to serve the paramount interests of the state in deciding cases. This very simple structural feature creates a judicial system lacking in independence from state actors. Such a system also lacks any real accountability to the people of the country, but it ensures the highest level of accountability to the state itself. Judges can be fined or otherwise punished for making incorrect decisions (that is, decisions reversed by higher courts). This last feature encourages conformity and devotion to superiors.

It is well understood that in cases involving the state, at least cases of some note or controversy, the judge is subject to the control of party officials who “stand behind the curtain” in the courtroom. Ordinary criminal defense lawyers in such cases operate as technicians, merely ensuring that the proper process is followed, and restraining the enthusiasm of their objections when procedure is not followed.

Ironically, and perhaps in a tribute to the never-ending imagination of lawyers, the *lack* of meaningful judicial independence in China has recently resulted in a fascinating technique now in use by

71. James Moliterno, *The New-Breed, “Die-Hard” Chinese Lawyer: A Comparison with American Civil Rights Cause Lawyers*, 25 WASH. & LEE J. CIV. RTS. & SOC. JUST. (forthcoming 2018).

72. *Zhōnghuá rénmín gònghéguó lǜshī fǎ (yīngwén bǎn)* [*Law of the People’s Republic of China on Lawyers*], SINA, http://blog.sina.cn/dpool/blog/s/blog_634a1ecb0100sp3g.html [<https://perma.cc/BZ67-VKFH>].

an aggressive sliver of the criminal defense and civil rights bar. A new breed of lawyer is practicing criminal defense in China. Dubbed the “die-hard lawyer” by the press, but sometimes self-eschewing the label, these new lawyers say they are simply representing their clients zealously, advancing their interests by whatever legitimate means are at hand. What is being said of them in the press?⁷³ What do they say about themselves?⁷⁴

The die-hard lawyer is certainly more aggressive in the first instance. He or she does all that the technically-oriented traditional lawyer does, but also vigorously pursues arguments about the legality of the prosecution’s evidence and methods. The die-hard lawyer challenges judges’ rulings on evidence admission and procedural rights and does so vociferously. And the die-hard lawyer does so even after it is clear that the judge will not be permitted by others to rule in the defense’s favor. But in addition to being more aggressive and more persistent, the die-hard lawyer uses tactics that are outside the walls of the courtroom and its procedures.

In particular, the die-hard lawyer uses social media as a tool of advocacy, trying to create social pressure on the Party officials who control the judges. During the Li Qinghong trial, an “all-star team” of defense lawyers blanketed the Chinese social media with news of the proceedings, commenting on everything from errors in the indictments to the disparate volume of the defense and prosecution microphones.⁷⁵ The media work was so intense that weibo (the Chinese version of Facebook and Twitter, which are banned in China) updates were being sent live from the courtroom by defense lawyers, and large segments of the population were riveted to the news.

[L]awyers’ online activities can be traced back to the influential case of Li Zhuang, a lawyer falsely prosecuted with perjury in Chongqing, in 2010. While the voices of the official media framing and blaming Li were dominating public opinion, the

73. Alexa Olesen, *Meet China’s Swaggering, ‘Diehard’ Criminal Lawyers*, FOREIGN POL’Y (May 16, 2014), <https://foreignpolicy.com/2014/05/16/meet-chinas-swaggering-diehard-criminal-lawyers/> [<https://perma.cc/PP44-3S66>]; Yueran Zhang, *China’s All-Star Legal Team Pleads for Defendants’ Rights on Social Media*, TEALAFNATION (July 25, 2012), <http://tealeafnation.com/2012/07/bilingual-brew-chinas-all-star-legal-team-pleads-for-defendants-rights-on-social-media> [hereinafter *All-Star Team*].

74. In July 2014, Professor Moliterno met and interviewed two of the more prominent new breed of Chinese lawyers.

75. *All-Star Team*, *supra* note 72.

defense had no choice but to tell the other side of the story via social media.⁷⁶

The Chinese die-hard lawyer's use of social media is an effort to combat raw power of those in control of the justice system, both judges and so-called "higher-ups." This use of social media to create public pressure and possible embarrassment of "higher ups" seems odd to some Americans, simply because such a technique would be so unlikely of success in the U.S. Ironically, it is the lack of judicial independence in China that makes the technique viable. The well-founded expectation of Chinese criminal defense lawyers in high profile cases is that judges are told what to do by people often referred to as "higher ups." These "higher ups" are party officials whose will is being done by local judges and prosecutors. Such orders, while not entirely unheard-of in an independent court system, are both rare and most likely ineffectual. In such an independent court system, nothing much would be gained in an individual case by generating public opinion. But the taste of the Chinese public seems to have been whetted for news of injustice, and the "higher ups," while they wield mostly unchecked power, do care about stirring the public ire. This is just the trend and tendency that is being banked on by the die-hard lawyer in the use of social media. The same phenomenon allows, but does not ensure, that they will stay out of jail.

The battle has been joined between the die-hard lawyers and the state. "These activist lawyers, who have wild intentions to challenge and change the law, have deviated from what their jobs are supposed to entail," a state-oriented editorial said. The editorial leveled a warning at the group, who must "realize that they are not commandos or the authoritative forces behind improvements to rule of law in China."⁷⁷ Such challenges seem only to further embolden the die-hards and their followers. A crackdown on July 9, 2015 (referred to as "709" by activists as a sort of code in their social media communications) has seriously undermined the strategy and restored the upper-hand to the Party.

For purposes of this article, the important point is that to be effective at enhancing or destroying judicial independence, systems must be designed with the legal culture in mind, with the attributes of

76. *All-Star Team*, *supra* note 72.

77. Shan Renping, *Legal Activists Must Also Respect Rule of Law*, GLOBAL TIMES (May 8, 2014), <http://www.globaltimes.cn/content/859107.shtml> [<https://perma.cc/6DJX-U482>].

the judges and lawyers in mind, and with attention to the balance between independence and accountability. If one were to imagine a hypothetical reform of the Chinese judicial system intended to move it toward democratic principles and norms, it would be natural for such a reform to over-emphasize judicial independence at the expense of accountability. At first glance, a post-communist judiciary needs more independence and less accountability (at least to state actors). This appears to have been the mindset of EU CoE accession officials in dealing with post-communist aspirant countries.

III. SOME BACKGROUND LEGAL HISTORY OF CENTRAL AND EASTERN EUROPE (LAYING THE GROUNDWORK FOR WHY THE EU-IMPOSED MODEL OF JUDICIAL INDEPENDENCE WAS SUCH A POOR FIT)

Much debate rages on what is meant by Central or Eastern Europe. For this paper, the judicial independence concepts apply generally to all post-communist EU entrants and aspirants. But the need to focus forces a narrower approach. As a result, in particular, our attention is on Hungary, Poland, Czech Republic and Slovakia (collectively, the “Visegrad countries”). Their commonalities make them worthy of common consideration and study. Before 1989, these four countries were a part of the Eastern Bloc; after the Revolution, they became so called post-soviet republics. By 2004, they became NATO and EU members. The Visegrad countries have much in common because huge political events of the twentieth century struck usually all of them together. Finally, because of our specialized knowledge and experience, we will focus on Slovakia more carefully as our example.

The results of strengthening judicial independence in the Visegrad countries by Council of Europe and European Commission was not what these organization might have expected in post-communist countries of CEE.

Browsing through texts dealing with the judicial method and mentality in Central and Eastern Europe (CEE) at the onset of the 2004 enlargement of the European Union(EU), one acquired a mixed feeling. The mandatory institutional optimism of the various approximation and pre-accession reports stood in contrast

with rather skeptical tones voiced in some of the scholarly writings.⁷⁸

On the one hand, the CEE countries adopted laws that strengthen the position of the judiciary and putting it into the position of an independent branch of state power; but, on the other hand, judges in these countries have never overcome the formalistic approach to law, (characterized as textualism) which does not comply with recent adjustments to the traditional European approach. By “recent” European approach, we primarily mean the functioning of the European Court of Justice and the European Court of Human Rights, both of which operate partially as common law courts. In other respects, the Visegrad tendency toward formalism and textualism is not much different from that in other civil law countries in continental Europe.

Their world of formalist, textualist, hyper-positivistic law stood worlds apart from the more dynamic and purpose-oriented reasoning style required by European law.⁷⁹ It became clear that independence is not only about structural, institutional separation, but mostly about an attitude of all judges or politicians toward an independent judiciary.

This mental, attitudinal transition from formalism under the control of state actors to a more flexible, purpose-driven judging did not happen. Changes to legislation in the CEE focused on the formal institutional framework but underestimated the personnel at the courts. Problems that are simple to solve on paper, by adopting legislation that would set the structure of the new regime, proved far more challenging to solve in reality because of the existing ideology, reasoning, and conviction of nearly all of the judges in the system. “The area of genuinely important change, the mental transition of the Central European judiciary from a caste of secure and subservient civil servants to personally and mentally independent and critical judges who are ready to make and (publicly) defend their opinions, has mostly been outside of the mainstream focus.”⁸⁰

78. MICHAL BOBEK, *Revisiting the Transformative Power of Europe*, in *CENTRAL EUROPEAN JUDGES UNDER THE INFLUENCE: TRANSFORMATIVE POWER OF THE EU REVISITED* 13 (Hart Publishing 2015).

79. *Id.* at 14 (“We shall overcome with the help from Europe’ rhetoric became intertwined with scary images of CEE post-Communist judges that were depicted as limited formalists who seek refuge in the realms of mechanical jurisprudence and senseless sticking to procedures. Afraid to decide on substance and to pass any controversial judgments, they seek to dispose of cases on obscure points of procedure, in the observance of which they are very meticulous.”).

80. Bobek, *The Fortress of Judicial Independence*, *supra* note 35, at 100.

An authoritarian regime is like a refrigerator. It can slow down all the processes in the society. But when the refrigerator stops working, everything starts to rot much faster. CEE was not ready for such a dramatic change from a judiciary totally dependent on instruction and control from the state to a judiciary almost entirely independent of state or public oversight. Of course, how could the states be ready for judicial independence when the judges' entire experience had been in a system that required all political activities to conform to the interests of the communist party?

A. History of Judiciary of CEE Countries

As demonstrated by the previous discussions of European judicial independence systems, the local legal culture and history of government systems assist an evaluation of what judicial independence system may be most successful. To understand the difficulties of the 180-degree swing from total dependency of judicial power on government in authoritarian regime to excessive independence according to the model proposed by the organizations of the CoE and the EU, it is helpful to have background on roots and legal traditions in CEE. Without the background, proposed solutions will lack grounding and context.

Before 1918, Hungary, Slovakia and the Czech Republic were a part of Austro-Hungarian Empire.⁸¹ After World War I, the Austrian and Hungarian law were adopted by the newborn legal systems in Czechoslovakia.⁸² Of course, the old systems had to be adjusted to fit the post-war, post-monarchy democratic institutions.⁸³ Although the Austrian and Hungarian Law was condemned as "foreign," legal culture was highly honored by lawyers until the communist coup in 1948.⁸⁴ The monarchy developed a complex system of bureaucracy, an

81. As were small parts of Poland.

82. In Czechoslovakia it was adopted by Act. No. 11/1918 Coll. The situation was very particular, because of two different legal systems in two parts of the country. In Czech, part of the Austrian laws from before 1918 were adopted, and in Slovakia the Hungarian laws from before 1918 were adopted. This dualism was not solved until the communist coup in 1948.

83. A notoriously famous quote of the first president of the Czechoslovak Republic, Tomáš Garrigue Masaryk, explains a lot: "Now we have a democracy, what we also need are democrats."

84. Paradoxically, it is now the 100th anniversary of the event when we stood at the crossroad of history, facing the problem of adopting a framework for institutions that we were not familiar with.

independent judiciary and sophisticated legal culture. The successor states of the Austro-Hungarian Empire inherited from the bureaucratic Habsburg State a deep confidence in written law.⁸⁵ Members of the judiciary were traditionally a privileged group. In 1918, this privilege is demonstrated in a matter of the location of the Supreme Court when Prague was initially designated as the home of Supreme Court, but Brno (the second largest town in the central part and much nearer to Vienna) became its location. At first blush, it might appear that the Czechoslovak legislature wanted to secure the independence of the court by moving it out of the capital, Prague; but the real reason for this move was that judges who served in Vienna until 1918 and who were of Czech origin did not want to move to Prague, which was far away from Vienna.⁸⁶

Because of the different timeline in all of the CEE countries, we focus on Czechoslovakia as the example to explain the position of the judiciary in the authoritarian regime. During WWII, Czechoslovakia lost many judges. Some were lost because they were Jewish and were either taken away by Nazi occupiers or fled. Others left the judiciary because their beliefs could not be conformed to the requirements of being a judge in a fascist state.⁸⁷ Following World War II, Czechoslovakia went from one authoritarian regime under the occupation of Nazi Germany to another, only changing the occupier to the Soviet Union. Under the influence of the Soviet laws, new institutions were adopted, such as non-law-trained people as judges,⁸⁸ retribution courts were established,⁸⁹ and the qualification of the judge

85. ZDENĚK KÜHN, *THE JUDICIARY IN CENTRAL AND EASTERN EUROPE: MECHANICAL JURISPRUDENCE IN TRANSFORMATION* 4, 9 (2011) (“Czechoslovak judges, despite the prevailing atmosphere that was generally hostile to the old Empire gave high praise to the distinguished legal culture, independence and efficiency of the Austrian judiciary.”)

86. In Act No. 5/1918 Coll., which created the Supreme Court, Prague is claimed to be the residence of the Court. See Otakar Motejl, *Soudnictví a jeho správa [Judiciary in Communism and Its Administration]*, in *KOMUNISTICKÉ PARVO V ČESKOSLOVENSKU [COMMUNIST LAW IN CZECHOSLOVAKIA]* 813 (Michal Bobek et al. eds., 2009).

87. *Id.* at 814.

88. Until 1948 it was common in Czechoslovakia to have jury trials in criminal proceedings as the lay instrument.

89. Act on Popularization of the Judiciary, Act No. 319/1948 Coll. As the Act on the Popularization of the Judiciary was adopted in 1948, the composition of the Supreme Court was completed by appointing a required number of lay judges. The panels were made up of two professional judges and three lay judges. See Kühn, *supra* note 85, at 32.

became devotion and loyalty to the state.⁹⁰ When deciding a case, their votes were equal. The lay judges even took part in decisions on complaints of the violation of law. Because the lay judges were appointed by the government, the principles of impartiality and independence were seriously violated. The first obligation of the courts was to acquire political and ideological character in order to protect the socialistic state, socialistic society and relations to the world socialistic structure.⁹¹

The early 1950s are notoriously known for the “Monster trials”⁹² and also for a huge crisis of the judiciary. After WWII, Czechoslovakia lost one-third of the educated elite.⁹³ Popular lay-judges were either illiterate or political fanatics.⁹⁴ Even though there were some judges who finished regular law schools in Prague or Bratislava, the administration of the courts was always in hands of the nominees of the Party. The judiciary in this period was strongly politicized. The selection of new judges was also under political influence,⁹⁵ because of

90. An application to the Communist Party could prove this devotion. In 1949, the Labour Schools of Law were opened and the loyalty to the Communist Party with the “right” political attitude became a stronger requirement than the competence of the judge.

91. Act on Popularization of the Judiciary, *supra* note 89, at ¶ 11.

92. Political trials: Also known as “Show Trials”— the political trials in which the judicial authorities have already determined the guilt of the defendant in advance. The actual trial has as its only goal to present the accusation and the verdict to the public as an impressive example and as a warning to other would-be dissidents or transgressors. The law in these trials represented a state ideology. The judge, the prosecution and the defense were acting on behalf of the government. These political trials were a sign of a subordination of the Czechoslovakian government to Soviet power. Among many trials, the most known are the trials of Rudolf Slánský and Milada Horáková, which demonstrate that the trials were conducted not only against “children of the revolution,” the topic of Slánský’s case, but also against active opponents of the Communist Party, such as the trial of Milada Horáková shows. *See Kühn, supra* note 85, at 26–27.

93. MÁRIA M. KOVÁCS, LIBERAL PROFESSIONALS AND ILLIBERAL POLITICS, HUNGARY FROM THE HABSBURGS TO THE HOLOCAUST xix (1964). In comparison, Poland lost even more: From 7980 lawyers before WWII, fifty-seven percent did not survive the war, and from 5171 judges before the war, 1110 did not survive. *See RZEPLINSKI, A. DIE JUSTIZ IN DER VOLKSREPUBLIK POLEN* 30 (1996). Zdeněk Kühn, *Socialistická Justice [Socialist Judiciary]*, in *KOMUNISTICKÉ PARVO V ČESKOSLOVENSKU [COMMUNIST LAW IN CZECHOSLOVAKIA]* 824 (Michal Bobek et al. eds., 2009).

94. Very often, these lay-judges did not finish high school. OTO ULČ, *THE JUDGE IN A COMMUNIST STATE: A VIEW FROM WITHIN* 9 (1972).

95. Act. No. 36/1957 Coll. ¶ 2 (election of the judges for the period of three years), followed by Act. No. 36/1964 Coll. ¶ 39 (for four years), and finally Act No. 156/1969 Coll. ¶ 40 (prolonging the period to ten years).

the idea of the popular judiciary.⁹⁶ Judges were elected by political bodies—National Council or local party committees,⁹⁷ and nominated by the National Front.⁹⁸ The argument was often presented that the lay-judge might be even better in deciding legal issues, because the law should be clear to laymen as well. The lay-judges were also assigned to the surveillance of the professional judges.⁹⁹ The notion of independence was completely different from the meaning of independence in democracy. The Constitution of the Czechoslovak Socialist Republic from 1960 claimed to safeguard the independence of the judiciary, including courts and judges, to some extent, at least on paper. Yet it is clear from various testimonials that such independence existed to a very limited extent, and in politically-relevant cases was virtually non-existent. Even if “in about ninety percent of the court agenda there was not the slightest sign of interference in our decision-making,” this “does not warrant the conclusion that ninety percent judicial independence and integrity existed.”¹⁰⁰ Subordination to the party interests, cloaked as the interests of the people, and the interests of its powerful members existed because of “the awareness that someone might at any time inflict his ‘suggestion’ upon us, conditioned all our adjudication.”¹⁰¹ This form of independence was just an instrumental requirement obligating the judge to honor official state policy and the Party.¹⁰²

Moreover, the phenomenon of “telephone justice” was well known across the former Communist Bloc, albeit in its local mutations.¹⁰³ “Telephone justice” refers to informal instructions on how to decide particular cases of interest to the ruling elites of the communist party and was based on informal (oral) commands, rather

96. Constitution art. 98, No. 100/1960 Coll.

97. Act on Election of Judges ¶ 2-5, 36/1957 Coll.

98. During the Communist Era in Czechoslovakia (1948–1989), National Front was the vehicle for control of all political and social activity by the Communist Party of Czechoslovakia. These elections were just confirmation of Party candidates.

99. KÁLMAN KULCSÁR, *PEOPLE’S ASSESSORS IN THE COURTS: A STUDY ON SOCIOLOGY OF LAW* 37 (1982). In the 1950s there were ten times more lay-judges in the judiciary than professional judges, and seventy percent of them were members of the Communist Party. Kühn, *supra* note 96, at 828.

100. ULČ, *supra* note 94 at 61.

101. *Id.*

102. MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 173 (1986).

103. Alena Ledeneva, *Telephone Justice in Russia*, 24 *POST SOVIET AFF.* 324, 350 (2008).

than formal documented commands, indicating the degree of discretion, web of mutual favors and non-transparency: A manifest function of such unwritten rules at every level is to preserve discretion and to achieve additional control and manageability on the basis of informal leverage in order to pursue declared goals. The latent function, however, is to distinguish between insiders and outsiders and to benefit the insiders along the lines of “for friends we have everything, for enemies we have law.”¹⁰⁴

As Ledeneva points out, such behavior, seen through the lens of judicial independence, must nowadays be understood as a form of corruption.¹⁰⁵ Telephone justice indicates that judges may have been victims of the encroaching executive power “in the name of the working people,” but it also posits that judges could be self-interested agents seeking self-empowerment through interaction and collaboration with the ruling elites or powerful actors. Thus, while the general presupposition of judicial independence is critical to upholding the rule of law, the concept needs to be operationalized within the context of certain social and cultural frameworks developed over decades.¹⁰⁶ A well-designed, but mechanistic approach to judicial independence would not necessarily yield reliable and desirable results.

In the 1960’s, “the mortification of the state,” as the Marxist theory called the outcome of the Marxist revolution, was happening: the number of the courts and judges was reduced and the judiciary was shrinking.¹⁰⁷ The quality of the judiciary was very low, mainly because the intensive political influence, unqualified judges, and ideologically focused law schools. In 1968, during “Prague Spring,” things slowly started to improve, for instance, by rehabilitation of judges who had been dismissed from the bench because of their political opinions. Qualitative requirements for the judges improved, and lay-judges were

104. *Id.* at 330.

105. *Id.*

106. One anecdote from the so-called normalization of the communist regime after liberalization of the year 1968 is telling: the communist party was undertaking cleansing of the local units of the party, whereas basically all of the units were expected to name *some* internal enemy within the party. Some of the, mainly Slovak, units of the party did not meet the expectation, claiming there was simply no internal enemy within their particular circles. Clearly, the internal cohesion of such units was very strong.

107. Jiří Příbáň, *Na stráží Jednoty Světa: Marxismus a Právní Teorie [On The Guard of Unity of the World: Marxism and Legal Theory]*, in *KOMUNISTICKÉ PRAVO V ČESKOSLOVENSKU [COMMUNIST LAW IN CZECHOSLOVAKIA]* 47 (Michal Bobek et al. eds., 2009).

banned in higher courts. But this improvement did not last long. Since 1969 and through 1970's, the process called "normalization" started and continued. Most of the reforms of the Prague Spring were stopped and reform judges were banned from the bench again. The position of the judge completely lost the social dignity it had enjoyed fifty years before. Low salaries in the judiciary meant that courts did not experience a rush of the candidates for this position. Because of low interest for the job among men, women could apply for it. Thanks to this paradox, the judiciary in CEE countries is one of the professions that first reached gender equality.¹⁰⁸

Law became a flexible instrument of social engineering, instead of functioning as a normative system. For instance, the constitutions from 1948 and 1960 were not respected in practice, since although they guaranteed certain checks and balances, the power was concentrated in the hands of communist elites. Hence the rule of law had mutated into the rule of the party.¹⁰⁹

B. After 1989

After the revolutions in 1989 many judges left the judiciary, either willfully because they sought private practice its financial rewards or because of the threat of "lustration process." Lustration was supposed to prevent the former agents or collaborationists of the secret service of the communist state, leaders of Communist Party, and graduates of Soviet ideological universities from entering the government, administration, military, public media and public companies established by the government. It yielded very different outcomes in CEE countries.

For example, in Czechoslovakia the National Assembly adopted the law on lustration¹¹⁰ for particular government positions. Hungary did the same. In both countries, there was a complaint that these laws are unconstitutional. While on the one hand, the Czechoslovak

108. See Rzeplinski, *supra* note 96, at 64 (42% women on the bench in Hungary (1980), 50% in DDR (1980), and 55% in Poland (1986)); ULRIKE SHAW, *WOMEN IN WORLD'S LEGAL PROFESSIONS* 323 (Gisela Schulz & Ulrike Shaw eds., 2003); Kühn, *supra* note 96, at 846.

109. MICHAL BOBEK, *KOMUNISTICKÉ PRAVO V ČESKOSLOVENSKU* [COMMUNIST LAW IN CZECHOSLOVAKIA] (Pavel Molek & Vojtěch Šimíček eds., 2009).

110. Act No. 451/1991 Coll.

Constitutional Court decided¹¹¹ that it complies with principles of rule of law to adopt such a law to build a just system, the Hungarian Constitutional Court¹¹² decided in the opposite way.

There were essentially two approaches, the application of lustration but without strict enforcement or a complete omission of lustration. The common criticism of the two approaches is that the post-communist countries did not prevent the transformation of the previously elite groups from the old regime into the elites of the new regime: the same people who were in power before 1989 turned into the post-1989 elites with essentially the same power, thanks to connections, intelligence, and information they could use.¹¹³

Judicial independence has had trouble developing in CEE. Under communist regimes, judicial independence and separation of powers were nonexistent and judges were considered loyal servants to the party in power.¹¹⁴ After the fall of communism in the late 1980s, states in CEE sought to form independent and democratic governments, using governments in the West as a guide. Poland, for example, based their

111. Decision of Constitutional Court of ČSFR Pl. ÚS 1/92 (Nov. 26, 1992) (“Unlike a totalitarian system based on immediate purpose and never linked to legal principles, the less the constitutional and democratic principles are based on completely different values and criteria. Each State, much less the one who was forced to suffer more than 40 years of fundamental rights violations by totalitarian power, has the right to establish a democratic establishment, to apply also legal measures aimed at averting the risk of subversion, the possible recurrence of totalitarianism, or at least their limitation. Legal certainty must be the certainty of its content values. The now-established rule of law, which is based on value discontinuity with the totalitarian regime, cannot therefore accept criteria based on a different system of values. Respecting continuity with the old system of values of the previous law would not, therefore, be a guarantee of legal certainty, but would, on the contrary, jeopardize the values of new ones, jeopardize legal certainty in society, and shake the confidence of the citizen in the credibility of the democratic system”).

112. Alkotmánybíróság (AB) [Constitutional Court] no. 11/1992 (contending that the change of the system is based on legality). The principle of legality requires the constitutional government to demand that the rules of the rule of law be fully applied. Political changes were made in a procedurally flawless manner, according to the rules of the old regime, including the legislative process, thereby preserving the binding force of these old legal norms. The old law retained its validity. Fundamental requirements of the constitutional state cannot be eliminated by reference to the historical situation and the requirement of justice in the rule of law. The rule of law cannot be based on the weakening of the rule of law. Legal certainty is more important than necessarily partial and subjective injustice.

113. ZOBEC, J. CERNIC, J.L., *CENTRAL EUROPEAN JUDGES UNDER THE INFLUENCE: TRANSFORMATIVE POWER OF THE EU REVISITED* 135 (Michal Bobek ed., 2015).

114. Parau, *supra* note 63 at 14–15.

governmental structure off of the model found in the United States by establishing three separate and equal branches of government.¹¹⁵

Some post-Communist states sought to develop an independent judiciary based on its forms in Western Europe. Others have been forced to develop independent judiciaries by external forces. For example, international organizations that award grants and loans to states require the state to establish a government with an independent judiciary and adopt the rule of law.¹¹⁶ Similarly, countries seeking accession into the European Union were pushed toward the establishment of a strong judiciary as a condition of acceptance.¹¹⁷

The establishment of judicial independence in CEE has been challenging.¹¹⁸ Post-communist states must develop a strong, independent judiciary where a few short decades ago the concept was nonexistent. Many judges still lack the confidence to think for themselves while society still sees judges as corrupt and inefficient servants of state interests or their own interests. Further, many governmental structures these states have adopted from the West fail to take into account the region's unique historical and cultural problems.

One of the major problems countries in this region face is a judiciary comprised of magistrates who remain loyal to communist notions of the "proper" role of the judiciary.¹¹⁹ The judicial culture in Eastern Europe embodies the perception that judges are simply "well-paid civil servants."¹²⁰ Judges see themselves as a "subservient technocrats" who lack the confidence to make judicial decisions on their own.¹²¹ Although judiciaries in these regions have achieved some sort of structural independence they still lack mentally independent judges.¹²² Even more problematic is the development of bureaucratic structures that encourage this subservient mindset. For example, in the Czech Republic, judicial appointment begins with the psychological testing of candidates in order to weed out those who may deviate from

115. Markus B. Zimmer, *Judicial Independence in Central and East Europe: The Institutional Context*, 14 *TULSA J. COMP. & INTL. L.* 53, 58 (2006).

116. Parau, *supra* note 63, at 15.

117. *Id.*

118. Bobek, *The Fortress of Judicial Independence*, *supra* note 35.

119. *Id.* at 2.

120. *Id.* at 8.

121. *Id.*

122. *Id.* at 10.

the norm.¹²³ This type of system forces judges to become subservient to the legislature and does not allow them to think critically on their own.¹²⁴ It fosters the same type of judicial culture that was found in communist Europe. But now, there is no communist party to direct the conduct of judges. And the powerful structures of independence mean the state lacks significant control. Instead, judges are largely under the control of superior judges.

Not only do judges see *themselves* as humble civil servants, the perception of a subservient judiciary persists among many politicians and citizens in post-communist Europe.¹²⁵ This perception has contributed to public distrust of judges which in turn has inhibited states' efforts to reduce corruption.¹²⁶ During the accession period, several states seeking accession into the European Union (e.g., Bulgaria, the Czech Republic, Latvia, Lithuania, Romania, and Slovakia) showed evidence of widespread corruption. The lack of political and public trust led to a lack of support for reforms that could strengthen judicial independence. In fact, recent laws have been implemented to increase judicial accountability while decreasing independence. In Bulgaria, for example, a law has been proposed which would abolish a judges' right to appeal disciplinary rulings.¹²⁷ In the Czech Republic, Lithuania, and Hungary, stricter screening measures for judges were implemented partially because of the public distrust of judges.¹²⁸

Another problem states in the CEE face is establishing a governmental structure sympathetic to the region's unique political history. Many of the states in this region have adopted models of governmental structure found in continental Western Europe.¹²⁹ However, looking uncritically toward the West for a proper government model may be problematic. Local culture must be considered in system design. States in the West have had a long time to develop the proper balance between judicial independence and

123. *Id.* at 8.

124. *Id.* at 8.

125. EU ACCESSION MONITORING PROGRAM, OPEN SOCIETY INSTITUTE, MONITORING THE EU ACCESSION PROCESS: JUDICIAL INDEPENDENCE 22 (Cent. Eur. Univ. Press 2001).

126. *Id.*

127. *Id.*

128. *Id.*

129. Zimmer, *supra* note 115, at 61.

judicial accountability.¹³⁰ In contrast, states in the CEE are still trying to find the right way to transfer judicial oversight from the executive to the judiciary.¹³¹ These states have also had major problems with establishing a sustainable amount of judicial independence.

In some CEE states, the executive still retains significant control over the judiciary. Modeled after the continental European structure, these states have created ministries of justice or councils comprised of members of the judicial, legislative, and executive branches with significant managerial control over the judiciary.¹³² The executive retains significant power over the judiciary through appointments, influence on oversight committees and budget control.¹³³ Although retention of power over the judiciary by the executive is not uncommon in Europe, this relationship may be troublesome in historically communist countries, where the judiciary was once completely subservient to the executive.

In other states the judiciary has been given too much independence. CEE states have tried to strengthen judicial independence by the creation of independent judicial councils like those found in Western Europe. The purpose of judicial councils is to prevent interference with judicial function from the power of the other branches.¹³⁴ But what has emerged in some CEE states is a judiciary so completely independent that accountability is almost non-existent.

IV. WHAT DID EUROPEAN UNION AND COUNCIL OF EUROPE DEMAND OF NEW ENTRANTS?

A. The European Union Accession Criteria

Judiciary and its improvement were not much discussed before 1990. Occasionally some documents like UN Basic Principles¹³⁵ adopted by the UN General Assembly and the Bangalore Principles of

130. *Id.* at 62.

131. *Id.* at 61.

132. *Id.*

133. EU ACCESSION MONITORING PROGRAM, *supra* note 125.

134. Bobek, *supra* note 35, at 4.

135. Basic Principles on the Independence of the Judiciary, endorsed by G.A. Res. 40/32 (Nov. 29, 1985) and G.A. Res. 40/146 (Dec. 13, 1985).

Judicial Conduct¹³⁶ emerged as international articulations of very general principles of judicial structure and conduct. But overall, the qualities of the judiciary was not a topic of serious discussion.

In Europe, unlike in the United Nations, the process of principles of court administration went much further and deeper. As Michal Bobek and David Kosař mention, the process divides into two periods: from 1950's until early 1990's, neither the European Union nor Council of Europe paid significant attention to the models of court administration.¹³⁷ However, in 1993, with the adoption of the EU Copenhagen criteria, developed and agreed upon during the European Council meeting in Copenhagen, the topic of court administration and organization became a significant focus in the ensuing EU accession process and the setting of condition vis-a-vis the candidate countries.¹³⁸

Ever since, judicial independence is seen as a critical element of the rule of law and as one of the core values of the European Union.¹³⁹ Judicial independence is required to effectively limit the exercise of state power over the judiciary. By protecting judicial decision-making from interference by state actors, judicial independence protects the rights and freedoms of individuals. The single market could not function without comparable and reliable judicial protection in the respective member states. Moreover, the effectiveness of common rules at the EU level should not be burdened by the fact that certain governments do not embrace the foundational elements of the Union. Member states should be free to negotiate and deal with states with comparable freedom and respect towards democracy and the rule of law when agreeing on detailed binding laws on majoritarian terms. The EU is a political entity, whose members implicitly share common

136. Bangalore Principles of Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity (2002).

137. Cristina E. Parau, *The Drive for Judicial Supremacy*, JUDICIAL INDEPENDENCE IN TRANSITION 619 (Anja Seibert-Fohr ed., 2012). Bobek & Kosař, *supra* note 36, at 168.

138. Parau, *supra* note 137; Bobek & Kosař, *supra* note 36, at 168.

139. These are listed in Article 2 of the Treaty on European Union, i.e. the so-called "Homogeneity Clause," which stipulates the core shared values of the member states and states vowing for the EU candidacy: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

values. Thus, it was clear that an independent judiciary was one of the critical aspects of the association criteria.¹⁴⁰

The European Union explicitly states that integration is founded on shared values, including the rule of law.¹⁴¹ European states may apply to become a member of the Union, once they fulfill the criterion of respecting the core EU values.¹⁴² Although Article 2 of the Treaty on European Union mentions the core principles, the interpretation and application of the provision on accession to the Union have been instable and subject to the actual enlargement policies.¹⁴³ Further specifications of the criteria are included within the Copenhagen political criteria.¹⁴⁴

Membership requires that the candidate country achieve stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. Membership also requires the existence of a functioning market economy, and the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.¹⁴⁵

In a series of analytical papers, country reports and other country-relevant documents, the criteria were further described and broken down into parameters, although the wide scope of these documents and papers left them necessarily vague and open to conflicting interpretations. This vague and open wording led to high degree of discretion by the Commission, who is their main interpreter, which in turn led to confusion and double standards applied during the accession

140. VLADIMÍR BILČÍK, *EÚ-MONITORING: PRÍSTUPOVÝ PROCES SLOVENSKA A IMPLIKÁCIE PRE POLITICKÉ INŠTITÚCIE, PRÁVNÝ ŠTÁT A REGIONÁLNU POLITIKU* [ACCESSION OF SLOVAKIA AND IMPLICATIONS FOR POLITICAL INSTITUTIONS, RULE OF LAW AND REGIONAL POLITICS] (2004).

141. *Presidency Conclusions of the Tampere European Council on 15 and 16 October 1999*, EUR. PARLIAMENT (Oct. 15-16, 1999), http://www.europarl.europa.eu/summits/tam_en.htm [https://perma.cc/5TFG-XEYE].

142. Treaty on European Union art. 49.

143. SUSANNA FORTUNATO, *THE TREATY ON EUROPEAN UNION: A COMMENTARY* 1358 (Hermann-Josef Blanke & Stelio Mangiameli eds., 2013).

144. Additional criteria of administrative capacity were added in 1995 by the Madrid European Council.

145. *Presidency Conclusions of the Copenhagen European Council on June 21 and 22, 1993*, EUR. PARLIAMENT (June 21-22, 1993), <https://www.consilium.europa.eu/media/21225/72921.pdf> [https://perma.cc/SNX9-6VH3].

procedures and progress evaluations.¹⁴⁶ Structural analysis of the Copenhagen criteria and related documents help identify critical components of the core elements of democracy and the rule of law, as they were assessed by the Commission and the Council during the accession procedures in late 1990s and early 2000s: (i) elections, (ii) the functioning of the legislature, (iii) the functioning of the judiciary, (iv) the functioning of the executive, and (v) anti-corruption measures (good governance).¹⁴⁷

Most of the criteria remained a challenge for all of the candidate countries from the CEE region, although their performance in individual criteria varied greatly. In the criterion of functioning judiciary, a host of features and elements were supposed to be complied with.

[T]he judiciary should be independent, well-staffed and well-trained, well-paid, efficient, respected and accessible to people. The self-governance of it should be real, including the non-interference of the other branches of power in the training of judges in a special Judicial Institute, the work of their self-governing bodies and their appointment, as well as the work of courts. The Lithuanian Constitutional Court ruling which found that some powers of the Ministry of Justice of the republic in the administering of justice contradicted the Constitution (Jarašiusas et al. 2003, 588) was welcomed by the Commission and mentioned in the 2000 Regular Report. The budget of the judiciary should also be largely in the hands of the judges. The Reports also demonstrate that lowering of the judges' salaries is a breach of judicial independence: 2002 Lithuanian Report regards the Lithuanian Constitutional Court's decision on prohibition of lowering of salaries of judges as a positive development (2002 Lithuanian Report, 23).¹⁴⁸

Interestingly, the Commission's reports on individual countries' performance in achieving judicial independence in the pre-accession period are inconsistent. While the Commission favorably assessed mandatory re-trainings of Estonian judges, it remained neutral on the

146. Eline De Ridder & Dimitry Kochenov, *Democratic Conditionality in Eastern Enlargement: Ambitious Window Dressing*, 16 EUR. FOREIGN AFF. REV. 589 (2011).

147. Dimitry Kochenov, *Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law*, 8 EUR. INTEGRATION ONLINE PAPERS 1 (2004).

148. *Id.* at 20.

apparent conflict between the principle of independence and “an urgent necessity to improve the training of the judiciary” in case of Czech Republic, where the constitutional court found compulsory trainings incompatible with independence.¹⁴⁹ The reports also did not give clear guidance on what the evaluation on “the uniform methods and criteria, not interfering with the independence of the judiciary” meant. The inconsistency is also manifested in the fact that strong, structural judicial independence from the executive was not necessarily a prerequisite of the EU membership.¹⁵⁰ Czech Republic has never adopted an independent council representing the formally independent judiciary, yet its score in substantial judicial independence is superior to those of the rest of the CEE countries entering the EU in 2000s, with notable exception of Estonia.¹⁵¹

The Copenhagen criteria and their operationalization in the Commission’s reports lacked consistency and comparability across the candidate countries, as “the demands [the Commission was] sending to the candidate countries were often contradictory and almost entirely unpredictable.”¹⁵² “[It is] clear that the candidate countries’ readiness to meet the initial political criteria was a political question on the EU side, rather than a result of any more or less serious assessment.”¹⁵³

The European framework for achieving common standards and approaches to the judiciary includes the EU’s consultative body on the judiciary called The European Network of Councils for the Judiciary (“ENCJ”), which periodically submits reports on condition of judiciaries in member states of the EU and proposes lock-step improvements of institutional structure.¹⁵⁴ ENCJ works with financial

149. *Id.* at 21.

150. Spáč, *supra* note 10, at 14–15.

151. *Id.*

152. De Ridder & Kochenov, *supra* note 146, at 9.

153. *Id.*

154. See generally EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY (ENCJ), COUNCILS FOR THE JUDICIARY REPORT 2010-2011 (2011), available at https://www.encj.eu/images/stories/pdf/workinggroups/report_project_team_councils_for_the_judiciary_2010_2011.pdf [<https://perma.cc/MLW6-8SDT>]; EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY (ENCJ), INDEPENDENCE AND ACCOUNTABILITY OF THE JUDICIARY 2013-2014 (2014), available at https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_adopted_version_sept_2014.pdf [<https://perma.cc/SZW8-XDBY>]; EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY (ENCJ), DISTILLATION OF ENCJ PRINCIPLES, RECOMMENDATIONS AND GUIDELINES 2004-2017 (2017), available at <https://www.encj.eu/images/stories/pdf/>

support of the European Commission. It consists of national institutions in the member states of the European Union which are independent of the executive and legislature and which are responsible for the support of the judiciaries in the independent delivery of justice.

Moreover, the Council of Europe, although politically far less significant than the EU and its structures and institutions, has its own consultative institution called Consultative Council of European Judges, which is devoted to contributing to implementation of the Framework Global Action Plan for Judges in Europe. It has an advisory function on general questions relating to independence, impartiality and competence of judges.¹⁵⁵

Another consultative body related to the CoE is the European Commission for the Efficiency of Justice. The Commission develops concrete measures and tools aimed at policy makers and judicial practitioners in order to analyze the functioning of judicial systems and orientate public policies of justice.¹⁵⁶ Their goals are to have a better knowledge of judicial timeframes and optimize judicial time management, to promote the quality of the public service of justice, and to facilitate the implementation of European standards and support member states in their reform of court organization.¹⁵⁷

The CoE and EU have required the creation of a clear separation of powers, with guardian being the institution at the top of the judiciary.

workinggroups/encj_distillation_report_2004_2017.pdf; [https://perma.cc/W24F-CYZT]; EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY (ENCJ), INDEPENDENCE, ACCOUNTABILITY AND QUALITY OF THE JUDICIARY (2017), available at https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_ia_ga_adopted_ga_13_6.pdf [https://perma.cc/UVL3-495R].

155. For documents of the Consultative Council of European Judges (“CCJE”), see *Framework Global Action Plan for Judges in Europe*, CONSULTATIVE COUNCIL OF EUR. JUDGES (Feb. 12, 2001), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680657eee> [https://perma.cc/57EL-HX8A]; *European Charter on the statute for judges*, COUNCIL OF EUR. (July 8-10, 1998), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168068510f> [https://perma.cc/TWD9-GQ85].

156. See generally Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, Council of Europe Portal (Nov. 17, 2010), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78 [https://perma.cc/LUW2-JW2N]; COUNCIL OF EUROPE EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ), https://www.coe.int/T/dghl/cooperation/cepej/default_en.asp [https://perma.cc/KW54-8LWW] [hereinafter CEPEJ].

157. See generally *Framework Global Action Plan*, supra note 155; CEPEJ, supra note 156.

The independence of judges, in a globalized and interdependent society, should be regarded by every citizen as a guarantee of truth, freedom, respect for human rights, and impartial justice free from external influence. The independence of judges is not a prerogative or privilege granted in their own interest, but in the interest of the rule of law and of anyone seeking and expecting justice. Independence as a condition of judges' impartiality therefore offers a guarantee of citizens' equality before the courts.¹⁵⁸

In the 1990s, different states endorsed different structures safeguarding the independence of the judiciary, and the CoE did not force states to change those systems that worked. "However, over the years CoE lost the flexibility and became a strong advocate of Judicial Council model."¹⁵⁹ The eventual creation "of the Council of Judiciary Euro-model presents a puzzle."¹⁶⁰ "Neither the EU nor the CoE have ever laid down any normative underpinnings of this model."¹⁶¹ Both of the organizations simply internalized the recommendations of various judicial consultative bodies, without addressing or assessing their content.

Bobek and Kosař provide a list of five key requirements of the judicial council Euro-model, which they gathered from numerous organs and affiliated bodies of the EU and the CoE; there appears to be some consensus on these requirements in Europe:

- 1) A judicial council should have constitutional status.¹⁶²
- 2) At least 50 per cent of the members of the judicial council must be judges and these judicial members must be selected by their peers, that is by other judges.¹⁶³
- 3) A judicial council ought to be vested with decision-making and not merely advisory powers.¹⁶⁴

158. Opinion no. 10, Consultative Council of European Judges (CCJE), ¶ 9 (2007).

159. Bobek & Kosař, *supra* note 36, at 161.

160. *Id.* at 169.

161. *Id.* at 161.

162. ENCJ, *Councils for the Judiciary Report 2010-2011*, *supra* note 154, at ¶ 1.4; CCJE, Opinion no. 10 ¶ 11 (2007).

163. ENCJ, *Councils for the Judiciary Report 2010-2011*, *supra* note 154, at ¶ 2.1; CCJE, Opinion. No. 10 ¶ 18 (2007).

164. ENCJ, *Councils for the Judiciary Report 2010-2011*, *supra* note 154, at ¶ 3.4; CCJE, Opinion no.10 ¶¶ 48, 49, 60 (2007).

- 4) A judicial council should have substantial competences in all matters concerning the career of a judge including selection, appointment, promotion, transfer, dismissal and disciplining.¹⁶⁵
- 5) A judicial council must be chaired either by the President or Chief Justice of the highest court or the neutral head of state.¹⁶⁶

B. Council for the Judiciary

The functions, proper powers, accountability of, and relationships with judges' interests of the institution called "judicial council" create enormous controversies in emerging democracies. The concept of a judicial council as a body to represent the judiciary in the panoply of state powers and entities is simple enough. But how should it be formed and with what membership? Should it have exclusive power to select new judges? Should it control and allocate the judiciary's budget? What, if any, role should it have in disciplining judges? Should its functions be transparent or opaque? Questions like these, and more, have bedeviled emerging democracies, particularly in post-communist settings.

Judicial councils are generally composed of the representatives selected by judges themselves, typically sitting together with a minority of the representatives from other branches of government. The council takes over some or all powers relating to the administration of justice, commonly including the selection and promotion of judges, disciplinary powers and others that might otherwise be exercised by a ministry of justice.¹⁶⁷ The underlying idea of the existence of a judicial

165. ENCJ, *Councils for the Judiciary Report 2010-2011*, *supra* note 154, at ¶ 3.1; CCJE, Opinion no.10. ¶ 42. (2007).

166. ENCJ, *Councils for the Judiciary Report 2010-2011*, *supra* note 154, at ¶4.1; CCJE Opinion no.10. ¶ 33 (2007). The "neutral head of state" option exists as a Council Chair alternative to the more common judge selected by the judiciary itself. CCJE and ENCJ insist on an impartial person presiding the Council, while having any close relations to political parties. In parliamentary systems, what is characteristic for Visegrad countries, there is no objection from CCJE and ENCJ to appoint the Head of the State to the position of the Council. The President is obliged to give up his affiliation to a political party in the moment he is appointed to the function. This requirement seems to secure the impartiality of the President, but in fact does not mean to change the preferences or interests of the President. It is usually perceived as a formal requirement without any possibility to be controlled or sanctioned.

167. CCJE, Opinion no. 10 ¶ 42 (2007) (recommending that the Council for the Judiciary ensures that the following tasks, to be performed preferably by the Council itself, or in cooperation with other bodies, are fulfilled in an independent manner:

- the selection and appointment of judges

council is to allow judges to make decisions in cases relatively free from undue outside or administrative influence and to have one central body that represents the judiciary in relation with the other branches of the government. A body of this type was established in Poland (1989),¹⁶⁸ in Hungary (1997),¹⁶⁹ and in Slovakia (2002).¹⁷⁰ The Czech Republic is a recent entrant to the EU that did not create a national council for the judiciary. There were debates about creating such an institution since 1998. But there is still no Czech statute or constitutional provision that would create a national council for the judiciary at present.

C. Judicial Council of the Slovak Republic

The situation in Slovakia receives our greatest attention. Slovakia had diligently adopted the model of strong judicial independence, which backfired and did not yield improvements in performance and independence indicators. In order to assess the reforms of the judiciary in Slovakia, it is important to understand the forces influencing its trajectory since the 1989 revolution. After the fall of the communist regime in 1989 and the division of Czechoslovakia into two states in 1992-93, Slovakia struggled to maintain a democratic regime between 1994-1998. The regime suffered from various defects in its governance structures and shortcomings in development of the country on many levels and aspects, including the independent judiciary.¹⁷¹ Eventually,

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- the promotion of judges
 - the evaluation of judges
 - disciplinary and ethical matters
 - the training of judges
 - the control and management of a separate budget
 - the administration and management of courts
 - the protection of the image of judges
 - the provision of opinions to other powers of the State
 - the co-operation with other relevant bodies on national, European and international level
 - the responsibility towards the public: transparency, accountability, reporting).

168. THE CONSTITUTION OF THE REPUBLIC OF POLAND art. 186.

169. CONSTITUTION OF THE REPUBLIC OF HUNGARY art. 25., sub. 4.

170. CONSTITUTION OF THE SLOVAK REPUBLIC art. 141a; On the Judicial Council of the Slovak Republic, Act No. 185/2002 Coll.

171. *Regular Report from the Commission on Slovakia's Progress Towards Accession*, COMMISSION OF THE EUR. COMMUNITIES, (Dec. 17, 1998), http://aei.pitt.edu/44608/1/slovakia_1998.pdf [<https://perma.cc/SW2B-DHEH>].

an election victory of the pro-reform and pro-European coalition started to build the institutions; and, through a series of reforms, fast-tracked the country on its way towards the EU accession. Among the reforms, structural independence of the judiciary was introduced upon the recommendation of numerous recognized documents and international organizations; yet the country would continue to search for the balance of independence and accountability for many more years. The right balance has not yet been found and the country has suffered as a result.

Before these reforms, procedures for nomination and removal of judges was under strong, even excessive, powers of the Ministry of Justice. Judges had to undergo an initial four-year probation period, during which they were screened out for “fitness” for the judgeship. Such screenings constituted infringement of the independence principle, which has been embedded in the constitution since its adoption in 1992.¹⁷² The judiciary suffered from a lack of capacities of judges and poor court administration, which led to massive pileups of caseloads, a problem that has still not been solved. Judges from the previous regime continued to serve as there has not been a lustration of judges for their too-close relationships with the communist party and the former regime. As the political elites of the (semi-)autocratic regime of 1994-98 were closely connected with former communist elites, no significant changes to the personnel of the court structures could have been expected.¹⁷³ New judges were thus educated and socialized in an environment that had not changed significantly from the previous regime, an environment that was clearly inconsistent with substantial independence of courts, judiciary, and judges. This lack of substantial changes to the courts’ personnel turned out to be an important factor toward the perils of the independent judiciary, just as well as it was for other public organizations in the post-communist countries.¹⁷⁴

172. Károly Bárd, *Judicial Independence in the Accession Countries of Central and Eastern Europe and the Baltics*, in *JUDICIAL INTEGRITY* 296 (2004).

173. Although Slovakia signed the first association agreement with the European Communities in 1991 as a part of Czecho-Slovak Federation and later in 1993 as Slovakia, it did not receive the invitation to the Communities (Union) along with the rest of the Visegrad countries due to its democratic deficit in 1994-1998 period. The formal invitation came after the election victory of the pro-reform coalition in 1998.

174. Bobek, *The Fortress of Judicial Independence*, *supra* note 35.

The reforms adopted by Slovakia in early 2001 were accepted positively by the European Commission; the reforms were called “considerable progress.” In 2002, the Commission advised the country to ensure their proper implementation, in particular placing much hope on the newly established Judicial Council.¹⁷⁵ Although, the reforms were politically well-accepted abroad, the domestic political scene was not wholly unified.¹⁷⁶ Yet, taking into consideration the fact that many of the critiques of the reform proposals were themselves involved in attacks on the judiciary during 1994-98 period, this lack of wide consensus did not necessarily mean very much. Contrary to previous experiences, the ministry of justice involved the representatives of the judiciary in cooperation on the reform proposals, especially those concerning the features of the judicial independence.

In time, the country’s judiciary progressively worsened, especially during 2006-10, when the formal independence of the judiciary became even stronger. This resulted from political support of a parliamentary coalition composed of people who were the prime actors in the 1994-98 undemocratic era and of people with ties to the former regime, including the former chief justice of the supreme court, Štefan Harabin. Independent from elected state actors, the judiciary developed into a self-interested branch, which became and continues to be the least trusted public institution in Slovakia.¹⁷⁷

As Kosař described the situation,

The European Commission, supported by the CoE and various advisory bodies, had the necessary leverage at its disposal and started to exercise significant pressure on the post-communist states that sought accession to the EU to adopt particular judicial reforms. These “pan-European” bodies identified the judicial

175. *Regular Report on Slovakia’s Progress Towards Accession*, COMMISSION OF THE EUR. COMMUNITIES, at 24 (Oct. 9, 2002), https://www.esiweb.org/pdf/slovakia_EC%20Regular%20Report%20on%20Slovakia%202002_en.pdf [<https://perma.cc/X3ZC-52MU>].

176. Even though the consensus on the reform was not all-encompassing, the constitutional majority had to be achieved to adopt the reform.

177. 60.4% of respondents did not trust the judiciary in 2016, although the situation improved in the past few years. This could perhaps be attributed to the corrective measures introduced recently. See VIA IURIS, REPORT OF THE SURVEY OF THE PUBLIC OPINION ON THE JUDICIARY (2016).

council model as the most appropriate means of reforming the judiciary.¹⁷⁸

However, that does not mean that the model of the council was well thought through. The Council of Europe and the European Union merely relied on the work done by the judicial consultative bodies. Their effort was not significantly discussed or reviewed.¹⁷⁹

The pressure on the aspirant states from the international sphere is also reflected in the explanatory memoranda to the Slovak Constitutional Act No. 90/2001 Coll. (“the Act”), which introduced the Judicial Council. The explanatory report explicitly referenced a recommendation adopted by the Council of Europe: Recommendation No. R. (94) from October 12-13, 1994.¹⁸⁰ The explanatory memoranda pointed also to General Assembly Resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985, and the explanatory memoranda also pointed to the Recommendation of the Council of Europe No. R. (94) 12 on European Charter on the Statute of Judges of July 10, 1998. The idea was to strengthen the independence and autonomy of the judiciary from executive and legislative branches, which, according to the Report by the expert mission of the European Commission from November 1997, had too much power while the self-government of judges was practically non-existent.¹⁸¹

The pressure from the European Union and from the CoE is evidenced by the Slovak scholarly discourse on various levels. For example, Drgonec explicitly states that the Judicial Council was established by the will of the European Union.¹⁸² On the other hand, Čič and the authors of newer textbooks of the constitutional law do not

178. DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES: HOLDING THE LEAST ACCOUNTABLE BRANCH TO ACCOUNT 123 (2016).

179. Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 GER. L.J. NO. 7 1257, 1261 (2014) (claiming that the Euro-model of the Judicial council is an unsuitable solution to problems of independency, accountability and performance of courts).

180. Constitutional Act No. 90/2001 Coll., NÁRODNÁ RADA SLOVENSKEJ REPUBLIKY [NATIONAL ASSEMBLY OF THE SLOVAK REPUBLIC] (2001), <http://www.nrsr.sk/dl/Browser/Document?documentId=162485> [<https://perma.cc/5N64-5JKT>] (explaining Constitutional Act No. 90/2001 Coll.).

181. *Id.*

182. JÁN DRGONEC, ÚSTAVA SLOVENSKEJ REPUBLIKY [THE CONSTITUTION OF THE SLOVAK REPUBLIC] 1205 (2015).

stress this fact.¹⁸³ From the latter point of view, it might seem that the Judicial Council is a natural part of the Slovak constitutional system, but this is not the case. Drgonec and even Orosz, who was one of the drafters of the constitutional amendment establishing the Judicial Council, reminds us of the drawbacks originating in the outside pressure. Drgonec states that the Judicial Council was implemented into the Constitution relatively quickly and the consequences are still visible. The reason for the existence of the Judicial Council was not explained and it stays unclear up-to-date.¹⁸⁴ He asserts that even the explanatory memoranda is unclear, vague and contradictory, while it also misinterprets the text.¹⁸⁵

Ladislav Orosz, one of the authors of the constitutional amendment and a Justice of the Constitutional Court since 2009, commented on the process and result of their effort self-critically. He admitted that, based on the hectic atmosphere, some failings had occurred. As to the Judicial Council, he stated that “[w]ith the passing time and the dangerously evolving power struggle for the rule over judiciary it shows that the writers of the constitutional amendment had a too idealistic vision about . . . the end adopted means of composition and operation of the Judicial Council.”¹⁸⁶

Because the Judicial Council lacked a constitutional definition, the Constitutional Court tried to provide one. The understanding of the institution evolved from the “constitutional public authority body which guarantees independent position of the judiciary in relation to

183. MILAN ČIČ ET AL., *KOMENTÁR K ÚSTAVE SLOVENSKEJ REPUBLIKY* [THE COMMENTARY TO THE CONSTITUTION OF THE SLOVAK REPUBLIC] (2012); *see, e.g.*, DANIEL KROŠLÁK ET AL., *ÚSTAVNÉ PRÁVO* [CONSTITUTIONAL LAW] 616 (2016) (claiming that the *raison d'être* of the Judicial Council was the effort to diversify the judicial legitimacy).

184. DRGONEC, *supra* note 182.

185. DRGONEC, *supra* note 182.

186. LADISLAV OROSZ ET AL., *ÚSTAVNÝ SYSTÉM SLOVENSKEJ REPUBLIKY (DOTERAJŠÍ VÝVOJ, AKTUÁLNY STAV, PERSPEKTÍVY)* [CONSTITUTIONAL SYSTEM OF THE SLOVAK REPUBLIC (EVOLUTION, PRESENT STATE, PERSPECTIVES)] 59 (2009). One of the issues Orosz had in mind was perhaps the merged seat of the President of the Supreme Court and President of the Judicial Council. In fact, the formal powers of those two positions are theoretically more or less organizational, but when occupied by one person he or she becomes the face of the judiciary and seems to have strong legitimacy. This was the case of Štefan Harabin. Hence, the constitution was changed, and positions were separated in 2014. Moreover, there is discussion about nature of the Judicial Council and its position in the constitutional system. We will return to this issue in context of the parameter of independence of the Judicial Council.

other state authorities”¹⁸⁷ through the “self-government body *sui generis*” which performs even the functions of public administration body¹⁸⁸ and the body whose “fundamental institutional component is independence”¹⁸⁹ to be finally understood as the “special independent constitutional body of judicial power that guarantees mainly independence of judiciary and judicial legitimacy, while it is responsible for the operation of judiciary, administration of the judicial power and judiciary and also for transparency of the judiciary; hence it shall be the fully-fledged partner of the legislative and executive power.”¹⁹⁰

However, the Constitutional Court later on reflected on the reality that the Euro-model is only one of many possible models and that it cannot be claimed that one model is suitable for each state because its mechanical transposition cannot guarantee the wanted level of independence, efficiency, and professionalism.¹⁹¹ The Euro-model was just that: a model. It was not designed with reference to local conditions in each of the entering states. The Constitutional Court even warned against the prospect of corporativism within the judiciary if the Judicial Council would be governed by judges.¹⁹² However, it still awarded the Judicial Council with the characteristics of independence. This became a matter of debate. Judge Mészáros in his dissenting opinion warned that the Constitutional Court was itself writing the Constitution because the Judicial Council was not defined as independent in the Constitution. If the Constitutional Court does so, he continues, there is a need to explain what independence of that body means in practice: what is the Judicial Council is *independent of* and *to what* it is independent.¹⁹³

In most countries, when introducing the concept of judicial independence to law students or lay persons, it is not common to offer disclaimers in the same breath. However, in Slovakia, warnings about

187. Decision of the Constitutional Court of the Slovak Republic no. III. ÚS 79/04 (Oct. 29, 2004) (Slovk.).

188. Decision of the Constitutional Court of the Slovak Republic no. I. ÚS 62/06 (Mar. 1, 2006) (Slovk.).

189. Decision of the Constitutional Court of the Slovak Republic no. IV. ÚS 46/2011 (Feb. 17, 2011) (Slovk.).

190. Decision of the Constitutional Court of the Slovak Republic no. PL. ÚS 2/2012 (Nov. 18, 2015) (Slovk.).

191. *Id.*

192. *Id.*

193. Decision of the Constitutional Court of the Slovak Republic PL. ÚS 2/2012 (Nov. 1 (Mészáros, J. dissenting) (Slovk.).

misunderstandings of the concept of independence found its way even into textbooks. Svák and Cibulka, while quoting the decision of the Constitutional Court, stress that independence is not the privilege of judges but the inevitable condition of the accountability of the judiciary for making impartial and independent judicial decisions. Then they state that after the revolution in 1989 judges rightly asked for independence. However, their successful political pressure motivated mainly by personal guarantees of independence pushed back the purpose of independence.¹⁹⁴ The means were mistaken for the end, and the actual purpose of judicial independence was lost within the self-interest of the judges.¹⁹⁵

D. Selection and Appointment of Judges of the General Courts

Changes in the Slovak law that were justified by the requirements of the European Union and other international bodies led to insulation of judiciary in the selection of new judges and to the partial backlash (e.g., Constitutional Court struck down part of the law) when Parliament tried to address the problem of this insulation in 2011. The EU criticism about the lack of independence of the Slovak judiciary in the process of accession also focused on the system of selection and appointment of judges.¹⁹⁶ Again, the independence as a means to achieve impartial justice was mistaken for the end. In the 1990's, judge selection was in the hands of the legislative and executive power.¹⁹⁷ The Parliament elected judges of the general courts based on proposals from the Minister of Justice.¹⁹⁸ In 2001, the Judicial Council was given the competence to nominate judges for appointment (and removal) to the President of the Republic which was supposed to limit the influence on judges coming from state actors.¹⁹⁹ The Judicial Council considered

194. JAN SVÁK & LUBOR CIBULKA, *ÚSTAVNÉ PRÁVO SLOVENSKEJ REPUBLIKY* [CONSTITUTIONAL LAW OF THE SLOVAK REPUBLIC] 402 (2006).

195. *Id.*

196. ŁUKASZ BOJARSKI & WERNER S. KÖSTER, *THE SLOVAK JUDICIARY: ITS CURRENT STATE AND CHALLENGES* 74 (2011)

197. *ÚSTAVA SLOVENSKEJ REPUBLIKY* [CONSTITUTION OF THE SLOVAK REPUBLIC], No. 460/1992 Coll. arts. 86(i), 145, para. 1 (Slovk.).

198. *Id.*

199. *ÚSTAVA SLOVENSKEJ REPUBLIKY* [CONSTITUTION OF THE SLOVAK REPUBLIC], No. 460/1992 Coll., after adoption of the Constitutional Act No. 90/2001 Coll. art. 141a, para. 4(a) (Slovk.).

applicants who succeeded before the selection committee or who had status of judicial candidates.²⁰⁰ The composition of committees varied over time: between 2001 until 2011, the majority of committee membership was constituted by the judiciary (council of judges: self-administrative unit on respective courts, presidents of the courts, collegium of presidents of the courts, etc.) and almost always solely of judges.²⁰¹ Essentially, the judges selected new judges at the level of selection committee and more or less also at the level of Judicial Council. The judicial candidates who could become judges directly without participation in selection of judges were also selected in a procedure administered by judges.²⁰²

There were many complaints of nepotism and corruption in selection process.²⁰³ Sometimes the names of successful applicants were known even before the selection procedure started.²⁰⁴ Too many applicants and judicial candidates seemed to be connected with judges.²⁰⁵ Hence a reform was proposed.

Minister of Justice, Lucia Žitňanská, strived to “open” the judiciary by changing the system of appointment of judges. Based on law from 2011, the selection became much more transparent and judges also lost the majority on selection committees. The new committees were supposed to consist of two members from the basket created by

200. On Judges and Lay Judges Act No. 385/2000 Coll. § 28 (Slovk.). Judicial candidates or judicial trainees were lawyers who were trained specifically in order to become judges.

201. *Id.*

202. Act No. 40/1964 Coll. (Slovk.); Act No. 401/2006 Coll. (Slovk.); Act No. 430/2009 Coll.; Act No. 132/2017 Coll (Slovk.).

203. The informal symbol of nepotism (of course without any formal charge) became Judge Imrich Volkai, the President of the Regional Court of Košice. The members of his family such as his wife, daughter, son-in-law or daughter-in-law all work on the court he serves on or within the region of Košice. One should note that his daughter-in-law became judge after the reforms, under a new more transparent selection, but again with majority of judicial power in selection committees. *See, e.g.,* Samuel Spáč a Erik Skácal, *Rozrastie sa Sudcovsky Klan Volkaiovcov o DALŠIU POSILU?*, TRANSPARENCY INTERNATIONAL SLOVENSKO BLOG (Nov. 27, 2015), <http://transparency.sk/sk/rozrastie-sa-sudcovsky-klan-volkaiovcov-o-dalsiu-posilu/> [<https://perma.cc/WF75-4SLF>].

204. *See, e.g.,* Interview with Jana Dubovcová, former judge who later became the Slovak ombudsperson, (Apr. 23, 2010), *available at* <https://www.pluska.sk/plus7dni/rozhovor/04/ovladnuta-justicia.html> [<https://perma.cc/WA3X-JZJS>].

205. *See, e.g.,* *Kto je s kym Rodina na našich súdoch*, SME BLOG (Nov. 20, 2013), <https://transparency.blog.sme.sk/c/342665/Kto-je-s-kym-rodina-na-nasich-sudoch.html> [<https://perma.cc/9JCC-9MKD>]; *Hlásite sa za sudcu? Mat' rodinu v justii?*, SME BLOG (May 16, 2014), <https://transparency.blog.sme.sk/c/356200/hlasite-sa-za-sudcu-mat-rodinu-v-justicii-pomoze.html> [<https://perma.cc/X4S5-FRTX>].

the Minister of Justice, one member from the basket created by the Parliament, one member from the basket established by the Judicial Council and one member elected by the local council of judges of the court with vacant seats.²⁰⁶ Those members did not need to be judges, nor even lawyers, but they had to be able to evaluate the candidates. The members of the committees were chosen from the baskets by the president of the court with vacant seats.²⁰⁷ However, the reform was challenged before the Constitutional Court by a group of forty-six members of the parliament claiming that it violated the principle of independence of the judiciary and international standards,²⁰⁸ specifically claiming that judges did not have a majority in the selection committees as the Recommendation suggested.²⁰⁹ They also interpreted establishment of the Judicial Council as the proof that judges had to have a majority vote in the process of judicial appointment, otherwise the process violated the independence of the judiciary and it was unconstitutional.²¹⁰ Unfortunately, the majority of the Constitutional Court in part agreed with the applicants. The Constitutional Court stated that even though three branches of power cooperated in the process of selection and appointment of judges, only the judge selected by the selection committee could get before the Judicial Council and hence the selection committee had a crucial say in the process.²¹¹ As the majority of the committee members were selected by the political branches, the Constitutional Court simply stated that there was a threat of politicization of the judiciary and hence the law violated the principle of the separation of powers.²¹² As a result, the Constitutional Court provided constitutional relevance, even force, to the recommendations of international organizations. Obviously, the international non-binding standards received strong legitimacy in the 1990s, because of the semi-authoritative regime under Vladimir Mečiar

206. Act on Judges No. 385/2000 Coll. §§ 28, 29 (effective May 1, 2011) (Slovk.).

207. *Id.*

208. See *Recommendation No. R (94) 12 of the Comm. of Ministers to Member States on the Independence, Efficiency, and Role of Judges*, COMMISSION OF MINISTERS (Oct. 13, 1994), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c84e2> [<https://perma.cc/2Z2K-GZXL>].

209. Decision of the Constitutional Court of the Slovak Republic no. PL. ÚS 102/2011, Arguments of Claimants (Slovk.).

210. *Id.*

211. Decision of the Constitutional Court of the Slovak Republic no. PL. ÚS 102/2011, Part VI.E. (Slovk.).

212. *Id.*

during that time, since they were seen as a road to developed West. But it is problematic to “blindly” rely on recommendations addressed to countries with different legal systems, constitutional experience and civil society or even to over-interpret them in order to back up the problematic argument such as the claim that independence of judiciary means that judges must have decisive vote in selection of judges.

The 2011 series of reforms proposal further aimed at increasing the accountability.²¹³ Transparency of the branch was strengthened by publishing of all courts decisions, information and documents about selection and promotion procedures and the recordings of meetings of the Judicial Council.²¹⁴ Moreover, the reports on judges’ performance got more frequent and thorough.²¹⁵ Further reforms were introduced in recent years in order to balance the strong independence with appropriately strong accountability, such as improving the selection procedures and their supervision, increasing the efficiency of disciplinary procedures, and the evaluation of judges. The position of the Chairman of the Judicial Council became separated from the Chief Justice of the Supreme Court in 2014, with the goal of diluting the previous concentration of judicial management power in one individual.²¹⁶ Moreover, the composition of the Judicial Council should progressively change, as the recent change of legislation indicates that the parliament, president and the government nominate non-judges for members of the Judicial Council.²¹⁷ These recent corrective measures should be understood as an attempt to swing the pendulum of power division towards the accountability, although it

213. See Act No. 33/2011 Coll., Explanatory Memoranda (Sept. 22, 2010) (Slovk.), available at <https://www.nrsr.sk/web/Dynamic/Download.aspx?DocID=346941> [<https://perma.cc/SGF8-WP27>]; Act No. 467/2011 Coll., Explanatory Memoranda (Jan. 18, 2012) (Slovk.), available at <https://www.najpravo.sk/dovodove-spravy/rok-2011/467-2011-z-z.html>.

214. This was done by the series of laws – Act no. 495/2010 Coll., Act no. 33/2011 Coll. and Act no. 467/2011 Coll. - that, among others, amended the Act of judges, Act on Courts or Act on Judicial Council of the Slovak Republic. See Act No. 495/2010 Coll. (Slovk.); Act No. 33/2011 Coll. (Slovk.); Act No. 467/2011 Coll (Slovk.)

215. See Act on Judges No. 385/2000 Coll. §§ 27 (effective Jan. 1, 2012) (Slovk.).

216. See Constitutional Act No. 161/2014 Coll., amending Art. 141a of the Constitution and the Explanatory Memoranda (Slovk.), available at <https://www.nrsr.sk/web/Dynamic/Download.aspx?DocID=397222> [<https://perma.cc/6VZJ-BAWC>].

217. See Act No. 152/2017 Coll., amending On Judicial Council of the Slovak Republic Act No. 185/2002 Coll (Slovk.). The President, the government and the parliament each nominates three members of the Judicial Council out of a total of eighteen members. A direct vote by judges elects the other nine members.

remains to be seen whether and when the pendulum eventually finds its balance.

*V. PROBLEMS FOSTERED BY THE EU-ENCOURAGED MODEL:
TOO MUCH INDEPENDENCE?*

Although the model presented in the documents of the Council of Europe²¹⁸ and the European Union²¹⁹ perhaps might produce good results, it was not the case of CEE post-communist countries. There the model in practice produced an isolated, largely unaccountable judiciary staffed and especially led by judges bent on corrupt, self-favoring action. Firstly, there was no significant personnel change in the judiciary.²²⁰ A majority of judges were educated before 1989 and after 1989 the school system did not accomplish any mentionable reform. It was unwise to bestow extensive self-regulatory powers on a post-communist judiciary immediately after the fall of the regime.²²¹

Furthermore, the model enabled the majoritarian group of judges to select their own candidates and exclude those with opposing opinions on the reforms of the judiciary.²²² In fact, if the majority prefers the status quo, the Council of Europe would be highly unlikely to initiate any reform of the judiciary.²²³ The model is not fit to counter the accumulation of power in hands of a few.²²⁴ Judges might have a tendency to elect a person who furthers their interests: guarantees them higher salaries, less accountability, and more independence, behind which corruption more easily exists without detection. This shows that the key change is not the formal institutional reform that established independence but the switch of an attitude of the judges, a courage to be independent and accountable. As Zalar claims: “[The] introduction of judicial self-government in a situation of transition does not entail

218. See CONSULTATIVE COUNCIL OF EUROPEAN JUDGES, *Opinion No. 10*, (Nov. 23, 2007), <https://rm.coe.int/168074779b> [<https://perma.cc/Y5HJ-M46G>].

219. See EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY, COUNCILS FOR THE JUDICIARY REPORT 2010-2011 (2011).

220. See Bobek, *supra* note 35, at 105-06

221. *Id.*

222. See, e.g., CONSULTATIVE COUNCIL OF EUROPEAN JUDGES, *Opinion No. 10*, (Nov. 23, 2007), <https://rm.coe.int/168074779b> [<https://perma.cc/TF5T-5MH7>].

223. *Id.*

224. *Id.*

anything other than the preservation of the judiciary as it was established by the undemocratic communist authorities.”²²⁵

In his recent analytical work, Spáč looked systematically at the selection procedures of new judges under the formally independent judiciary system in Slovakia. Unsurprisingly, the analysis showed strong tendency of the judiciary to favor like-minded candidates for the office.²²⁶ In fact, “the statistical analysis clearly demonstrated that candidates with higher social and cultural capital – hence those who either knew someone in the committee or had a relative who was a judge, were preferred.”²²⁷ Moreover, “these candidates were more likely to succeed in each part of the process.”²²⁸

[T]he research showed that judge-dominated selection process of new judges does not produce selection based on merit, but in bureaucratic judiciaries with bureaucratic and corporatist attitudes prefers such candidates that are likely to protect the status quo. A system which such a selection produces creates networks of gratitude and loyalty where less experienced judges can be considerably controlled by senior judges or judges higher in the hierarchy in such a way that could pose a substantial threat to output independence. This particularly applies to judiciaries where non-democratic legacies are still present and where judges served regimes and were willing to implement laws in such a way that conformed with preferences of ruling elites. Finally, judge-dominated models of judicial selection are likely to create a situation where judiciary may protect itself from effective accountability, where it will be perceived as not independent, and where judges will be willing to abuse their powers to foster their interests – whatever they may be.²²⁹

As Bobek and Kosař noticed, the model pressed on CEE entrants to the European Union most resembles the Italian model—*Consiglio Superiore della Magistratura*.²³⁰ On the one hand, it is one of the oldest Councils for Judiciary in Europe, but it is also often criticized for lack

225. Bostjan Zalar, *From ‘Communist Legacy’ to Capacity Building to Better Manage the Rule of Law*, in *CENTRAL EUROPEAN JUDGES UNDER THE INFLUENCE: TRANSFORMATIVE POWER OF THE EU REVISITED* 149, 156 (Michal Bobek ed., 2015).

226. Spáč, *supra* note 10, at 131, *et passim*.

227. Spáč, *supra* note 105, at 131.

228. *Id.*

229. *Id.*

230. Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 *GER. L.J. NO. 7*, 1270 (2014).

of accountability and low efficiency.²³¹ It is a model that is focused on strict detachment from other branches of government,²³² but inside the judiciary it is uncertain whether it could save the judiciary from dictatorship or oligarchization.

The concept of judicial independence has been misused and abused by some parts of the judiciary who shielded their often unethical, unlawful or status-quo-defending behavior with a cloak of the independence.

Judicial independence has been used, for instance, to explain why to disregard established case law of higher courts and thus render the judicial process almost unpredictable; why not to display the full name of deciding judges in published decision of the court; why it is impossible for judges to regularly publish their assets and incomes; why there cannot be any legal obligation for judges to follow continuous education after their appointment; or why only judges have to keep 13th and 14th salaries when the government is trying to push through cuts in public savings. . .²³³

This abuse of the argument of independence went so far, that when judges needed help from media and public to save their independence, there was nobody who stood up to protect them.²³⁴

For a long time, independence as a value was in the limelight, but recently the consequences of too much of independence have been admitted.²³⁵ It is much easier to ask for institutional independence, than

231. See CARLO GAUNIERI & PATRIZIA PEDERZOLI, *THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY* 54–59, 174–77 (Cheryl A. Thomas ed., 2002).

232. See *id.*

233. Bobek, *supra* note 35, at 112-13.

234. In 2014, the National Council of Slovak Republic adopted a constitutional amendment that allows surveillance of the candidates and judges already on the bench via the National Security Office. Judges might not have been aware of this surveillance. CCJE concluded that this was a serious breach of the principles of independence of the judiciary and separation of powers. However, it must be stressed that the Judicial Council has the final word on the evaluation of surveillance. The law was challenged before the Constitutional Court, and the case is pending. Radka Minarechová, *New security clearances for judges implemented*, *Za Otvorenú Justiciu* (Oct. 2, 2015, 06:30 P.M.), <http://www.sudcovia.sk/en/documents/38-external/1969-new-security-clearances-for-judges-implemented> [<https://perma.cc/Q8JZ-JJZ9>].

235. Compare COMM. OF MINISTERS, *Recommendation No. R (94) 12 of the Comm. of Ministers to Member States on the Independence, Efficiency, and Role of Judges*, and Opinion no. 1 with CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE), *Magna Carta of Judges* (Nov. 17, 2010) (setting independence, liability, and remuneration, etc. as priorities). Later, more recent documents of CCJE and CEPEJ put accountability and transparency forward.

to ask for ethical self-reflection, respecting of code of ethics, transparency and controlling system of the competence of the judges. Yet, based on the case-study of post-communist transition of judiciary in Slovakia and other CEE countries we can conclude that self-administration and independence should be given to judges after their competency and accountability is proved. It is difficult to expect self-reflection after the period, when justice has been abused as an everyday routine as Leah Wortham mentioned: “How do you create respect for the rule of law where the honorable thing to do, in some countries, was to avoid the law?”²³⁶

Euro-model does not consider specifics of every system. Every country has specific system of checks and balances, depending on how much power is situated in whose hands. This process has been developing for decades and still is not over. After that, a model policy could be harmful for emerging democracies that do not have a tradition of self-administration of judiciary, that would be accountable to a well-developed civil society. In some ways over-reacting to concerns about the obvious lack of judicial independence in communist times, the European Union pressed systems on the new members that over-emphasized judicial independence. The unfortunate consequences are systems that operate with too little judicial accountability, shielding judicial leadership and local judges alike from scrutiny, a condition that is conducive to corruption. In addition, the EU-pressed systems, while creating excessive insulation for judges from state actors, did nothing to discourage control of local judges by judge-superiors such as court presidents. So while local judges may be well-insulated from interference from elected state actors, the same system opens them to interference by court presidents who control significant parts of the local judge’s existence.

Notice that *Recommendation no. R (94) 12*, and the European Charter on the Statute for Judges do not mention transparency at all. COMM. OF MINISTERS, *Recommendation No. R (94) 12 of the Comm. of Ministers to Member States on the Independence, Efficiency, and Role of Judges* (Oct. 13, 1994), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c84e2> [<https://perma.cc/J82G-ZN4G>]; COUNCIL OF EUROPE, *European Charter on the Statute for Judges* (July 10, 1998), <https://rm.coe.int/16807473ef> [<https://perma.cc/2PTG-WF8J>].

236. Aubrey McCutcheon, *Eastern Europe: Funding Strategies for Public Interest Law in Transitional Societies*, in *MANY ROADS TO JUSTICE* 233, 235 (Mary McClymount & Stephen Golub eds., 2000).

A. *Liability and Accountability: Unexplained Difference in CEE Judiciary*

A problem of adopting the right ratio of independence and accountability lies often in the perception of ethical and legal duties, therefore in understanding what the difference between accountability and liability really is. As we mentioned when discussing the history of CEE countries, the perception of the importance of ethical principles is very low. It became more than clear for politicians, public figures, as well as for ordinary inhabitants, that only the law has that miraculous power of enforcement. For the last seventy years, forty years of the authoritarian regime and another almost thirty years of transition, traditional normative systems such as morality and ethics have been neglected and forgotten somewhere in the background. They did not, and could not have, reemerged as a simple result of granting independence to the judiciary.

The judiciary is no different from the rest of the country. As Jiří Příbáň mentioned regarding the Czech judiciary:

moral dimension of personal independence is somehow problematic. . . . Czech judges tend to mistake moral and ethical behaviour for legality. The popular perception is that as long as no legal provision is violated, the behavior is “moral”. This problem is then multiplied by lacking peer pressure and censure and deficient sanction mechanism. . . .²³⁷

Michal Bobek also points out a very narrow understanding of the ethical scope of independence and accountability in the CEE countries. Often, the CEE idea of the independence was the right to a lawful judge.

This right is a typical post-totalitarian reaction device, which was introduced to avoid any (further) political manipulation in the allocation of cases and the assignment of certain cases to politically “conscious” judges. The “reply character” of this constitutional right determines its geographical application: having German origins, the right to a lawful judge was, after the fall of Communism, taken on into quite a few of the Central and Eastern European constitutions. We do not find any similar

237. Bobek, *supra* note 15, at 110 (citing Jiří Příbáň, Independence as a Value of Legal Thinking, Address at the Conference on Judicial Independence by the Czech Bar Association, (Oct. 20, 2006)).”

principle in countries with no or minimal totalitarian experience, typically the United Kingdom.²³⁸

Unlike their position at the time of accession, the Council of Europe and the European Union have finally noticed this problem and started to recognize the importance of accountability as a counterpart of independence in their documents.²³⁹ These documents summarize the principles of ethics of a judge that represent an accountability of the judge.²⁴⁰ ENCJ recently states:

Independence and accountability go together: accountability is a prerequisite for independence. Independence is granted by society. A Judiciary that does not want to be accountable to society and has no eye for societal needs will not gain the trust of society and will endanger its independence in the short or long run. Accountability without independence reduces the Judiciary to a government agency.²⁴¹

The need for codification is a characteristic feature of the continental legal culture.²⁴² Every rule that is binding, is expected to be laid down in writing. Codes of ethics and codes of professional conduct have started to be very important instruments in thriving for excellence in professions, including the judiciary. The goal of such principles in a code is to perfectly express the quintessence of certain activity. CEE countries lag in the proper observance and enforcement of these principles.²⁴³

Confusion comes from the existence of different levels of normative rules with different consequences, if violated. In addition to the legal framework that limits action, there are disciplinary and ethical boundaries as well. CCJE strictly distinguishes among three types of rules: statutory rules, disciplinary rules, and standards of professional conduct.²⁴⁴

238. *Id.* at 111-12.

239. See *Opinion No. 3*, CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (Nov. 19, 2002), <https://rm.coe.int/16807475bb> [<https://perma.cc/PKJ5-R9K7>]; see also EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY, COUNCILS FOR THE JUDICIARY REPORT 2016-2017 INTRODUCTION (2017) [hereinafter ENCJ].

240. *Id.*

241. See ENCJ, *supra* note 239.

242. CONSULTATIVE COUNCIL OF EUROPEAN JUDGES, *supra* note 210, at ¶ 41.

243. See ENCJ, *supra* note 237.

244. *Id.* at ¶ 45.

Standards of professional conduct are different from statutory and disciplinary rules. They express the profession's ability to reflect its function in values matching public expectations by way of counterpart to the powers conferred on it. These are self-regulatory standards which involve recognizing that the application of the law is not a mechanical exercise, involves real discretionary power and places judges in a relationship of responsibility to themselves and to citizens.²⁴⁵

Furthermore, CCJE admits the danger of ambiguous interpretation of vague ethical principles.²⁴⁶ Moreover, it is aware of the fact that without discussion about the essence of the principles their application might be too rigid.²⁴⁷ In that context it suggests to speak of "statement of standards of professional conduct," rather than of "a code".²⁴⁸

The disturbing circumstance in CEE countries is quite the opposite. Accountability is not confused with criminal, civil or disciplinary liability. On the contrary, there is a common bias against any other responsibility other than legal or disciplinary liability. It could be said—what is not illegal cannot be wrong.

So where is accountability? Just like independence is not intended to serve the judge, but is a right of individuals towards the government, in the same way, the accountability is owed to public by judges, as the proof that they do not abuse their independence. Accountability has two perspectives. First, it obliges from inside: for a judge, it motivates her to stand by ethical principles that are essential for the vocation.²⁴⁹ One of the best instruments to secure accountability of the judge is an established, effective and respected code of professional conduct. It signals outward, for the public, the values endorsed by the judiciary and communicates what people can expect from an honorable judge. It also binds inward and sets the list of the values of the vocation for the judge herself. The way a judge is supposed to present her good will and devotion to fundamental principles of the judiciary is in the opinion that she provides in decision and reasoning she applies. These two are essential and crucial instruments of securing accountability.

245. *Id.* at ¶ 45.

246. *Id.* at ¶ 46.

247. *Id.*

248. *Id.*

249. CONSULTATIVE COUNCIL OF EUROPEAN JUDGES, *supra* note 210, at ¶ 50 (summarizing those principles of conduct).

The CEE approach to rules is a never-ending story of textualist and formalist approaches, that disables the application of these principles to advance administration of the judiciary, to raise the trust of the judiciary among public and to build on integrity and quintessence of the judiciary: a judiciary that is both accountable and independent.

Independence without accountability poses serious problems. It is an unstable model because it insulates judicial acts of greed and corruption from examination. It risks destruction of transparency of judicial decision-making.²⁵⁰ For example, Romania has a completely autonomous judiciary.²⁵¹ It is controlled by a judicial council with nineteen members.²⁵² Four of these members are appointed with some influence by the Senate while the other fifteen are magistrates appointed exclusively by the judicial council.²⁵³ Discipline of judges is done exclusively by the judicial council. This configuration makes the judiciary completely isolated from the executive and legislative branches.²⁵⁴ As a result, Romania has been repeatedly reprimanded by the European Commission for the judiciary's lack of transparency and accountability.²⁵⁵ It has come to the point that ““while judges may see the Council as a body responsive to those who elected them, the Council no longer sees its position as being judges' representative but as one who owns the judiciary”²⁵⁶ Therefore, problems with accountability, impartiality, and transparency persist.

And Slovakia has struggled with a prolonged period of judicial domination by one man and his comrades, Štefan Harabin. In 2014, Harabin was rejected in his re-election efforts for both President of the Supreme Court and Chair of the Judicial Council, marking some progress.²⁵⁷ Nonetheless, his influence runs deep into the judiciary, and he remains on the Supreme Court with life tenure, so his period of domination may have diminished but is not yet closed.²⁵⁸ The media and NGOs report highly questionable judicial conduct, most of which

250. See Parau, *supra* note 67, at 6–7.

251. *Id.* at 17.

252. *Id.* at 17–18.

253. *Id.* at 17–18.

254. *Id.* at 17.

255. *Id.*

256. *Id.* at 20.

257. See, e.g., John Boyd, *Harabin Loses Grip on Slovak Judiciary*, THE DAILY.SK (May 20, 2014), <http://www.thedaily.sk/harabin-loses-grip-on-slovak-judiciary/>.

258. *Id.*

was made possible by too great a level of judicial independence and too low a level of accountability and transparency.²⁵⁹ Harabin had moved from the Supreme Court in mid-2006 to become the Minister of Justice only to arrange reforms transferring competences from the ministry on the Judicial Council.²⁶⁰ Upon leaving the Ministry in 2009, he got elected to become the chief justice of the Supreme Court, who was at the same time chairman of the Judicial Council, finalizing his massive conflict of interests. This controversial figure dominated the Slovak judiciary for years through some of the following means: (i) initiating of disciplinary motion against judges acting contrary to his interests; (ii) using harsh sanctions against his opponents, such as removal of judges from their office or imposing salary reductions; (iii) influencing of nomination of the Judicial Council members and regional court presidents; (iv) misusing the hierarchical structure of the judiciary and his powers as the chief justice of the highest court (Supreme Court) to provide extraordinary remuneration to judges favoring his interests, manipulate the allocation of cases, or influencing of particular decision making of other judges; (v) deploying harassing libel cases against media criticizing his actions; and (vi) facilitating nepotism in judges selection procedures.²⁶¹ These actions eventually mounted up to the point where the judiciary was completely hijacked by the interests of the few powerful actors within the judiciary and their web of judges who owed their positions to the few powerful actors.

As will be shown, Harabin consolidated his power when he, one, deployed harassing disciplinary motions against dissenters, and two,

259. ŁUKASZ BOJARSKI & WERNER S. KÖSTER, *THE SLOVAK JUDICIARY: ITS CURRENT STATE AND CHALLENGES* 74 (2011).

260. Štefan Harabin, as the minister, drafted the amendment of the Act on judges no. 385/2009 Coll., and the draft law was introduced by the government. While the law was discussed in the Parliament, Harabin resigned as minister of justice and was elected the chief justice of the Supreme Court and (hence automatically) President of the Judicial Council. The law, however, was widely criticized and the government withdrew it from the Parliament. For the drafted law and the legislative process, see *Vládny návrh zákona, ktorým sa mení a dopĺňa zákon č. 385/2000 Z. z. o sudcoch a prísediacich a o zmene a doplnení niektorých zákonov v znení neskorších predpisov a o zmene a doplnení niektorých zákonov [Government bill amending Act no. 385/2000 Coll. On the Judiciary and the Supreme Court and on Amendments to Certain Acts, as amended, and on Amendments to Certain Acts]*, NARODNA RADA SLOVENSKEJ REPUBLIKY (Mar. 27, 2009) <https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&ZakZborID=13&CisObdobia=4&CPT=1014> [<https://perma.cc/5DZH-MNRE>].

261. ŁUKASZ BOJARSKI & WERNER S. KÖSTER, *THE SLOVAK JUDICIARY: ITS CURRENT STATE AND CHALLENGES* 82-83 (2011).

manipulated so called anti-discrimination claims of judges against the state.²⁶² In these ways and many others, judges (supported by Harabin in his position of minister of justice and later in the position of the president of the Supreme Court and the president of the Judicial Council) promoted their own final interest while misinterpreting the concept of independence. Alternatively, all of this might be simply be understood as a clear example of internal corruption within the judiciary, made easier by the high level of judicial independence and absence of meaningful accountability.

The state of judiciary in Slovakia attracted wide public attention around 2009 when more than 100 judges signed the document called ‘Five Sentences’.²⁶³ They stressed the importance of freedom of expression even within judiciary, and they claimed that the fear that existed and spread within the judiciary harmed discussion about the state of judiciary and the reasons for the public’s low trust in it.²⁶⁴ This petition was a reaction to disciplinary motions initiated against those dissented against Harabin’s judiciary. The first wave of motions included, for example, the case of Judge Darina Kuchtová (initiated by Štefan Harabin while still Minister of Justice) who was accused of infringing the respect for the function of the judge and detracting from the dignity of the judge’s office because she had served as a witness in a criminal libel action filed by another judge (Pavol Polka), expressing her opinion on the judge’s character.²⁶⁵ She stated that she only responded to the questions of the court and that there was no legal basis for her not to serve as witness.²⁶⁶ She was never accused to provide false testimony. The disciplinary senate of the first instance found her guilty in 2009.²⁶⁷

Another case is related to the motion against a former Judge Jana Dubovcová who signed a petition on the website of a reputable

262. *See id.*; *see also* NEMOC TRETEJ MOCI [DISEASE OF THE THIRD POWER], (Atelier.doc, 2011).

263. *Five Sentences*, ZA OTVORENU JUSTICIU (Mar. 28, 2010), <http://www.sudcovia.sk/en/documents/archive/202-five-sentences> [https://perma.cc/P8G5-W2BE].

264. *Id.*

265. *See 3. Pripad – sudkyňa Darina Kuchtová [3. Case – Judge Darina Kuchtová]*, ZA OTVORENU JUSTICIU (Oct. 15, 2009) <http://www.zoj.sk/sk/dokumenty/disciplinarne-konania/61-darina-kuchtova> [https://perma.cc/A4E4-ET9K].

266. *Id.*

267. *Id.*

watchdog organization that asked the Judicial Council not to elect Štefan Harabin for the position of the president of the Supreme Court and the chairman of the Judicial Council.²⁶⁸ She allegedly diminished trust in the judiciary, infringed the respect for the function of the judge and detracted from the dignity of the judge's office.²⁶⁹ The sanction asked for was removal from the office.²⁷⁰ Her office was terminated by the decision of the Minister of Justice (Viera Petriková, who became the minister after Harabin) but the motion was withdrawn shortly after the case became public and "Five sentences" were published.²⁷¹

The third case featured a disciplinary motion filed by Štefan Harabin as the President of the Supreme Court against the judge of the Supreme Court and dissenter, Miroslav Gavalec. Gavalec wrote a letter to the Health Care Surveillance Authority ("HCSA") with a request to evaluate the health conditions at the work place, the Supreme Court building. However, the HCSA had no jurisdiction over this matter. Because the HCSA lacked jurisdiction, Harabin claimed that Miroslav Gavalec had violated his duty to continual education and that he diminished the public trust in the judiciary as he did not address his motion to the competent authority.²⁷²

In 2015, Štefan Harabin spoke of the new president of the Supreme Court as somebody who was controlled only by the public opinion and politicians. He also said: "She is in a way lamentable lady. I tell you, in a short time she can end up in the mental hospital. And they will blame me. But it is not my fault."²⁷³ The disciplinary senate in the first instance (the case is still pending) decided that Harabin did

268. See 6. *Případ – sudkyňa Jana Dubovcová* [6. Case – Judge Jana Dubovcová], ZA OTVORENU JUSTICIU (Oct. 15, 2009), <http://www.zoj.sk/sk/dokumenty/disciplinarne-konania/64-jana-dubovcova> [<https://perma.cc/KQA2-BDPZ>].

269. *Id.*

270. *Id.*

271. *Id.*

272. See *Harabin stiahol disciplinarny navrh na sudcu Gavalca*, SME DOMOV (May 28, 2014), <https://domov.sme.sk/c/7218307/harabin-stiahol-disciplinarny-navrh-na-sudcu-gavalca.html> [<https://perma.cc/C3Y3-XXCS>]; see also *14 Disciplinárnych Konaní Sudcov–14 Otáznikov*, TRANSPARENTNOST SPRAVODLIVOST OTVORENOST (Feb. 2, 2011), <http://www.zoj.sk/sk/dokumenty/disciplinarne-konania/406-14disk-14ot> [<https://perma.cc/4JR5-CKEC>]; Michaela Stanková, *Fifteen judges sound loud warning*, THE SLOVAK SPECTATOR (Sept. 21, 2009), <https://spectator.sme.sk/c/20033929/fifteen-judges-sound-loud-warning.html> [<https://perma.cc/3Q29-NLWC>].

273. *Šéfka najvyššieho súdu je chudera, Harabin urazil aj Kisku*, WEBNOVINY (Oct. 20, 2016), <https://www.webnoviny.sk/sefka-najvyssieho-sudu-je-chudera-harabin-urazil-aj-kisku/> [<https://perma.cc/HX2X-AAXF>].

not violate the rules of ethics because the subjective mens rea was missing: he did not intend to diminish trust in judiciary.²⁷⁴ Standards of evaluation of unethical behavior in disciplinary senates are somehow twisted.

B. Anti-discrimination Cases Against State

The problematic understanding of judicial independence as judicial autonomy lead to the judicial corporativism in the case of the so-called judicial anti-discrimination claims.

The story begins with the establishment of the Special Court in Slovakia in 2004.²⁷⁵ The original act that established the Special Court guaranteed significantly higher salary to the judges of the Court because they had to fulfill special requirements and there were risks connected with their function of ruling on corruption cases.²⁷⁶ The salary was later tripled as there were long-term vacancies on the Court.²⁷⁷

The law on the Special Court was later challenged before the Constitutional Court, based on the difference in the salary of judges of Special Court and other judges.²⁷⁸ The Constitutional Court did not perform the regular test of proportionality, and simply stated that the difference in salaries is obviously disproportionate.²⁷⁹ A minority of Constitutional Court judges had differing opinions.²⁸⁰

Shortly after the verdict of the Constitutional Court in May 2009, the judges of general courts started to file anti-discrimination claims based on the Act on Antidiscrimination. The judges calculated how

274. *Disciplinárny senát oslobodil Štefana Harabina [Disciplinary Senate liberated Štefan Harabin]*, TERAZ.SK (May 13, 2016), <http://www.teraz.sk/slovensko/disciplinarny-senat-oslobodil-s-hara/196638-clanok.html>.

275. See Memorandum to Act No. 458/2003 Coll. (May 28, 2003), <http://www.nrsr.sk/Dynamic/Download.aspx?DocID=186588> [<https://perma.cc/M6S5-YVB2>]. The Special Court was a court with special jurisdiction to hear cases of corruption, organized crime, and other similar crimes. The rationale behind the establishment of the Court was to strengthen the investigation and punishment of corruption and organized crime. *Id.*

276. See MP Ms. Majdová, speech in the minutes from the Parliamentary session proposing the amendment to the Act of judges which was later adopted as Act No. 122/2005 Coll. (Mar. 17, 2005), available at <https://www.psp.cz/eknih/2002nr/stenprot/041schuz/s041022.htm> [<https://perma.cc/4Y4A-K99A>].

277. *Id.*

278. See Constitutional Court of the Slovak Republic no. PL. ÚS 17/08.

279. *Id.*

280. *Id.*

much they would earn being judges of the Special Court and considered it to be non-pecuniary damage. Almost two-thirds of judges filed such action against the Slovak Republic.²⁸¹ As it was later found by the chamber of the Constitutional Court, the claims were mostly either similar or practically identical with repeated grammar mistakes from claim to claim, indicating that these actions had been organized.²⁸² Moreover, those mass claims were decided by the judges who themselves filed such actions.²⁸³ The judges mostly denied that they might not be impartial. This legal opinion was discussed. The position that they are indeed impartial prevailed at the Supreme Court.²⁸⁴ This practice was eventually stopped by the decision of the Constitutional Court. The senate of the Constitutional Court stated that because the claims were either similar or the same, the judges who claimed discrimination would materially decide their own matter.²⁸⁵ Because “if the judge believes in her claim and we cannot reasonably assume otherwise, it is hardly believable, ‘here and now’ practically unbelievable, that she would decide the same matter of her colleague differently.”²⁸⁶ The Supreme Court, whose President was Harabin and some of whose members had joined in the claims, in a majority of the senates (panels of judges within the Supreme Court) ruled that there was no impartiality problem for a judge who had filed a claim to rule on another judge’s identical claim: the filing of the claim, the Court said, was merely the expression of a legal opinion.²⁸⁷ But the Constitutional Court ruled that filing the lawsuit is not a mere expression of the abstract legal opinion that might not harm the impartiality, but was a concrete opinion with a preconceived idea.²⁸⁸

Besides that, the Supreme Court and Judicial Council actively supported such actions and the Supreme Court even tried to “fix” the

281. See, e.g., Michaela Terenzani, *Some judges rethink their wage-claim suits*, THE SLOVAK SPECTATOR (Oct. 17, 2011), <https://spectator.sme.sk/c/20041359/some-judges-rethink-their-wage-claim-suits.html> [<https://perma.cc/C6FF-3L2B>].

282. Decision of the Constitutional Court of the Slovak Republic no. II. ÚS 16/2011 (deciding the complaint of the Ministry of Justice against the Special Court where the Ministry of Justice as defendant in anti-discrimination actions claimed violation of the principle of impartiality of judges and the right to the judge established by the law).

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

difference in salaries on the Supreme Court by bending the law through changes in the work schedule of the court. This led to the unconstitutional assignment of cases connected with these lawsuits.²⁸⁹

When in 2011 Łukasz Bojarski and Werner Stemker Köster issued the report on the Slovak judiciary prepared for the Open Society Foundation, they stated concerning the anti-discrimination claims the following:

The public discussions about salaries, wage discrimination cases and bonuses have greatly undermined the authority of and respect for the Slovak judiciary. The general belief that judges enrich themselves is fueled by the opinion of the politicians. However, most shocking is the evident lack of professional ethics as far as the wage discrimination cases and the bonuses are concerned. As for the former: it should be obvious for any judge that such a claim should preferably never be dealt with in court and if so, may never be judged by a judge who has a similar claim pending.²⁹⁰

Besides the lack of professional ethics, judges at the time showed widespread insensitivity, or perhaps the lack of social responsibility, towards the economic situation in the Slovak Republic within the context of the recent economic crisis, which probably added to the negative public view towards the judiciary. In this instance, concepts of independence and impartiality were bent by the judges in their personal favor.²⁹¹

VI. CONCLUSION

Judicial independence is a term with many meanings and applications but a singular aura. The reality is that judicial

289. Moreover, in 2010 the Judicial Council presided by Judge Harabin adopted the resolution no. 1099 in which it commented on the legal basis of the anti-discrimination claims, explicitly stating that there is existing discrimination and that judges should be awarded pecuniary satisfaction. *See Resolution no. 1099*, THE JUDICIAL COUNCIL, (Dec. 13, 2010), <http://www.sudnarada.gov.sk/antidiskriminacne-zaloby-sudcov/> [<https://perma.cc/KZQ3-JJEN>]. On January 2011, the Plenary meeting of the Supreme Court adopted the memorandum, proposed by Mr. Harabin, which had the same spirit as the resolution of the Judicial Council. Only a few judges of the Supreme Court protested and left the meeting while pointing to the fact that the judges of the Supreme Court just expressed their opinion on the substance of the pending cases.

290. Bojarski & Köster, *supra* note 224, at 111–12.

291. *See id.* at 110–12.

independence is but one means toward the truly crucial end of judicial impartiality. But judicial independence is not an absolute and must be balanced by appropriate levels of judicial accountability and transparency. Judicial independence in the United States is not doled out in equal portions among federal Article III judges (the most independent structurally) to state court judges to federal and state administrative law judges, who are not meant to be independent in the most accurate sense of the term at all.²⁹²

An analysis of judicial independence in Europe makes clear that judicial independence is not a static concept and is expressed differently in each European state.²⁹³ In Western Europe and among member states of the European Union, the concept of judicial independence has had a relatively long time to mature. Western European states appear to have reached a certain comfort point where the judicial independence of judges is not threatened.²⁹⁴ However, these states still face the challenges that come with maintaining an independent judiciary, including deciding the proper balance between independence and accountability.

In contrast, the precise concept of judicial independence in CEE states has not yet been established. States in these regions not only have to establish the judiciary as an independent body for the first time but also work to separate their states from their troubling pasts. Previously communist states try to foster public support in order to establish a more independent judiciary from citizens who perceive the judiciary as a corrupt arm of an oppressive executive branch. However, these states should not be discouraged. Many Western states have slowly established healthy, independent judiciaries in the wake of previous rule by oppressive regimes. A key goal of these states must be to balance judicial independence with appropriate measures of accountability and transparency with a clear understanding that judicial independence must prevent the government from influencing judicial decision-making in actual cases, without preventing appropriate inquiries by the government into judicial spending and operations and appointments.

292. See generally Moliterno, *supra* note 17.

293. See Adenitire, *supra* note 37.

294. Zimmer, *supra* note 118, at 62 n.24.

Individual countries necessarily require individual approach and assessment of robustness of their institutions. Institutions, often taking decades or even centuries to build, achieve high degrees of resilience through sustained practice.²⁹⁵ Only then, can stable institutions emerge and develop their regulative and normative qualities. A giant leap in structural setup of the judiciary, budget allocations, as well as shifts of mindset were expected from the CEE candidate member states. Well-meaning recommendations of the European Union, combined with Council of Europe's advice, represented an institutional overhaul for candidate states, conditioned not by the recognition of necessity to put one's own house into order, but by financial and political motivations of states to gain the Union's and Council's acclamation. This conditionality in some instances triggered speedy procedures to adopt reforms without proper internal discussion and considerations, almost to the point of undermining other principles the European Union was set to encourage and develop, such as due legislative procedures, based on open public discourse. The tendency to speed up reform proposals was unsurprisingly even stronger in countries, which were laggards in the accession process, such as Slovakia, which suffered from a democracy deficit between 1994-98, as these countries needed to catch up and felt they had had to prove themselves. Moreover, it can also be reasonably expected that these countries would opt for rather visible, even radical reforms in order to seek legitimacy and endorsement from the European Union.²⁹⁶ However, such legal transplants may not turn out to be successful.

The excessive independence, unbalanced by accountability, created an environment in which corruption could thrive, largely unseen and unchecked. Judicial power was consolidated in few hands, and these hands were essentially the same as in the prior regime. The relatively sudden opportunity to control the judiciary was seized upon and used for personal gain and stockpiling of power.

While the formal transition from a judiciary dependent on the state to one that must be independent of its actors occurred, the mental transition of the judges has not occurred. With many notable exceptions of courageous, public-minded judges, the judiciary as a whole has still not made the transition to one that is worthy of so much independence

295. WILLIAM R. SCOTT, *INSTITUTIONS AND ORGANIZATIONS* (2nd ed. 2013).

296. Samuel Spáč, *Judiciary Development After the Breakdown of Communism in the Czech Republic and Slovakia*, 9(3-4) *CENT. EUR. U. POL. SCI. J.* 234, 262 (2014).

and self-governance. This should not be surprising to the European Union, but it was plainly not considered at the time of accession. Instead, the policy chosen was to reform structures ensuring independence without simultaneously ensuring a judiciary staffed with judges who were worthy of such trust. The result has been a judiciary that is correctly mistrusted by the public, and all the consequent harms to the Slovak people that result from a judiciary unworthy of public trust.

The recent alarming events in Poland should give pause to states such as Slovakia, Czech Republic, Croatia, Montenegro, and perhaps later, Ukraine, Serbia, and Kosovo. The current Polish situation finds a populist party (“PiS”) in control of the government, acting, and threatening to act further to destroy judicial independence in Poland. The actions of PiS have a surface legitimacy that is created by the undue level of judicial independence, lack of accountability, and internal corruption that mark not only the Polish judiciary but also other judiciaries in the region. The Polish government can explain to the public that the judges are out of control, have no oversight, and have embraced corrupt practices as a result. These arguments are currently being made to justify a move toward government take-over of the judiciary, a move that threatens to return Poland to the absence of judicial independence that marked the communist times and that still exists, for example, in China.²⁹⁷

The public, if not the European Union itself, have been accepting of these Polish government justifications for taking control over the judiciary. The recent proposal by the European Commission to the Council to adopt a decision under Article 7 of the Treaty on European Union, the first in the history of the European Union,²⁹⁸ should not be understood as an effort to retain the Polish judiciary as it currently exists, but instead should be used as an opportunity to reform the Polish judiciary, retaining the right measure of judicial independence while adding judicial accountability and controls over the conduct of judicial superiors such as court presidents.

297. *Poland's Ruling Law and Justice Party is Doing Lasting Damage*, THE ECONOMIST (Apr. 21, 2018), <https://www.economist.com/europe/2018/04/21/polands-ruling-law-and-justice-party-is-doing-lasting-damage> [<https://perma.cc/L9K9-WQZ9>].

298. See Press Release, European Commission, Rule of Law: European Commission takes next step in infringement procedure to protect the independence of the Polish Supreme Court (Aug. 14, 2018), available at http://europa.eu/rapid/press-release_IP-18-4987_en.htm (Aug. 14, 2018) [<https://perma.cc/RNE7-8XNN>].

States such as Slovakia should recognize the narrow window of opportunity that remains to get its judicial house in order before conditions that have produced the Polish situation materialize. No judicial independence is an untenable position for a democracy. Too much independence can lead to none, as current events in Poland make clear.

