Introduction

> Each juryman must reflect that he is being watched by hallowed and inexorable Dike … because he has received a sacred trust from the laws, from the constitution, from the fatherland, the duty of guarding all that is fair and right and beneficial in our city.
>
> Demosthenes

The quest of a 'fair justice' belongs to the core of Western culture (Ost, 2004). Ancient Greek philosophy, witnessed by countless authors and seminal works in theatre, literature and poetry, reminded citizens and politicians who lived in the *polis* how both difficult and important was the daily instantiation of an ideal of 'fair justice' to make a political order legitimate (*nomos*, Vernant, 1965).[1]

Yet the germinal traces of the prototype of a 'fair justice' have been deeply transformed by the waves of history (Caenagem, 1991), especially during the Medieval and Modern ages. Those traces have been remade and implemented in innumerable different institutional settings, where the archetype of a justice 'made by laws rather than by men' incrementally revealed its innermost meaning.

Therefore, in a way, it would be myopic to appraise the quest of quality in the realm of justice only by looking at the more recent developments undergone by contemporary democracies. The search for an impartial, transparent, stable and predictable *nomos* not made by men, but made by laws, was already the pillar of ancient Greek and then Roman moral and political traditions (Ost, 2004). In this respect it may seem difficult to glimpse something new 'under the sun of the contemporary age' as far as the quest for a fair justice is concerned.

However, on closer inspection, something new in the realm of justice administration seems to have forth over recent decades. An unquestionably intriguing novelty is represented by the massive *intervention of international and supranational actors*, both governmental and non-governmental, within national judicial systems. These actors have mainly acted in the name of the principle of the rule of law (Carothers, 2006; Börzel and Risse, 2004).

The belief in the power of law to medicate human poverty, economic underdevelopment and political instability has gained, over the last three decades, a spectacular glamour in the international political discourse (Piana, 2007a: 99–

1 The volume does not deal with due process of law, because (as correctly mentioned by Zannotti, 2006: 31) this concept is substantially related to the experience of common law. Only lately in Europe has the concept of fair trial incorporated some of the dimensions of the concept of due process of law (as for instance the dimensions referring to the guarantees of habeas corpus). On this last point, see Shapiro, 2006.

100).[2] By promoting the rule of law, international organizations have endorsed the view that a legally ordered society would give citizens the chance of living in a better world.

Among many others, the Rule of Law Initiative of the American Bar Association stated that 'rule of law promotion is the most effective long-term antidote to the pressing problems facing the world community today, including poverty, economic stagnation, and conflict'.[3] However, it is not necessary to cross the Atlantic to encounter a strong and vivid belief in the power of the rule of law. The largest part of the mainstream conceived by the Council of Europe stands on the basis of the uncontested belief that democracy can originate from rule of law (Council of Europe, 2005).

Thus, whereas traditionally the search for a fair justice stood at the core of the agenda of national political communities, nowadays things have considerably changed. The creation of guarantees of fair trials has become also (or above all?) a matter for international or supranational actors, whose legitimacy originates almost entirely from the distinctive endowment of know-how and expertise they have or they are able to mobilize by the involvement of legal professionals and policy-makers. Unquestionably, once working in the recipient country (the country toward which the international organizations address their suggestions, recommendations, templates, standards), the belief that the rule of law may boost economic and political development took the promoters of the rule of law directly to the establishment of an impartial judiciary in the countries; that is, a formal, stable and permanent guarantee of the impartiality and reliability of the rules of the economic (market) and political (democracy) games. Indeed, once developing countries are provided with a government limited by laws the international discourse predicts that people living in such countries are enabled to reach higher living standards.

Impartiality is the essential basis for achieving a more comprehensive and forward-looking goal, that of the establishment of a market-based economy and a democratically oriented political system. From this premise originates the endless search for *guarantees* of *judicial impartiality*. These guarantees are therefore an intermediate step in the long causal chain that is deemed to take any country from under-development to developed status.

In order to justify the authoritative allocation of value (Easton, 1953) of a non-elective institutional actor (such as a judge), his/her impartiality must be ensured in order to make his/her decisions legitimate (Shapiro, 1981). In the greater part of the Western culture this impartiality has been ensured through the establishment of formal guarantees of *judicial independence* (Russell and O'Brian, 2001). The isolation from undue influences is formally guaranteed by a set of institutional mechanisms, which ensure that the judge's behaviour does not follow 'improper motives' (Cappelletti, 1989).

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2 On the 'instrumental view' of law, see Tamanaha, 2006.

3 See <http://www.abanet.org/rol>.

Notwithstanding the universal value of the above-mentioned, the institutional means adopted by each political system to implement the constitutional principle vary according to many different factors (Burbank, 2003), both historical and cultural.[4] Nonetheless, countries that benefit from the programmes of rule of law promotion have been assessed on the basis of a general standard, which focuses on the degree of judicial independence deployed by their judicial system.[5] Thus, the concept of 'judicial independence' has been included among the basic principles of any policy of rule of law promotion to *describe* the conditions that *should be put in place* to legitimate adjudication and also *to assess the legitimacy* of a new democracy or of a democratizing country (Dakolias, 1999). In this, by fostering judicial independence, experts and policy-makers aim at creating favourable conditions for the establishment of democratic institutions (Carothers, 2006; Dietrich, 2000; Hammergren, 1998). As a matter of fact, many empirical reasons support the belief that between the implementation of the constitutional principle (that is, the principle that states the supremacy of the law to be the basis of government) and the creation of a democratic system there is a strong – but definitely not linear – relationship.[6]

In democratizing countries, judicial reforms contribute to change the legal and political legacies imbued in non-democratic institutions and thus contribute to legitimate the new regime, institutionalizing a mechanism of self-restraint in the State: 'this raises the immediate question of the extent to which judges who served

4 This applies to any political system; that is, any system in which social processes are ruled through the authoritative allocation of value. The democratic organization of this type of rule is one of the several forms that the governance of the political systems may take.

5 Even in case of policies addressed toward hybrid regimes or quasi-authoritarian regimes, the first step accomplished by democracy promoters consists of the bringing about of domestic reforms based on the constitutional principle, which in the field of judicial reforms is phrased in terms of guarantees of 'judicial independence'. In so doing, these policies seem to accept that the implementation of the constitutional principle creates favourable conditions for the emergence of a democratic political system. In some cases, the pressure exercised by external actors on democratizing countries drives mainly toward the establishment of a constitutional setting, even if in several cases this does not entail, at least in the immediate future, the establishment of a democracy. See Blackburn, 2000, on lessons drawn from the rule of law promotion in CEECs, the Middle East and the Balkans.

6 The relationship that exists between constitutionalism and democratic rules is a complex issue for social and political scholars. See Elster and Slagstad, 1996, for a general view of the theoretical aspects of this relationship; see also the seminal work of Linz and Stepan, 1996, which recognizes a strong relationship between the democratization of the arena of 'rule of law' and the democratization of the other arenas. Also, for consolidated democracies, liberal theorists have contested that the establishment of constitutional rules might directly benefit the balanced and sustainable development of a democratic system of governance. See for instance, on that point, Bellamy and Castiglione, 1996 (and then particularly Bellamy, 2006, who addresses in detail the controversial issue of constitutional democratic governance in Europe).

non-democratic regimes are able to become part of that 'usable and functioning democratic State apparatus and how political and institutional changes may affect their ability' (Guarnieri and Magalhaes, 2001). In particular, recruitment, appointment and career policies can deeply reshape the situation of action of judges. Due to these premises, democratizing elites face the crucial challenge of reforming mechanisms of judicial appointment, promotion, evaluation and training, in order to come to terms with the past and to pave the way to a legitimate liberal State (Gargarella and Skaar, 2004).[7]

If any generalization may be put forth at this stage, one can state that the establishment of permanent guarantees of judicial independence represented a common aim of the democratizing elites that emerged in the 'third wave' of democratization (Linz and Stepan, 1996), in Latin America and in Southern Europe.

Therefore, nowadays, speaking about the quality of justice it is essential to deal seriously with a number of new key questions:

- Do these external interventions really matter?
- Did they endeavour to create persistent changes in the cultural and institutional landscape of the incoming democracies? And if they did, have then these changes entailed any 'spillover' effect in the consolidated democracies?
- To put simply a complex story, did the promotion of the rule of law provide old and new democracies with effective tools they can use to improve the quality of justice?

The 'spillover' effect can be described as follows. Throughout the 'rule of law promotion exercise', Western legal and political institutions underwent a process of self-reflection about their own model of justice administration (Piana, 2005a). As a matter of fact the promotion of the rule of law entailed the development of a wide and differentiated array of assessment tools, whose target encompasses the organization of judicial systems and judicial offices, judicial ethics, and legal and judicial training programmes (Albers, 2008; Vigour, 2007). The process of standard-setting played a double role. On the one hand, it served the purpose of the rule of law promotion, which aimed at detecting the weaknesses and the shortcomings of the democratizing countries in the judicial field and, on the base of this *ex ante* evaluation, providing the remedies to come to term with them. On the other hand, it represented a policy instrument that might have been used – and

7 The importance of judicial independence to democratic rule has been strongly advocated and to many degrees forcefully demonstrated in comparative political and legal studies. However, despite an almost universal consensus as to its normative value, judicial independence may be one of the least understood concepts in the fields of political science and law (Larkins, 1996: 606).

as a matter of fact has been used – to assess the quality of justice in both incoming and consolidated democracies.

This last aspect comes out as completely new if compared with the traditional tools used by governmental institutions to establish impartial judiciaries. Beside the design of adequate mechanisms that ensure the completely and exclusive accountability of judges to legal norms, the machinery of justice evaluation introduces surreptitiously different mechanisms of accountability: managerial accountability and societal accountability. It requires the judicial systems to be compliant with non-legal standards: standards of effectiveness and efficiency in the management of courts and judicial procedures.

The concept of 'fair trial' does not only refer to a trial handled according to the law, but also to a trial handled in due time and efficiently. This turn toward managerialism in the judicial field also exposes the legal professions to new behavioural standards, derived from other professions, such as public administration and ICT (Frydman, 2007).

The emergence of external watchdogs that check the 'guardians' even from abroad, by mean of different mechanisms of monitoring and evaluation, seems to be a new phenomenon in the field of justice administration. In practical terms, the processes of evaluation, monitoring and standard-setting started as appendices, functional to the promotion of rule of law, and ended up with autonomous lives of their own, both in the US (Buscaglia and Dakolias, 1999) and in Europe.

The complexity of the issues depicted above goes hand-in-hand with the crucial impact the phenomenon of the rule of law promotion and the assessment of quality of justice have on contemporary societies. Beyond the importance of judicial independence for an impartial adjudication, in particular in political systems that come out from unstable and unpredictable legal environments, the explanation of the pathways followed by developments undergone by domestic judicial systems under the protective wings of external anchors (Morlino, 2005) still remains a largely unexplored issue. 'Explaining' means here tracing out the factors – both external and internal to the domestic systems – that compose the patterns of change that involve legal norms, legal culture and judicial behaviours. Whereas judicial independence is formally entrenched in domestic constitutional texts (and, if not in the texts, in the domestic legal practices), a more complex dimension of judicial governance is on the way to becoming, correctly speaking, *supranationalized*. Indeed it is under the influence of both domestic and supranational norms, which supports the establishment of guarantees of fair trial, as defined above. We will argue that this supranationalization touches upon the patterns of *judicial accountabilities*. However, this is very much the end of our journey.

To start and explore the dynamics of the judicial reforms enacted under the influence of two different types of factors, domestic and international, we need to go beyond current scholarship in comparative politics. Indeed, with few exceptions (Mattina, 2004; Morlino and Magen, 2008), scholars involved in the study of democratization processes did not fully integrate domestic and international factors

in their framework. These processes and the actors involved in them captured our attention and posed us some key urgent demands:

- How the promotion of rule of law and the evaluation of quality of justice come together?
- How do they design the new pattern of accountabilities under which the judicial systems seem to be nowadays subject?
- How do they bypass the traditional borders of the sovereign States that still exercise in the field of justice administration a solid and indisputable power?

The European policy of rule of law promotion is of a particular interest to scholars and practitioners exactly because of the relevance it has for the achievement of due and adequate responses to these questions. Indeed, the EU brought about a political strategy – unique in the world in fact – aiming at promoting judicial independence in a group of countries expected to become, sooner or later, themselves European member States.[8] Thus these countries were expected to become, after their accession to the EU, proactive actors in the process of integration of the European judicial space.

The research presented in this volume started some years ago from a cluster of crucial questions, which substantially raised the points above as inescapable dilemmas of contemporary social sciences:

- To what extent did the pressure that the European Union exercised on the judicial systems of the Central and Eastern European Countries (since 2004/07 new member States of the EU) put in place a set of *effective guarantees* of judicial independence?
- Did this pressure effectively entail *any permanent change in the cultural and institutional landscape* of the incoming members? And, if it did, how is it possible to *render, in an empirically based manner, the logic of change*?
- *Can the logics of changes be adequately described by means of the concept of judicial independence*? Or, rather, should we better look at other features

8 This peculiarity has been stressed by scholars in different ways. Some have argued that the European financial conditionality, which imitates the type of conditionality adopted by the IMF and by the World Bank, turned out to be more effective in Central and Eastern Europe because of the membership conditionality (Schimmelfennig, 2005; Youngs, 2001). Others oppose this view, arguing that the so-called 'membership conditionality' entailed too many and too heavy tasks for the candidate countries, which have been burdened by the institutional adaptation required by the EU (Hughes et al., 2004). Independently from the position adopted, it is worth to bear in mind the *sui generis* character of the European policy of rule of law promotion in the CEECs, since it is the only example we have so far of a supranational political institution that has promoted democratic rules by removing political boundaries (by accepting the recipient countries as members; Baracani, 2007).

of judicial governance; that is, features that are defined and formalized not only at the national level (as, for instance, is the case for the guarantees of judicial independence), but also at the supranational level?
- What might be these features be?
- How do they sit with the constitutional principle, which is based on the principle of government of law rather than of men?

The analysis is divided into five chapters. In the first chapter, I *elaborate a conceptual framework*, which tries to put in innovative terms the relationship that exists between the organization of the judicial system, judicial independence and the enforcement of the right to a fair trial in a multi-level system of governance. This chapter shows how the institutional designs of judicial governance in Western democracies deploy different arrays of guarantees of judicial impartiality. These guarantees are basically related to the legal and the institutional accountability of judges and prosecutors: how they are appointed, trained, selected, promoted, disciplined and evaluated, how their tenure and their immovability are ensured, and how the primacy of legal norms is guaranteed.

Then the chapter will develop a multi-dimensional concept of judicial accountability, disclosing its multiplicity. It will refer thus to legal, institutional, managerial, societal and professional accountability and will suggest that in contemporary societies legal administrative, societal and professional accountabilities may have undergone a process of transnationalization. Judges are indeed held accountable to legal norms and behavioural standards that are defined and enforced across national borders, by supranational bodies, as (for instance) by legal epistemic communities.

This framework allows us to *design a set of hypotheses disclosing the logic of action* of the judicial reforms in countries that are subject to the influence of external actors. The book considers five countries: Poland, Czech Republic, Hungary, Bulgaria and Romania, in the period 1989–2007.

At the end of the first chapter I put forth three hypotheses.

- *Hypothesis 1*: In the EU domestic agencies are intertwined with supranational streams of influences, coming from the EC hard and soft law and from the norms issued by the Council of Europe. We would argue that domestic judicial institutions have been the major factor in the processes of policy formulation and agenda-setting. They maintained the control of the pathways followed by the judicial reforms. This first hypothesis is inspired by the schooling of comparative political scholars, who worked on Latin America and Southern Europe.
- *Hypothesis 2*: The second hypothesis takes seriously the main point raised in scholarship about domestic processes of change. Are cultural and historical factors dominant in shaping the judicial governance of Central and Eastern European countries (CEECs) or should we attribute to strategic factors the responsibility for the design of the judicial systems? We are

keen to follow this second explanation, which states that strategic factors ruled out influences – still present – coming from the *longue durée*.

- *Hypothesis 3*: We suspect that the assessment of the influence exercised by external factors on CEECs is better achieved if the judicial governance is unpacked and its components are considered separately. This idea is inspired by the results obtained by mean of a limited investigation we carried on the reforms of judicial training systems. Whereas the institutional design of the judicial schools might have seemed resistant to external influence, programmes of training did undergo a substantial transformation resulting from the absorption of external inputs (Piana, 2007c). We then would argue that this statement holds for the entire judicial governance. We suspect that the mechanisms of institutional accountability (which touch upon the distribution of power foreseen by the constitutional design) remained basically the same, whereas the mechanism of administrative, legal, professional and partially societal accountability experienced a more intensive and meaningful process of change due to the influence of the external inputs.

The second chapter starts with a comprehensive reconstruction of the external inputs addressed by the EU and the Council of Europe toward the CEECs. The reconstruction is divided into five sections, each one corresponding to the five dimensions of judicial accountability.

In the third and fourth chapters the hypotheses are verified on the base of a huge dataset of primary and secondary literature, complemented by a set of 50 interviews and 2 surveys conducted from 2005 to 2007. The third chapter focuses on Poland, Czech Republic and Hungary, whereas the forth chapter describes the developments of the Bulgarian and Romanian judicial systems.

In the fifth chapter I discuss some of the consequences of the European policy of rule of law promotion, regarding both the future development of the CEECs' judicial systems and the process of standard-setting and justice evaluation that since the enlargement has been taking place in the enlarged EU. On the base of the empirical evidence provided, the fifth chapter will show that hypotheses 1 and 2 are substantially confirmed. For each dimension of judicial accountability the influence of external inputs provoked different patterns of changes, some of them patently divergent (institutional accountability), some partially convergent (legal accountability), some others strongly convergent (managerial and professional accountability). Societal accountability seems to look like a promise rather than an achievement at this stage, because of the weakness of civil society exhibited by the countries analysed. The strategic position of domestic actors is determinant in driving the reforms and in curbing the external inputs, sometimes throughout the exploitation of the opportunities created by external actors (the EU and the Council of Europe), sometimes throughout the enhancement of their position within the judicial systems. Therefore, the chapter will engage in a broader comparative analysis and will show how the influence of the EU and the Council of Europe is

deployed in the five sub-fields that correspond to the five dimensions of judicial accountability (institutional, managerial, legal, societal, professional). This analysis will open a bridge between the results obtained in the research presented here and the major issues raised by the European scholars who have extensively treated the process of European enlargement.

As the reader will notice throughout the volume, the research presented and discussed deals mostly with the patterns of change exhibited by institutional settings, as much as it considers the unit of analysis at the macro level – namely the governance of the judicial systems – and the meso level – the governance of the judicial offices. The volume aims at providing new impetus to the comprehensive scholarship that questions how and to what extent external factors do matter in shaping the pathways of change followed by domestic institutions. Judicial reforms adopted by incoming European member States are of a dramatic heuristic value at the point. As much as the governance – macro and meso – is here thought as a dependence variable, the assembly of factors that co-participate to shape or reshape the arenas and the opportunities of actions of policy-makers – judicial and non judicial ones – has been conceived as the matrix of the independent variables, comprising both domestic factors and international forces. By pointing out the target of the analysis, I want also to make clear that the volume draws the main trajectories that must be followed in a further research, in case one would seek to cast new light upon the actual functioning of the daily practices of justice administration in all the countries considered here. Whereas unfolding the real practices is not in the scope of the current analysis, surely the empirical evidence here exposed and the theoretical questioning brought about in the following pages do provide a far-reaching basis for going further and exploring why and how justice administration still looks like an aching point in the new body of post-communist states and old democracies. Without the knowledge offered here, any deep and extensive exploration of those dynamics that currently characterize – and can be expected to characterize in the very near future – the new European member States in terms of their justice administration will suffer major shortcomings, whose significance will be better expressed in the last chapter of the volume.