

**Daniela Piana**

**a**  
ASHGATE

# Judicial Accountabilities in New Europe

From Rule of Law  
to Quality of Justice

STUDIES IN MODERN LAW AND POLICY

# Judicial Accountabilities in New Europe

From Rule of Law to Quality of Justice

DANIELA PIANA

*University of Bologna, Italy*



ASHGATE

© Daniela Piana 2010

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior permission of the publisher.

Daniela Piana has asserted her right under the Copyright, Designs and Patents Act, 1988, to be identified as the author of this work.

Published by  
Ashgate Publishing Limited  
Wey Court East  
Union Road  
Farnham  
Surrey, GU9 7PT  
England

Ashgate Publishing Company  
Suite 420  
101 Cherry Street  
Burlington  
VT 05401-4405  
USA

[www.ashgate.com](http://www.ashgate.com)

### **British Library Cataloguing in Publication Data**

Piana, Daniela.

Judicial accountabilities in new Europe : from rule of law to quality of justice. -- (Studies in modern law and policy)

1. Judicial power--European Union countries. 2. Judicial independence--European Union countries. 3. Political questions and judicial power--European Union countries.

I. Title II. Series

347.4'012-dc22

### **Library of Congress Cataloging-in-Publication Data**

Piana, Daniela.

Judicial accountabilities in new Europe : from rule of law to quality of justice / by Daniela Piana.

p. cm. -- (Studies in modern law and policy)

Includes bibliographical references and index.

ISBN 978-0-7546-7758-1 (hardback) -- ISBN 978-0-7546-9500-4 (ebook)

1. Justice, Administration of--Europe, Eastern. 2. Judicial independence--Europe, Eastern. 3. New democracies--Europe, Eastern. 4. Law--Europe, Eastern--European influences. 5. European Union countries--Foreign relations--Europe, Eastern. I. Title.

KJC3655.P53 2009

347.47--dc22

2009026751

ISBN 9780754677581 (hbk)

ISBN 9780754695004 (ebk)



**Mixed Sources**

Product group from well-managed  
forests and other controlled sources  
[www.fsc.org](http://www.fsc.org) Cert no. S65-COC-2482  
© 1996 Forest Stewardship Council

Printed and bound in Great Britain by  
TJ International Ltd, Padstow, Cornwall

# JUDICIAL ACCOUNTABILITIES IN NEW EUROPE

# Studies in Modern Law and Policy

Series Editor: Ralf Rogowski,  
Reader in Law, University of Warwick

*Also in the series*

**The European Social Model and Transitional Labour Markets  
Law and Policy**

Edited by Ralf Rogowski  
ISBN: 978-0-7546-4958-8

**The Changing Law of the Employment Relationship  
Comparative Analyses in the European Context**

By Nicola Countouris  
ISBN: 978-0-7546-4800-0

**Property in Work  
The Employment Relationship in the Anglo-American Firm**

By Wanjiru Njoya  
ISBN: 978-0-7546-4587-0

# List of Tables

1.1	Three ideal-types of constitutionalism	22
1.2	Legal accountability	32
1.3	Institutional accountability	32
1.4	Professional accountability	33
1.5	Managerial accountability	33
1.6	Societal accountability	34
1.7	Institutional accountability before pre-accession	44
1.8	Managerial accountability before and after pre-accession	44
1.9	Expected impacts of European inputs on judicial accountabilities	47
2.1	Actors and mechanisms of the EIDHR (targeted projects)	50
2.2	Objectives, focuses and mechanisms of the EIDHR	52
2.3	Objectives, focuses and mechanisms of the rule of law promotion in CEECs	53
2.4	Main normative inputs of the Council of Europe in the justice field	58
2.5	Perceived importance of transnational networks with regard to national judicial policies	63
2.6	Perceived importance of international networks with regard to national judicial policies	64
2.7	Distribution of projects of judicial cooperation, by area	66
2.8	Groups of reference across domestic borders	68
2.9	European standards of legal accountability	73
2.10	European standards of institutional accountability	75
2.11	European standards of professional accountability	79
2.12	European standards of managerial accountability	79
2.13	European standards of societal accountability	83
3.1	Adoption of European standards of legal accountability	96
3.2	Mechanisms of institutional accountability, 1997	101
3.3	Managerial accountability, 1997	101
3.4	Comparative overview of institutional accountability, 2006	103
3.5	Comparative overview of managerial accountability, 2006	104
3.6	Actors in twinning projects realized in the field of judicial training	111
3.7	Communication between the courts and the parties involved	116
3.8	Changes in the trust of citizens in judicial systems during the pre-accession	117

3.9	Degree of fitness between domestic setting and European standards of the judicial reforms adopted 1997–2006	118
4.1	Adoption of European standards of legal accountability (Bulgaria and Romania)	128
4.2	Mechanisms of institutional accountability, 1997 (Bulgaria and Romania)	133
4.3	Managerial accountability, 1997 (Bulgaria and Romania)	134
4.4	Comparative overview of institutional accountability, 2006 (Bulgaria and Romania)	145
4.5	Comparative overview of managerial accountability, 2006 (Bulgaria and Romania)	146
4.6	Communication between the courts and the parties involved (Bulgaria and Romania)	152
4.7	Change in trust of citizens in judicial systems during the pre-accession (Bulgaria and Romania)	152
4.8	Degree of fitness between domestic setting and European standards of the judicial reforms adopted 1997–2006 (Bulgaria and Romania)	155
5.1	How judicial accountabilities changed during the pre-accession (five countries)	165
5.2	How judicial accountabilities fitted European standards (five countries)	165
5.3	Inclusiveness of judicial networks and participation of domestic actors	172
5.4	Change in trust of citizens in judicial systems during the pre-accession (five countries)	177
5.5	Judicial training programmes in five new member States	179

# Acknowledgements

This volume offers and deploys for an interdisciplinary public the outcomes of intense research activity carried out in several countries: Italy, France, Belgium, the US and the Central and Eastern European countries. During the four years spent in collecting data, conducting interviews and discussing with colleagues and friends the main topics addressed in the volume, I have been enormously helped by the kindness and the collaboration of several people working in international organizations, European institutions and NGOs. If, when I started in 2004, the DG Enlargement and the DG AIDCO had not allowed me see their archives and had not responded with patience, curiosity and competence to my questions, this project would have been different and probably never would have been realized. I would like to thank in particular: (within the European Commission) Michela Beati, Alan Van Hamme, Frantisek Hauser, Detlev Boeing, Micol Eminente; and (within the Council of Europe) Alessandro Mancini, Raffaele Sabato, Giacomo Oberto, Fausto De Sanctis and, above all, Muriel Decot and Stéphane Leyenberger. When I met these individuals in Strasbourg for the first time they showed an extraordinary courtesy in helping me with my ‘strange and unusual’ questionnaires. Without their support and their collaboration the surveys conducted among the members of the CCJE, the CEPEJ and the Lisbon Network would not have been possible. I want also to thank the experts who worked in the projects financed under the PHARE programme from 1998 to 2008, many of whom supplied information and detailed descriptions of the activities they carried on within the judicial institutions of the candidate countries: in particular Laurent Graviere, Petr Landkammer and, above all, ‘Monsieur’ Eric Maitrepierre, whose friendship and curiosity for my researches have been not only helpful but also encouraging over these last years. The Open Society Institute located in Budapest supported this project with an unstinting provision of data and contacts. Miriam Anati, responsible for the EUMAP Initiative, has been of great help to me. I warmly thank Henrikas Mickevicius, scientific director of the EUMAP. Special thanks are also due to all the practitioners involved in the EUMAP initiative, who answered two rounds of questionnaires between November 2005 and June 2006. I thank the NGOs that have provided me with information from the US, in particular the American Bar Foundation and the local representatives of the ABA CEELI initiative in Warsaw, Budapest, Sofia and Bucharest. All these practitioners have been sources of both information and enthusiasm. Their participation and their interest represented for me a strong incentive to develop and go further with the project.

None of the pages of this book would have been written without the support and the participation of the domestic judicial institutions in old and new European



member States. All of them were happy to share with me the data and the experiences they had had during the pre-accession period. I want to say thank you in particular to Jan Passer, Anna Suchova, Miroslav Wyrzykowski and Dragomir Yordanov. I trust that our collaboration will last into the future.

The discussion of parts of this book has often been a very good reason to travel and to meet colleagues and friends in conferences and seminars, where informal discussions have substantially enriched the formal debates. I am also very grateful to Antoine Garapon and Harold Epineuse who run the Institut des Hautes Etudes sur la Justice in Paris: this is a formidable place, where any researcher will feel that she can really relish the richness of a free intellectual exchange. This book is unquestionably 'nourished' by the patience, the presence and the regular discussions I have had with Marco Almagisti, Elena Baracani, Davide Carnevali, Ramona Coman, Francesco Contini, Cristina Dallara (more than any other young scholar, a stimulating and enriching collaborator), Marco Fabri, Gaetano Insolera and Andrea Lollini. Some of the inspiration and precious ideas developed in the volume are due to the contributions from Giuseppe di Federico, Angelo Panebianco and Francesca Zannotti. My most grateful thoughts go to Cheryl Thomas, with whom I discussed most of the ideas I developed in this volume. My sincere thanks go to Jiri Priban and Wojciech Sadurski, who have opened the doors of Eastern and Central European legal cultures for me. I learnt from them the small details that matter in sketching out the profile of cultures which are so different and, at the same time, so close to those we share in Western Europe. My thanks go to the Natolin College of Warsaw, where I met Bronislav Geremek whose charisma gave me an unforgettable experience. I will always retain a shining memory of our encounter: a young scholar and an experienced and wise politician and intellectual who watched restlessly the processes of democratization in ex-communist countries. I am indebted to the University of Berkeley, and in particular to my colleagues and friends of Boalt Hall – Malcom Feeley, Martin Shapiro, Bob Kegan and Rosann Greenspan – who have hosted me and discussed my work during the period spent in the US. I would also like to thank Terry Halliday for his 'cross-investigation': during one of our conversations during the Law and Society Conference of Baltimore I felt from his positive attitude that the project had finally reached a mature stage. However, it is not only from foreign colleagues and friends that I have received support, collaboration and persistent encouragement. My gratitude goes to Liborio Mattina: his work on European enlargement has been a key example for the development of my own inquiry on Central and Eastern Europe. The value of his precise and persistent comments on my work is priceless. I learned from Carlo Guarnieri what the judicial systems are, how they work, and how they should be investigated. I based my studies of European judicial systems on his scholarship. My research would have never followed this path without the support, the schooling, the remarks and the inspiration drawn from the work of Leonardo Morlino. He has been an extraordinary example of intellectual curiosity and scientific excellence, the kind of example that I wish each young scholar could meet at least once in his or her life.

The research project has been funded by several institutions: the Italian Ministry of Education, Universities and Research (MIUR), the Fulbright Commission, the French Ministry of Justice, the University of Florence and the University of Bologna. My warmest acknowledgements go to all them. Colleagues and anonymous referees from Ashgate who addressed me their remarks and criticisms have been extremely helpful to me. I am also grateful to Alison Kirk, who positively received, then enthusiastically supported this editorial project.

Preliminary versions of some parts of this book have been discussed in international peer-reviewed conferences and partly published in peer-reviewed journals and in edited books. 'New Judicial Accountabilities', which is a paragraph placed in the first chapter of this book, has been published in a slightly different and more detailed version in *Comparative Sociology*, in the special issue on 'Rule of Law and Democracy', edited by Luigi Palombella and Leonardo Morlino; 'European Standards of Judicial Governance' has been discussed in Berlin at the Law and Society Association Conference and published in a early version in *Judicial Reforms in Central and Eastern Europe*, edited by Ramona Coman and Jean Michel De Waele.

*vuelvo con los ojos cansados a veces, de haber visto la tierra que no  
cambia, pero al entrar tu risa sube al cielo buscàndome y abre para mi  
todas las puertas de la vida*

*To Jannis*

# List of Abbreviations

ABA	American Bar Association
ABA CEELI	American Bar Association's Central Europe and Eurasia Law Initiative
BEI	Banque Européenne pour l'Investissement
CBOS	Centrum Badania Opinii Społecznej (Centre for Public Opinion Research, Poland)
CCJE	Consultative Council of European Judges
CCPE	Consultative Council of European Prosecutors
CEPEJ	European Commission for the Efficiency of Justice
CLS	Centre for Liberal Strategies
CSD	Centre for the Study of Democracy
EAW	European Arrest Warrant
EBRD	European Bank for Reconstruction and Development
ENCJ	European Network of Councils for the Judiciary
ENM	Ecole Nationale de la Magistrature
ENJT	European Network for Judicial Training
ERA	Academy of European Law (Trier, Germany)
EUI	European University Institute
EUMap	EU Monitoring and Advocacy Programme
EUSA	European Union Studies Association
GRECO	Group of States against Corruption
JRI	Judicial Reform Initiative
ICER	International Centre for Economic Research (Turin, Italy)
IDLO	International Development Law Organization
IO	international organization
IRZ	German Foundation for International Legal Cooperation
NGO	non-governmental organization
NHC	Netherlands Helsinki Committee
OCSE	Organization for Security and Cooperation in Europe
OECD	Organization for Economic Cooperation and Development
PHARE	Poland and Hungary: Assistance for Restructuring their Economies [as at foundation in 1989; now covering 10 countries]
SCM	Superior Council of Magistracy
UACES	University Association for Contemporary European Studies
UNDP	United Nations Development Programme
USAID	United States Agency for International Development

# Contents

<i>List of Tables</i>	<i>vii</i>
<i>Acknowledgements</i>	<i>ix</i>
<i>List of Abbreviations</i>	<i>xiii</i>
Introduction	1
<b>1 Logics of Action, Hypotheses and Impact</b>	<b>11</b>
Glimpsing Something New Under the Western Sun	11
The Supremacy of Law and the Impartiality of the Judiciary:	
Three Ideal-Types	16
New Accountabilities in the Judiciary	24
European Judges Under External Influence	34
Hypotheses, Cases, Data, Expected Results	41
<b>2 European Standards of Judicial Governance</b>	<b>49</b>
<i>A Sui Generis</i> Rule of Law Promoter	49
The Council of Europe: Partner ‘for Prestige’	56
Enforcing Professional Accountability Abroad	62
Normative Inputs and Accountabilities	70
New Situations of Action: The Expansion of Domestic	
Legal Systems	85
<b>3 Beyond Legal Accountabilities: Poland, Hungary</b>	
<b>and Czech Republic</b>	<b>89</b>
(Un)Even Combinations of Old and New	89
The Champions of Legal Accountability	92
Self-restraining States	97
Reshaping the System	102
Professional Accountability	105
The Quest for Trust	114
Intermediate Conclusions	117
<b>4 Highlights and Shadows in Bulgaria and Romania</b>	<b>121</b>
Bringing Back the External Agents	121
The Introduction of Mechanisms of Legal Accountability	124
Reshaping the States Through the Judicial Reforms	128

The Emergence of a Neo-Latin Model	134
Professional Accountability	146
The Quest for Transparency	151
Intermediate Conclusions	154
<b>5 Judicial Governance as a Mirror of European Constitutionalism</b>	<b>159</b>
Introduction	159
‘Refracting’ External Inputs: Beyond Conditionality	161
Institutions as Arenas of Socialization	166
Reference Groups: More on Professional Accountability	174
From Rule of Law to Quality of Justice	181
Patterns of Accountabilities in the New Europe	186
Conclusions	193
<i>Bibliography</i>	<i>197</i>
<i>Index</i>	<i>225</i>

# 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).<sup>1</sup>

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).<sup>2</sup> 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’.<sup>3</sup> 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).

---

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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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).