

## **Judicial independence is not some sort of property of judges that shields them from accountability**

As a preface to my answers, I have never worked in Bulgaria, so I have no first-hand knowledge of the legal/judicial culture there. My work in Slovakia, Czech Republic, Georgia, Ukraine, and Kosovo have taught me that post-communist, emergent democracies are far from being all alike, so I am careful not to generalize as if they are all the same. One of the key points of the article I wrote with my Slovak colleagues is that the EU/EC should not have treated even the Visegrad-Four as if they were all (nearly) alike when they made their ways into the EU, promoting a common judicial independence scheme. As a consequence, my comments are not specifically about Bulgaria because I am neither so bold nor so foolish as to think I know enough about a country where I have never worked to comment specifically.

**Legalworld Question:** Professor Moliterno, you are renown specialist of Judicial Ethics, Lawyer Ethics, Professional Responsibility. Where do you think lies the balance between the accountability and the independence of the judicial system in general?

Start with the current example of a major country that lacks judicial independence: China. In China (as I understand was true in USSR and in most Warsaw Pact countries, it is well understood that the state/party officials have the power to tell judges how to decide cases. Until recently in China, and previously in at least some of the communist countries of central and eastern Europe, judges did not have to be trained in law at all. Rather they understood their role as implementers of party orthodoxy and doctrine. They were better at this task when they were either military or political officials rather than those trained to decide cases by independent legal analysis. Such a total lack of judicial independence can never be allowed to exist in a democratic country that cares about the rule of law.

But the amount of independence that judges and prosecutors should have from other state officials is a matter of degree. In all democratic, rule of law countries, state officials have some input NOT in individual judge's decisions, but in the overall management and composition of the judiciary. The formulas are different in different places but non-judge state officials have input into who will be the new judge when there is a vacancy, how much will the budget be for judicial activities, and what are the rules for disciplining a judge who acts inappropriately. So while we should accept zero influence by state officials with judge's decisions in particular cases, we should accept that judges and the judiciary in general are not entirely independent of state input. Obviously, a legislative body makes the law that judges must follow. These are not threats to judicial independence.

Further, judicial independence is not some sort of property of judges that shields them from accountability. Instead, judicial independence is one aspect of what allows judges to give impartial decisions to people who come to the courts and as a result judicial independence is actually an instrument of fair justice for all the people of a country. It does not "belong" to judges for their own benefit.

Independence needs to be balanced with accountability in at least two forms. First, there should be a clear, detailed set of rules (they may be in law or in conduct codes or both) that govern good behavior by judges. These laws/codes must be enforced fairly and without corruption or bad motive. Second, to be accountable, judges must explain their judgments in writing clearly

and thoroughly so that the parties, the lawyers, the media, and the people can understand. I do not mean that the decisions reasoning must be without technical terms of the law. Nor do I mean that judges should meet with media to explain decisions. I mean the decisions themselves, within reason in compliance with legal norms, should be written and easily accessible and thoroughly explained.

**Legalworld Question:** Bulgaria being a post communist country still fights to prove before the world and especially before the European Commission that we have a Rule of Law. After joining the EU in 2007 both Bulgaria and Romania have to comply with the Cooperation and Verification Mechanism as a transitional measure to assist the two countries into their efforts to remedy these shortcomings. Would you consider that the EU model of judiciary is the most exemplary one?

I think that the model of a Judicial Council, made up by majority or close-to-majority of judges can be very effective and sound if other institutions and cultures are in place to balance the independence of the judiciary. This has not always been the case in some post-communist EU entrants during that general time period. For example, if essentially the same judges were in charge of the judiciary before and after communist times, they would have had to transform themselves from judges who were not so independent to ones that are very independent. In some places, this produced a judiciary culture in which the judges went from being people who could be ordered to obey state command to those who were in charge of giving those commands. This was very natural and predictable. As a consequence, the judges became quite independent of executive branch officials but the court presidents or the leaders of the judicial council, for example became those who would control other judges in sensitive cases. This sort of internal corruption in the judiciary can be just as damaging to the state as the former kind in which party or executive branch officials could tell ordinary judges how to decide cases. In such situations, the leaders of the judiciary shouted “judicial independence” when their conduct was questioned by others including government officials and media and parties to cases.

The EU model can be good. But the leaders of the judiciary needed to be people who wished to conform the judicial branch to the rule of law instead of people who wished to consolidate power within a judicial leadership cohort.

**Legalworld Question:** In Bulgaria are about to happen some real changes and reform in the accountability system regarding the high rank magistrates. Those changes imply creating a special procedure for initiating a penalty procedure against the Presidents of the Supreme Court of Cassation, the Supreme Administrative Court and the Chief Prosecutor. Some opponents of the amendments find that such an accountability procedure should apply not to all high magistrates but only to the Chief Prosecutor. Leaving the other two apart. Do you think that such accountability measures should apply to all high ranking magistrates?

I cannot knowledgeably comment on the specifics of these proposals without learning much more about Bulgarian legal culture. But in my judgment, accountability structures should apply to all judges and all prosecutors.

**Legalworld Question:** Is the accountability of judges as important as the accountability of prosecutors?

Certainly yes.

**Legalworld Question:** What is your opinion in general for creating accountability mechanisms for high ranked magistrates? Do you find it is necessary for the balance and existence of the Rule of Law ?

Without judicial and prosecutorial accountability, judicial independence can be used to foster corruption among judges and prosecutors, harming the people and the country in the process. A successful country cannot exist without both judicial and prosecutorial independence and accountability, in carefully measured balance that depends on local culture and conditions.