Impartiality and Independence: Misunderstood Cousins

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By James E. Moliterno

Like most carefully defined concepts, judicial independence exists as a matter of degree. In the narrow (and probably more precise) sense, independence is about insulation from interference by the electorate and by the 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 the consequences can be grave.

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. 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. Is independence a fundamental attribute of a judge? What is independence in the judicial sense?

1 Vincent Bradford Professor of Law, Washington & Lee University. 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, 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.

Another way of seeing the relationship is to say that 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 judge, but is a desirable attribute if the judge is meant to check the other branches.

One major process attribute designed to foster impartiality is the prohibition on *ex parte* communications. *Ex parte* communications are communications with either party to a case concerning the case in the absence of the other parties; they are forbidden by the *ABA Model Code of Judicial Conduct* and are not permitted under the APA in formal adjudications. The basic concepts of fair hearings are founded on contemporaneous opportunities to be heard in response to an opposing party’s factual and legal assertions. *Ex parte* communications undermine that concept by allowing one party access to the decision-maker in the absence of

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others. A judge so exposed to the unchecked arguments of one party experiences a threat to the judge’s impartiality, not independence, unless that party happens to be the government, in which case both concepts are implicated.

Dispute resolution structures other than the ex parte prohibition foster impartiality by removing the judge’s personal interests from the equation. The classic impartiality case\textsuperscript{5} illustrates: During the prohibition era, the General Code of Ohio gave mayors, among others, authority to try without a jury cases of persons charged with unlawfully possessing intoxicating liquor in violation of the state’s Prohibition Act. Defendant Tumey was tried and convicted before the mayor of the village of North College Hill, Ohio for such a violation. Tumey appealed his conviction as a violation of the due process guaranteed him under the Fourteenth Amendment of the Constitution. Fines collected upon conviction under the statute were divided between the state and the village. Under a local village ordinance, deputy marshals, detectives, prosecuting attorneys, and the mayor were compensated from the village’s portion of the fines above their normal salaries for their part in securing a conviction. Since no fees or costs in such cases were paid to the mayor, except by the defendant if convicted, there was no way by which the mayor would be paid for his service as judge if he did not convict those who were brought before him.\textsuperscript{6} The Supreme Court held, “[I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest

\textsuperscript{5} Tumey v. Ohio, 273 U.S. 510 (1927).

\textsuperscript{6} Id. at 520.
in reaching a conclusion against him in his case.”7 Additionally, the mayor was the chief executive of the village, and thus responsible for the finances of the village. The statute offered the village officers “a means of substantially adding to the income of the village to relieve it from further taxation.”8 “A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.”9

There are at least three underlying forms of impartiality threat. Consider this deceptively simple hypothetical that I use when doing judicial training on impartiality:

A case is filed in Judge’s court in which Plaintiff claims that he used an over-the-counter herbal remedy that claims to relieve pain. Plaintiff claims that he became seriously ill from using the product. Six months prior, Judge’s spouse used the same product and became very ill. Can Judge be impartial?

Most judges in my training agree that it will be difficult for Judge to be impartial. Exploring their reasons for concluding so, they suggest the following threats to impartiality. First, Judge has been exposed to factual material regarding the case outside the court process of accepting evidence. Judge is likely to believe he knows the answer to the causation question before the litigation really begins. Judges who know or believe they know facts of the case before the litigation begins may have difficulty being impartial. Second, Judge may begin the case with some anger toward the product maker/defendant. To the extent Judge believes the product caused his or her spouse’s illness, Judge may harbor dislike for the product-maker. We understand and accept that judges may form opinions about the parties during litigation because of the way the

7 Id. at 523.
8 Id. at 533.
9 Id. at 534.
parties conduct themselves. But when a judge begins the case with dislike for a party, that judge may have difficulty being impartial. Third, a ruling in the Plaintiff’s favor may set the stage (explicitly in a common law system and more subtly in a civil law system) for Judge’s spouse to obtain compensation from the Defendant for his or her own illness. Judges who have a personal or family financial stake in the outcome of a case have difficulty being impartial.

By contrast to the ever-necessary judicial attribute of impartiality, some judges are meant to be more independent than others, without diminishing the sense in which the less independent judge is a judge.

Properly understood, judicial independence is a wonderful thing—an essential 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. Judicial independence is not permission for judges to engage in wrongdoing. It is not a defense to the requirement of making transparent decisions.

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.
Judicial independence belongs to the people of a nation, 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 a property of the judges themselves, but rather an instrumental concept that favors justice and fair application of the law. Judicial independence belongs to the public, not the judges.

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.

In nations where judicial independence is properly understood and followed, justice is not perfect, but it is expected. Failures of justice, corruption, are unusual even though they do happen. Decisions are made with which some people disagree, and a small 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 charged with crimes
and punished when they make decisions based on unlawful motives, for example, to benefit the economic interests of themselves, their friends, their family.

Judicial independence is one side of a valuable coin; the other side is accountability. Without the accountability side of the coin, the public cannot believe in justice. The public sees judges who do as they please and hide their improper motives and acts behind a shield of judicial independence.

Even the most independent U.S. judges, Article III judges, are not completely and literally independent.10,11

“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


11 For example, the judiciary was threatened with impeachment and restrictions on their judicial independence following the case of a Florida woman, Terri Schiavo. Schiavo lapsed into a permanent vegetative state after a cardiac arrest deprived her brain of oxygen for an extended period. For fifteen years, a feeding tube provided artificial nutrition and hydration to keep her body alive. In early 2005, federal courts refused to get involved after lower courts ordered doctors to remove Schiavo’s feeding tube. Then-House Majority Leader Tom DeLay suggested impeachment for those federal judges who did not intervene in Schiavo’s case, warning they would be responsible for their behavior. DeLay stepped back from those warnings somewhat, but still instructed the House Judiciary Committee to examine the actions of federal judges in the Schiavo case and to recommend possible legislation. See, Carl Hulse & David D. Kirkpatrick, The Schiavo Case: Political Strategy; Even Death Does Not Quiet Harsh Political Fight, 4/1/05 N.Y. TIMES, April 1, 2005, at A1; Sheryl Gay Stolberg, Majority Leader Asks House Panel to Review Judges, N.Y. TIMES, April 14, 2005, at A1.
misconduct, they may be disciplined.\footnote{Charles G. Geyh, Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts, 78 IND. L.J. 153, 159 (2003).}

“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”\footnote{Id.}; that is what makes article III judges independent. Why are they not completely independent? Because “increased judicial independence is not always better.”\footnote{Frank B. Cross, Thoughts on Goldilocks and Judicial Independence, 64 OHIO ST. L.J. 195, 195 (2003).} Judicial independence is not an end in itself; it is a means to an end,\footnote{See Burbank, supra note 10, at 323.} and it ought to be curtailed when it ceases to be conducive to that end.\footnote{See Geyh, supra note 12, at 163 n.29 (“that judicial independence is not an end in itself, but an instrumental value that serves another end”).}

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.”\footnote{Geyh at 162. See also John A. Ferejohn and Larry D. Kramer, Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint, 77 N.Y.U. L. REV. 962, 962 (2002) (that the end of independence and accountability is “a well-functioning system of adjudication”), Frank B. Cross, Thoughts on Goldilocks and Judicial Independence, 64 OHIO ST. L.J. 195, 195 (2003), at 195 (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) (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) (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).}
a third branch of government and check the other two, but at the same time we do not want the judiciary to be able to run amok, doing whatever it wants. So we guarantee judicial tenure and salary, but we do not guarantee that the entire judiciary will be free from any checks from the other branches. We see, then, 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 accountability checks on the courts are almost never used, even though they are technically available to Congress, 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 accountability. How can we resolve this tension, keeping judges accountable to the other branches while not beholden to them?

Geyh distinguished between three types of independence in order to help explain how the Constitution, and the way we have interpreted it, does so. There is “doctrinal” independence (which is simply the independence which article III makes indisputable), “functional”

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18 The desirable degree of accountability, of course, depends upon our theory of judicial decisionmaking, as Elizabeth Larkin notes, supra note 17, at 66-67 (that the importance of judicial accountability over and against judicial independence depends on “what political and social role a judge should play”). The debate over judicial activism is crucial on this point; here, however, it is not at issue.

19 Geyh, supra note 12, at 164.

20 Larkin, supra note 17, at 65.

21 Burbank has argued that this is not really a conflict, but rather simply another side to the judicial coin. However, his own phraseology establishes that the two balance one another, and so the distinction is most probably solely rhetorical; Burbank merely means to say that the tension between independence and accountability is not a conflict, but a balancing. See Burbank, supra note 10, at 330–332.
independence (which is that independence which is at the sufferance of Congress), and
“customary” independence (which is the independence granted by the customs of interfering or
not interfering in constitutionally permitted ways with judicial independence).

The political branches struck a constitutional balance over time between judicial
accountability and independence.\textsuperscript{22} This balance, which is represented by customary
independence, can be altered by the political branches.\textsuperscript{23} Similarly, the courts may alter the
scope of doctrinal independence.\textsuperscript{24} 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.”\textsuperscript{25} 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,\textsuperscript{26} just as courts occasionally do.

Article III judges, at least when thought of as members of courts made up of several
judges (the Supreme Court, the courts of appeal, and the district court panels) are themselves the

\textsuperscript{22} Geyh, \textit{supra} note 12, at 165.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
product of a combination of executive and legislative choice. 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.

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 (adjusting court size, reducing court budgets, impeachment for unfavorable decisions) has been gradually abandoned, forming the “customary” independence of article III courts. So the appointment process stands as the only remaining check on article III independence, ensuring the judiciary’s

27 Michael J. Gerhardt, The Federal Appointments Process: A Constitutional & Historical Analysis, Duke University Press, p. 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.)


29 Geyh, supra note 12, at 220 (“if Congress is to reclaim ground lost to the Supreme Court . . . it will be via the appointments process”).

30 Id. at 211 (that Congress restrains itself against limiting the court except in the appointments process).
integrity as a third branch of government so that it can serve as a check on the two others, and its own accountability.  

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 long 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, 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 as 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

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31 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.


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

There are two sets of system attributes that support independence.

One set is structural: federal judges are selected through a process that involves both of the other branches; they have life tenure; their salary cannot be reduced. 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; 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  

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34 In Virginia, judges of state courts of record are elected by a majority vote of each house of the General Assembly (GA). Va. Const. Art. 6, § 7. Candidates must go through steps, however, before they are voted on by the GA. First, candidates interview with a panel of citizens and lawyers. Then, the candidate seeks support from her bar associations and must win nominations from her Senate and House representatives. The leading candidates then interview with the Senate and House Courts of Justice committees. After the committees make their top selections, the Senate and House vote on the judgeships. See Katrice Hardy, GOP Leaders Hope to Change How Judges are Reappointed, ROANOKE TIMES & WORLD NEWS, January 27, 2004, at B3. Virginia’s system of judicial appointment has received criticism, as shown in the case of Virginia Askew, a Newport News Circuit Judge denied a second term in 2003. Due to lawyers’ complaints about Askew’s demeanor and work habits on the bench and due to Askew’s failure to disclose during the judicial review process a complaint filed by a former city employee alleging sexual harassment and retaliation by Askew, the Senate and House Courts of Justice committees found Askew was not qualified for reappointment. The decision not to reappoint Askew resulted in allegations of discrimination based on race and sexual orientation, as well as allegations that the decision was politically motivated. More recently, legislators have been working to improve the judicial appointment process, including proposing a reform that would require independent performance evaluations of judges up for reappointment. See Hardy at B3; Robert McCabe, Lawmakers Deny 2nd Term to Judge Racism Charged in Controversial Decision on Newport News Jurist, VIRGINIAN-PILOT & LEDGER STAR, January 23, 2003, at A1.
parte communication; they are not to be the recipient of extravagant gifts; 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 as much as
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,

35 Felter distinguishes between “functional” and “practical” independence. He says functional is the
personal trait of being independent despite structures that disfavor independence. Practical independence refers to
the institutional structures that foster independence. Hon. Edwin L. Felter, Jr., Special Problems of State
when the judiciary is expected to function in a counter-majoritarian manner.\textsuperscript{36}

\textbf{Judicial Independence in Europe}

Several international organizations have developed standards to help states understand what it means for a judicial system to be independent.\textsuperscript{37} The standards produced by these international organizations focus on certain structural characteristics.\textsuperscript{38} 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.\textsuperscript{39}

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.\textsuperscript{40} 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

\textsuperscript{36} Michael E. Solimine, \textit{The Future of Parity}, 46 WM. \& MARY L. REV. 1457, 1491-1494 (2005) (Symposium: Dual Enforcement of Constitutional Norm)(noting that though “there is indeed increasing evidence that many elections for state supreme courts are hotly contested, costly, and highly politicized affairs, … it is not unfair to call these exceptions to the rule of low-profile [state] judicial campaigns. The majoritarian pressures of the exceptions are indeed troubling, but they do not support a conclusion that state judges, at any level, are systematically forfeiting federal constitutional rights due to a fear of the electorate.”).

\textsuperscript{37} EU ACCESSION MONITORING PROGRAM, OPEN SOCIETY INSTITUTE, MONITORING THE EU ACCESSION PROCESS: JUDICIAL INDEPENDENCE 17 at 26–31 (Cent. Eur. Univ. Press 2001). (citing several sources of standards of judicial independence including the EU, ECHR jurisprudence and other international organizations).

\textsuperscript{38} \textit{Id.} at 27.

\textsuperscript{39} \textit{Id.} at 27

\textsuperscript{40} John Adenitire, Judicial Independence in Europe the Swedish, Italian, and German Perspectives at 3 (unpublished project).
Europe and other European Union member states as compared to its development in Central and Eastern Europe.

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

Judicial independence was adopted among “old” E.U. member states as a response to historical and cultural events that changed the state’s 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.\(^{41}\) 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.\(^{42}\) In other Western European countries, the idea of judicial independence developed as a reaction to previous totalitarian rule. Both Spain and Italy, for example, developed strong, autonomous judiciaries after the fall of fascism in Italy and the end of Francisco Franco’s reign in Spain.\(^{43}\)

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 in 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.


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.44

In order to maintain independence, threats of violence to public officials and bribery are criminalized.45 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.”46 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.47

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.48 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.49

44 THE INSTRUMENT OF GOVERNMENT [CONSTITUTION], art. 3 (Swed.).
45 ADENITIRE, supra n. 40 at 7.
46 Id.
47 Id.
48 Id. at 8.
49 Id.
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.\(^{50}\) 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.\(^{51}\) 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.

**Judicial Independence in Italy**

Italy’s judiciary is extremely independent. Italy’s Constitution states that “[t]he judiciary constitutes an autonomous and independent branch of government not subject to any other.”\(^{52}\) Among civil law countries, Italy is ranked as one of the highest in terms of protections established to ensure judicial independence.\(^{53}\) 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 a made up of judges and has complete managerial control over the employment, assignments, and discipline of judges and prosecutors.\(^{54}\) 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.\(^{55}\)

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\(^{50}\) ADENITIRE, *supra* n. 40 at 9 (If the case is taken to the Court of Appeal, the panel is comprised of three permanent judges and two lay judges).

\(^{51}\) Id.

\(^{52}\) CONSTITUZIONE DELLA REPUBBLICA ITALIANA [CONSTITUTION], art 104(1) (It.).

\(^{53}\) Giuseppe Di Federico, *Independence and Accountability of the Judiciary in Italy. The Experience of a Former Transitional Country in a Comparative Perspective* 2 (modified version of an article that was published in Andras Sayo (Ed) Judicial Integrity, Kroninleklijke Brill, Leiden, NL.).

\(^{54}\) ADENITIRE, *supra* n. 40 at 14.

\(^{55}\) Id. at 15.
Italy has a strong, independent judiciary but this independence has been achieved at the cost of efficiency and accountability. To increase judicial independence, evaluations of a judge’s performance have been eliminated. The CSM has also put policies in place to minimize outside supervision of judges. 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. 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.

Judicial Independence in England

England has what some consider the “hallmarks” of an independent judiciary. Judges in England are afforded security of tenure, fiscal independence, impartiality and freedom from executive power. 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. However, this relationship does not appear to be problematic. Also, judicial impartiality seems to be maintained.

57 Giuseppe Di Federico, Independence and Accountability of the Judiciary in Italy. The Experience of a Former Transitional Country in a Comparative Perspective 9 (modified version of an article that was published in Andras Sajó (Ed) Judicial Integrity, Kroninlekijke Brill, Leiden, NL.).
58 Id. at 10.
59 Id.
60 Id.
62 Id.
simply by “[t]he formality of English law, a relatively small bar, a divided profession, and the orality of English courtroom procedure.” 64

On a structural level, the English judiciary is not a co-equal branch of government, as is the case in the United States. 65 The English Constitution states that the judiciary is subordinate to Parliament. 66 Parliament has the ability to make or end law and no future court decision can change an existing law. 67 This type of relationship between Parliament and the judiciary may limit the decision-making ability of the judiciary. 68 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. 69 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. 70

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. 71 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. 72 As a result of these allegations, radical

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64 Id. at 604.
65 Id. at 608.
68 PARAU, SUPRA N. 66 at 7.
69 Id.
70 Id. at 8
72 Id. at 117.
reforms have taken place in the 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.\(^{73}\)

**Judicial Independence in Central and Eastern Europe**

Judicial independence has had trouble developing in Central and Eastern Europe. Under communist regimes, judicial independence and separation of powers were nonexistent and judges were considered loyal servants to the party in power.\(^{74}\) After the fall of communism in the late 1980’s, states in Central and Eastern Europe sought to form independent and democratic governments, using governments in the West as a guide. Poland, for example, based their governmental structure off of the model found in the United States by establishing three separate and equal branches of government.\(^{75}\)

Some post-Communist states sought to develop an independent judiciary based on its acceptance 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.\(^{76}\) Similarly, countries seeking accession into the European Union have been pushed toward the establishment of a strong judiciary as a condition of acceptance.\(^{77}\)

\(^{73}\) *Id.*

\(^{74}\) *PARAU, supra* n. 66 at 14–15.


\(^{77}\) *Id.* at 3, 15.
The establishment of judicial independence in Central and Eastern Europe has been challenging. 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. Further, many governmental structures these states have adopted from the West fail to take into 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. The judicial culture in Eastern Europe embodies the perception that judges are simply “well-paid civil servants.” Judges see themselves as a “subservient technocrats” who lack the confidence to make judicial decisions on their own. Although judiciaries in these regions have achieved some sort of structural independence they still lack mentally independent judges. 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 the norm. This type of system forces judges to become subservient to the legislature and does not allow them to think critically on their own. It fosters the same type of judicial culture that was found in communist Europe.

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79 Id. at 2.
80 Id. at 8.
81 Id.
82 Id. at 10.
83 BOBEK, at 8
84 Id.
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.\textsuperscript{85} This perception has led to a public distrust of judges which has inhibited states’ efforts to reduce corruption.\textsuperscript{86} During the accession period, several states seeking accession into the E.U., 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.\textsuperscript{87} In the Czech Republic, Lithuania, and Hungary, stricter screening measures for judges were implemented partially because of the public distrust of judges.\textsuperscript{88}

Another problem states in Central and Eastern Europe 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.\textsuperscript{89} However, looking exclusively toward the West for a proper government model may be problematic. Local culture must be considered in the design. States in the West have had a long time to develop the proper balance between judicial independence and judicial accountability.\textsuperscript{90} In contrast, states in Central and Eastern Europe are still trying to find the right way to transfer


\textsuperscript{86} Id.

\textsuperscript{87} Id.

\textsuperscript{88} Id.


\textsuperscript{90} Id. at 62.
judicial oversight from the executive to the judiciary.⁹¹ These states have also had major problems with establishing a sustainable amount of judicial independence.

In some Central and Eastern European 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.⁹² The executive retains significant power over the judiciary through appointments, influence on oversight committees and budget control.⁹³ 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. Central and Eastern European 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 shield the judiciary from the power of the other branches.⁹⁴ But what has emerged in some Central and Eastern European states is a completely independent judiciary so independent that accountability is almost non-existent.

Complete judicial independence 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.⁹⁵ For example, Romania has a completely autonomous

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⁹¹ Id. at 61.
⁹² Id. at 61.
judiciary. It is controlled by a judicial council with nineteen members. Four of these members are appointed with some influence by the Senate while the other fifteen are magistrates appointed exclusively by the judicial council. Discipline of judges is done exclusively by the judicial council. This configuration makes the judiciary completely isolated from the executive and legislative branches. As a result, Romania has been repeatedly reprimanded by the European Commission for the judiciary’s lack of transparency and accountability. 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. . . .” 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, Stefan Harabin, a period which may be coming to a close with recent election results in Slovakia. The media and NGOs report highly questionable judicial conduct, most of which was made possible by too great a level of judicial independence and too low a level of accountability and transparency.

Conclusion

Judicial independence is a term with many meanings and applications but a singular aura. The reality is that judicial independence is but one means toward the truly crucial end of judicial

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96 Id. at 17.  
97 Id. at 18.  
98 Id. at 17.  
99 Id. at 20.  
100 Łukasz Bojarski and Werner Stemker Köster, THE SLOVAK JUDICIARY: ITS CURRENT STATE AND CHALLENGES Report prepared for the Open Society Foundation, Slovakia (December 2011)
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.\textsuperscript{101}

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.\textsuperscript{102} 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.\textsuperscript{103} 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 Central and Eastern European 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

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\textsuperscript{102} John Adenitire, Judicial Independence in Europe the Swedish, Italian, and German Perspectives 3 (unpublished project).
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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.