

# Foreword

The publication of this volume on judicial capacity complements that of the volume on judicial independence issued in 2001; there is an obvious and close link between the two notions. Justice is a public institution, designed to serve valuable social functions. The way the members of the judiciary and the staff under their authority are selected, promoted, trained, evaluated and disciplined; the way they perform their duties, both individually and collectively; and the way courts are managed are the constituent elements of judicial capacity.

At the same time, each of these areas carries with it an element of *power*, and hence is linked with independence: which persons, which institutions shall control the judiciary? The number of political and social actors is limited: the executive – that is, the Ministry of Justice – Parliament, National Judicial Councils, and the judiciary itself, including its Supreme and Constitutional Courts (as shown by the recent decisions of the Czech and Hungarian Constitutional Courts on judicial reforms) and court presidents. Who decides, and according to which procedures?

In any country judicial reform is bound to be fraught with obstacles, difficulties and delays – and the more so in Central and Eastern European countries, after half a century of Communist rule during which the judiciary, the courts and law itself were debased and used as mere instruments of power. Their rehabilitation in public opinion, and their attainment of real autonomy, require both time and tangible achievements – proofs of their effectiveness and accountability – beyond the black letter of the law. Hence a somewhat disturbing query: who, today, is asking for judicial reform?

The valuable studies contained in this volume are a vivid illustration of a number of paradoxes: profound structural reforms are needed in all these countries in order to provide the judicial system with the capacity to fulfil its constitutional mission according to the requirements of a democratic society. Such reforms require a strong and lasting political will from Governments and Parliaments – but one may ask if such a will really exists, or even how consistent the European Union itself has been in calling for such commitment.

Political actors are naturally reluctant to abandon the many means, legal and *de facto*, by which a judicial system can be influenced or made sensitive to external pressure. The pages that follow contain many concrete and compelling examples of undue discretion, lack of transparency and opaque procedures; equally importantly, they document the need for clearer standards so that States – both as candidates and later as

members – can know what they must do in a democratic society. Governments and Parliaments need to be praised when they try to overcome these obstacles – and encouraged to be bolder and better when they do not.

Last, but not least, attempts at comprehensive reform may meet with another kind of resistance, that of corporatism: the temptation of the judiciary to become an insular and conservative guild opposed to change and accountability – and under the banner of independence.

Advocates of judicial reform face a difficult but necessary task. The useful studies in this volume tend to show that the start has been somewhat late in some countries. 2002 has seen a spate of reforms, perhaps in view of the forthcoming European Council in Copenhagen, when the admission of these countries will probably be decided. One thing, however, is clear enough: much will remain to be done once these States are admitted, especially in selection, training and evaluation; the obligations these States undertake are not obligations of accession, but of membership.

The pages that follow will be a valuable guide for all those involved in this essential field; the Open Society Institute's European Union Accession Monitoring Program and the authors deserve to be praised for making available such a wealth of useful information and assessment. But more importantly, their findings deserve to be read, and acted upon by anyone who is interested in what the Union will become.

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