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Reshaping Governance through Standards.
Lessons from the European Policy of Rule of Law promotion.

Judicial Institutions and Governance

Despite the semantic vagueness that seems to affect nowadays the concept of governance, one may safely say that the concept of “governance” refers to the creation and the enforcement of rules whose main role is maintaining and ensuring the well functioning of a system of collective actions (Mayntz, 1990; Heritier, 1999; Kerver, 2005; Jordan and Schaut, 2006; Rhodes, 1997). To inquire the ways in which work the systems of governance that are named “demo-constitutional systems”, more specific conditions should be added to this general definition. In the demo-constitutional systems of governance the respect of a set of impartial rules and of the principle of equality before the law represent the conditions to be fulfilled in order to transform a general system of collective actions into a demo-constitutional setting (Bellamy, 2005; Palombella, 2009; Piana, 2009). Both these aspects, impartiality of the rules and equality before the law are embedded in the principle of the constitutionalism. If not anything else, constitutionalism is surely about the existence of a limited government, whose boundaries are set down by mean of impartial rules, which turn out to be legitimate in virtue of their impartiality. Law should be therefore applied even when it is contrast with the will of the majority or with the will of the State. Courts play in such a system a critical role. The lack of impartial and independent benches would be fatal to the healthy functioning of a demo-constitutional system of governance.¹

These few introductory remarks justify the choice of focusing on the model of judicial governance that seems to dominate in the EU nowadays. The governance of the judicial institutions may be thought as the assemblage of all those rules, formal and informal, that define competences, roles, and mechanisms of rule enforcement within the judicial field.²

¹ This holds even if surely for good the concept of democracy has a narrower and more specific semantic than the one attributed to the concept of constitutionalism (this is to say that a system of governance may be constitutional, but not necessarily democratic, whereas the other way round, being democratic without being constitutional is not possible).

² The institutional guarantees of judicial independence, which are usually entrenched into the constitution, belong to the realm of the “judicial governance”.

The term of “constitutionalism” is used by European scholars to point out substantial and procedural features of the European architecture (Weiler, 2003; Walker, 2003; Wiener, 2003). However, very little knowledge has been put at the disposal of the scholars to cast light on the relationship that exists between the judicial governance exhibited by the European member states and the European model of constitutionalism. For, if what stated above holds true, the model of constitutionalism promoted or endorsed by the European institutions³ is tightly connected with the model of governance toward which the European institutions are willing of moving in the very next future.⁴ Unquestionably, a comprehensive analysis of the European constitutionalism deserves a more detailed treatment than the one it may receive in the space of one article. However, it may be of some interest to leave the general debate developed about the European constitutionalism on the background and concentrate on a more limited aspect of it. In particular, the question addressed in this paper is not so much which constitutionalism is exhibited by the EU, but rather which kind of constitutionalism comes out from the ideal-type of judicial governance that is promoted by the European judicial networks in which representatives of domestic judicial institutions meet and set down standards of rule of law and quality of justice (Frydman, 2007; Madsen and Vauchez, 2005; Piana, 2007a and 2009). This ideal-type comes out from a process of standard setting deployed in the last decade and involving national representatives of the judicial institutions, presidents of the High Judicial Councils, directors of the Judicial Schools, Presidents of the Constitutional Courts and of the Supreme Courts of Cassation. In brief, it represents a spectacular case of policy coordination which is characterised by a reflexive approach to governance (Rogowski, 2007; Wiener, 2003; Piana, 2006).

The point raised in this paper is the following. By means of an extensive activity of rule of law promotion started at the beginning of the '90s and afterwards by means of a systematic setting of standard of quality of justice the European institutions have – whether intentionally or not is a question of empirical research – impacted the model of governance featured by the European democracies. Indeed, by touching upon the way the courts are governed, the European institutions managed to step into a realm of policy in which so far the national States have been exclusive and proud sovereigns.

³ European institutions are used here to refer to the European Union and the Council of Europe altogether. This choice does not want to neglect or underestimate the difference these two institutions exhibit in terms of legal status.

⁴ The reader should have in mind that the paper does not treat the constitutionalism as an exhaustive account of the governance. Constitutionalism is herein considered as a narrower concept than the concept of governance. This point is developed in the last section of the paper.

Stressing accountability to uncover independence

The constitutional principle states in brief that a political action is legitimate to the extent it does not violate individual basic freedoms.⁵ Therefore the construction of a system of governance in which the constitutional principle is substantially respected is made possible only if this system fulfils two pre-requisites: it should ensure individuals about the effective enforcement of impartial rules and at the same time it should ensure that individual rights are not violated by rulers themselves. One way of implementing this principle is the creation of a system of governance in which social and political conflicts among ruled and between rulers and ruled are settled on the base of general, non retroactive, impartial norms, applied *erga omnes*: *these norms are "the law"*.⁶

Because of the intrinsic failure embedded in any human action, constitutionalism is intimately linked with the idea of the accountability. Indeed, even the most illuminated and insightful ruler might transform in a despotic tyrant. Therefore, any ruler should be checked and held accountable to an authority whose power does not rely on his own will.⁷ At first, judges are accountable to legal norms. Therefore, they can be free to adjudicate independently from any other influence coming from the social and political system. Nonetheless, only if judges *are considered* by citizens as actually impartial actors, they function as a legitimate instrument to settle social and institutional conflicts (Shapiro, 1981). This is the reason why judges should also be subject to a set of mechanisms of control, which ensure citizens that judicial behaviours can be corrected or sanctioned in the case of corruption or in erroneous decisions.⁸

Having these consideration in the background, the judicial systems may be deemed as complex and comprehensive system of judicial accountabilities

⁵ The right to a due process states indeed that any part brought before the bench should be treated without any discrimination and should be protected from any arbitrariness or abuse of power. This general protection also encompasses protection from the abuse of power that might come from the judiciary itself. Thus, judicial power has an intrinsically paradoxical status, because it is the guardian of the other branches of the State (Dahl, 1957; Garapon, 1997), but at the same time the degree of respect of individual basic freedoms it deploys should be checked.

⁶ As Cappelletti, 1983 and Rebuffa, 1992 showed, the concept of constitutionalism is twofold: it points out the limited character of power and, at the same time, it points out the importance of ensuring the fundamental rights of individuals subject to power. Both these goals can be pursued both throughout the establishment of a legally limited government and throughout the creation of a legal system based on the non discrimination and the formal equality of individuals.

⁷ These two different strategies correspond to the division of power (each power has its own mission) and to checks and balances (each power includes a part which depends on the mandate of a other power). The configuration of the institutions turns out very differently in the two cases.

⁸ As mentioned in Voigt, 2005, judicial independence and judicial accountability are not related by a trade off. It is rather the opposite, since a due mechanism of checks and balances ensure citizens on the impartiality of the adjudication.

(Burbank, 2003; Cotterrell, 2007), i.e. complex systems subjected to external and internal mechanisms of control. Besides the concept of judicial independence, the concept of accountability is a pillar of the constitutional principle.⁹ While socio-legal studies emphasised the mutual (and inverse) relationship of judicial independence and judicial accountability, there is weaker tradition stressing the homogeneous nature of these two concepts. At this regard, the words pronounced by Brutus, in the “Anti-Federalist Papers” reveal to us, so to say, the “other side of the coin”: “It is, moreover, of great importance, to examine with care the nature and extent of the judicial power, because those who are to be vested with it, are to be placed in a situation altogether unprecedented in a free country. They are to be rendered totally independent, both of the people and the legislature ... No errors they may commit can be corrected by any power above them ... nor can they be removed from office for making ever so much erroneous adjudication.” The words of Brutus pointed out the fact that the guarantees of judicial independence perfectly mirror the mechanisms that prevent the other branches of the States and the social actors to exercise any undue influence over the judicial behaviour. This is to say that some kinds of mechanisms of control and influence are forbidden. Therefore, the guarantees of judicial independence can be conceived also as mechanisms of *negative accountability* (or a sort of prevention of accountability on behalf of the political and of the social system). Negative accountability means that judges are appointed during good behaviour, that their tenure should protect them from any need that might lead to the acceptance of bribes or to other forms of corruption, that their selection and promotion should be done on “objective” basis. Notwithstanding the “negative” face of judicial independence, which directly refers to the exclusivity of legal accountability of judges (judges are held accountable only to the law), it might be questioned whether accountability in the judicial field might have a more complex meaning.

Over the last decades, the concept of “accountability” has been characterised by a new wave of debate occurred across the disciplinary boundaries. The increasing complexity of policy-making, the impact of the transnational level of norms produced far beyond the control of democratic assemblies, and the mainstream of the new public management diffused among domestic policy makers and international experts (McNeill, 2006), increased the attention given to this concept in public debate. Scholars have put forward different ways to conceptualise accountability. As correctly stressed by Koppelt, this concept has been so much stretched and semantically transformed that scholarship in the

⁹ The main issue faced by political theorists consists into finding the path of rule making and rule enforcement that turn out into a legitimate political order. This is possible if the political order is based on a moderate State. The moderation of the State depends on the capacity of civil society to control political power and on the effectiveness of the mechanisms of political accountability.

social sciences seems to deploy a sort of “multiple accountability disorder” (Koppelt, 2007).

However, accountability is properly meant to be a mechanism of control, which is enacted to ensure the coherence between the behaviours of actors and the prescription embedded in the norms that govern a given social or political field. Saying that an actor is accountable for her behaviour is not only saying that she should pay the costs of a lack of compliance with a set of norms which the actor is supposed to comply with. It also means that an actor may interiorize the norms themselves and exercise a sort of inward looking control on her own behaviours. Seminal works in administrative science and sociology of organization showed to what extent the socialization can create internal mechanisms of accountability (informal) that replace and often complement the formal mechanisms of reward and punishment embedded in the structure of an organization (Simon, 1956; Merton, 1968; March and Olsen, 1989). The life of a political organization is therefore nourished with the enforcement of the norms throughout mechanisms of informal and formal accountability. Moreover, accountability as a mechanism of control is enacted in the outer face of the organization (inter-institutional accountability) and in the inner segments of the organization (intra-institutional accountability).¹⁰

To zoom into the judicial field, accountability may be held as “a condition in which individuals who exercise power are constrained by external means and by internal norms” (Koppelt, 2007). It has something to do with control, which is a way to *bind or to restrain the set of alternative actions* that an actor is allowed to consider before deciding what to do or what to say. In the judicial field, it might be possible to go further and to achieve a more suitable definition of the concept. Even maintaining the attention on the conceptual concept “control versus sanction”, *the judicial accountability might refer to a situation in which judges expects costs and negative rewards in case her behaviour and/or her decisions deviate too much from generally recognised standards*” (Voigt, 2005, p. 4). Thus the description of the mechanisms of accountability should mirror the description of the mechanisms that set costs and benefits faced by judicial actors. Indeed, judges are expected to comply with a manifold set of standards (Sajo, 1996). The compliance with these standards is not always enforced by adopting hard

¹⁰ The separation of power and the balance of power are in this respect two principles that entail a different allocation of mechanisms of inter-institutional accountability among the branches of the State. Whereas the separation of power maximizes the importance of the intra-institutional accountability but recommends the branches of the State to be not accountable one to the other (but almost democratic accountable or legally accountable), the balance of power maximises the importance of the inter-institutional accountability and recommends the branches of the States being mutually accountable.

mechanisms of accountability, such as the mechanisms of selection and promotion, or the mechanisms of disciplinary control. Besides hard accountability (Gein, 2006), judicial actors are subject to a wide array of soft accountabilities, which comprise the obligation of being transparent to the public, responsive to colleagues (and in particular to senior judges), morally honest. In some respects, these soft mechanisms of accountability can be considered as more powerful and effective than the hard ones might be. Indeed, often they are enforced through implicit mechanisms of reputational costs (Baum, 2006), which can be reconstructed by a policy maker with many difficulties and therefore changed or reformed. Furthermore, soft accountabilities are strongly related to legal culture, both internal and external (Cotterrell, 1991). In fact, the expectations that citizens (external culture) and the legal actors (internal culture) have regarding how a judge should behave, to what extent she/he should intervene into pre-trial proceedings, in which manner she/he is allowed to communicate to the public and the media, to what extent she/he is allowed to refer to extra-legal principles during her/his legal reasoning, all these aspects are evaluated according to the cultural status quo of a socio-political system. An important part of the reputational costs faced by a judge is related to the informal evaluation to which she/he is subject by the “group of reference”, i.e. the group composed by people to which a judge feels to belong or to be affiliated (Guarnieri, 2007).¹¹ Furthermore, judicial actors face cognitive costs. By arguing in favour of his decision, a judge deploys a legal reasoning on the base of the arguments that he expects might be accepted as reasonable by colleagues and by the public. The costs raised by a “dissonant reasoning” are very important in the revision of a judicial argument. Thus, even at the cognitive level, judges are subject to a mechanism of accountability to an ideal-type public (Baum, 2006).¹²

This complex picture figures out a situation where judges expect costs and negative rewards if their behaviour does not respect a set of several different standards. Some of them are weaker and informally enforced, while some of them are harder and legally binding. Thus, following Mark Bovens (Bovens, 2006), five

¹¹ Scholars have pointed out the extent to which consensus is important in driving the agenda setting of supreme courts (see for instance the work on the US Supreme Court, by Epstein and Knight, 1998; on post-communist courts, Boulanger, 2003).

¹² This view is based on an implicit agency model which encompasses instrumental and cognitive rationality (Piana, 2005). We assume that the motivations that drive judicial behaviors are of a twofold nature: the first one, instrumental, is interest-seeking; the second one, cognitive, is oriented to achieve a situation of cognitive coherence, at least with regard to the beliefs and the arguments that actors are ready to defend and advocate in public. This view, which has become quite widely accepted in the scholarship on constitutional courts (Elster and Slagstad, 1998), seems to point out a mechanism of self-restraint that works once judges have learnt to think according to some common way of reasoning and on the basis of common and accepted legal ideologies.

types of accountabilities are suggested and described in the following: 1) legal; 2) administrative; 3) political; 4) social; 5) professional (see Annex).

The concept of *legal accountability* is related to the mechanism of legal control. It is guaranteed by the judicial review¹³ of statutory law, by the mechanism of appeal to the higher courts, by the procedural guarantees of due process and by the formal relationship that exist among the norms embedded in a legal system.

Administrative accountability refers to fact that an institution should be accountable to a standard of efficiency. The administrative accountability ensures that the judiciary allocates the resources – in terms of money and of time – in an efficient manner, managing the case-flow in a way that speeds up the judicial proceedings and managing effectively the human resources available into the court (see, for a comparative view on Europe, Fabri and Contini and Mohr, 2007). Nowadays, the introduction of court management systems represents a way to ensure administrative accountability at the level of judicial offices (courts and prosecution offices) .

Institutional accountability refers to the appointment, the selection, the promotion and the disciplinary control of judicial actors. Also, it refers to the composition of the board of the judicial council, which reveals the political accountability to which the judicial council is subject during its mandate. These means of control can tackle the problem of providing citizens certainty with regard to the competence and impartiality of the judicial staff, since they formally guarantee the objectivity of the criteria used to govern the judicial staff.¹⁴

Social accountability covers any kind of control exercised by private actors, in particular by civil society organisations and by citizens. Societal accountability is made possible today by using a number of ICT tools provided by the court information management systems. As recently pointed out by several scholars (Gein, 2006; Voermans, 2007; Langebroek, 2005), these tools allow the public to monitor judicial proceedings, their length and their lawfulness, and decrease enormously the costs faced by the public to find information needed in order to appeal to the court. A further, but less diffuse means used to tackle the problem of making the judiciary more sensitive to the demands of the users is the external audit, which creates a process of surveying the citizens' trust and satisfaction about the judiciary.

¹³ Even if we can't enter into details here, judicial review does not only exercise a mechanism of legal accountability. It might be possible – and usually it is the case – that the constitutional courts adjudicate also on the basis of extra-legal principles (see for instance, the principles of proportionality and necessity followed by the European Court of Justice, Stone Sweet, 2000).

¹⁴ As stressed at the beginning of this chapter, the criteria used to select the judicial staff vary from a political system to another. On recruitment, training and selection, see Di Federico, 2006.

Professional accountability refers to the control exercised by peers on the base of their knowledge and expertise. They also transmit and enforce legal ideologies. Professional accountability is strongly linked with the allocation of moral and cognitive costs. In a way, if a judge wishes to be held in high consideration by its colleagues, she will be encouraged to argue and to decide according to the main streaming doctrine. This also has also an impact on the career path followed by individual judges.

The indicators we figure out for the assessment of these five types of accountability are presented in annex.

The reconstruction of the accountabilities put in motion within the judicial governance and in between the judicial system and the social system provides a description of the configuration of the power of control that is exercised by many different actors all of them having an impact upon the judicial arena. All of these accountabilities, which are partially entrenched in the constitution – work also behind the formal institutional design. Indeed, the mechanism of actual control exercised by any of the sources of norms mentioned above – legal coherence, administrative efficiency, political aims, social aims, professional ethics and expertise – are “living institutional orders” (La Torre, 1999). To assess the degree of respect of the constitutional principle featured by a system of governance, the accountabilities should be considered as *they work in practice*. Our claim is that the concept of accountability, in the sense of “power to control and sanction behaviour”, provides us with a powerful analytical perspective to explain also the logic of action of judicial policies. Indeed, starting from this analytical perspective, one might achieve a better understanding of the logic of the (re)distribution of power when a judicial reform is adopted. Furthermore, one can achieve a better assessment of the actual implementation of the constitutional principle. In fact, the implementation depends on the mechanisms of accountabilities to which the judicial actors are subjected, not only within the judicial branch, but also outside, throughout the interaction they have with social forces. *The institutional guarantees of the judicial independence are therefore just a part of complex pattern of governance, where independence depends on how accountabilities work: so to say, “the judicial accountability is yin to the judicial independence yang”* (Geyh, 2006, 7).

The Row Material of the European standard setting: Domestic Ideal-Types

The type of constitutionalism featured by a country is strictly related to the mechanisms adopted to ensure the judicial independence and the impartiality of adjudication (Rebuffa, 1993). Indeed, in each type of constitutionalism, the role played by the judicial branch reflects a specific character that is coherent with the

view that this type constitutionalism has of the law and of the relationship that should exist between law and politics. In continental Europe, it is possible to identify two ideal-types of constitutionalism, the French and the German model.

French constitutionalism recognizes in the majoritarian voluntary (the will of people represented into the Parliament) the first and definitely most important source of legal norms. The legitimate law is thus the positive law, law “posita” by the will of people. In this context, the judiciary plays a minor role, since it is asked to enforce the rules in a just way by a strict application of legal norms produced in the Parliamentary Assembly. Judicial independence is guaranteed by ensuring that adjudication is carried out by strictly applying statutory law (Pasquino, 1994).¹⁵ The main mechanism used to make judicial behaviours coherent with obligations set out by the majoritarian assembly is the bureaucratic judicial training. Judges are selected according to the same model of recruitment used for civil servants, and are socialised into an *esprit de corps*, which ensures that their behaviours will be consistent with the criteria defined by senior justices. These latter are vested with the power of guaranteeing the coherence of the legal system. French constitutionalism recognises a primacy to the Court of Cassation, which represents the highest jurisdiction of the judicial system. Neither discretion nor arbitrariness in the adjudication are admitted by the French conception of the constitutional State.¹⁶ The French system experienced a first deep change of judicial institutions right after the end of the Second World War. The constitution issued in 1946 established the Conseil Supérieur de la Magistrature¹⁷, a truly autonomous institution of governance, whose members include in part representatives of the executive branch (the President and the Ministry of Justice), in part members nominated by the legislative chamber. The CSM is thus, even if indirectly, democratically legitimate (its members are legitimated by their nomination on behalf of the democratic branches of the State).¹⁸

The second type of continental constitutionalism is based on the Austro-Hungarian tradition. *German constitutionalism* is strongly attached to the vision of *Rechtsstaat*, which interprets the legitimacy of the law as a pattern of legality (formal coherence with the *Gründnorm*) (Rebuffa, 1990). The State is endowed with the power of issuing the fundamental norm of the legal system.¹⁹ The legal

¹⁵ The primacy of the legislative branch has been enhanced during the French Revolution. See on that point Rebuffa, 1993, p. 29 and Pasquino, 1994.

¹⁶ According to the French version of constitutionalism that was developed during the XIX century, the judge was considered as a *buche de la loi*.

¹⁷ Title IX of the Constitution of 1946.

¹⁸ With regard to the evolution that occurred in the French institutional setting, see Stone 1992 (it also comprised a detailed analysis of the role played by the *Conseil constitutionnel*).

¹⁹ It would be useful to analyze this legal ideology taking into consideration the recent historical evolution of the German constitutionalism (from the Weimar Republic to the totalitarian

accountability of judges functions predominantly as a guarantee of judicial independence. In this system, undue interference is not expected from the executive, but rather from the legislative. The risk of an overwhelming majority which overrules the fundamental rule of the constitutional State is avoided by adopting a strong constitutional mechanism of judicial review. The review is operated by an *ad hoc* institution, specialised in monitoring the formal and substantial coherence of the statutory law with the *Grundnorm*, i.e. the fundamental rule of the State (Kommers, 1993).

In the Southern European countries, parliamentary democracy reveals the most extensive development of judicial insulation. Indeed, after the authoritarian regimes, Judicial Councils were introduced in Italy, Spain, Portugal and Greece in order to insulate judges from the influence of the executive (Toharia, 1976; Guarnieri and Magalhaes, 2001). The *neo-latin model*, which emerged from this evolution, marked a turning point in the development of the European constitutionalism, which exhibits a distinctive tendency toward the following features: 1) a scepticism for the influence of the executive on the judicial field; 2) increasing judicial activism, which emerged over the two last decades (Garapon, 1997); 3) the separation of powers, at least with regard to the division between the executive and the judiciary.²⁰

experience). Curiously, some features of the type of constitutionalism that developed in Germany after the Second World War have been recalled by scholars who are currently involved in the investigation of the legitimacy of so-called European constitutionalism. See Pernice, 1999.

²⁰ Therefore, major changes can be expected from the project of reform promoted by Nicolas Sarkozy, a project that aims at transforming the French judiciary with regard to access to the Conseil constitutionnel and to the composition of the CSM.

TAB. 1.1. Three Ideal-types of *Constitutionalism*

Dimensions		Horizontal (UK and US)	French (later Southern European Countries)	German
Legal Accountability	Appeal	Yes, (<i>stare decisis</i> principle)	Court of Cassation	Courts of Appeal; the Court of Cassation does not exist
	Judicial Review	Does not exist in UK; diffuse and horizontal in US.	It exists in Italy, Spain, Portugal, Greece, it does not exist properly in France.	Yes (formal, centralized, ex post and abstract).
	Legal Education	Yes (not necessarily to become judge in high courts in US).	Yes	Yes
Institutional Guarantees of Judicial Independence	Recruitment, selection and promotion	By the Bar, appointment on merit and prestige	By the State, High Judicial Council in recently developed democracy	By the State Ministry of Justice. In some countries (Northern Europe) the appointment is handled by a Committee (mix composition judicial and non judicial members).
	Mechanism of training delivering	Diffuse and distributed	Centralized, by an judicial institution (judicial school)	Centralized, by the State (Ministry of Justice)
	Disciplinary control, removal	Executive	High Judicial Council (Italy, Portugal and Spain) or High Judicial Council together with the ministry of justice (France).	Ministry of Justice
Professional Accountability	Judicial ethics and deontology	Common to legal actors	Separate from the other public administrative corps.	Common to civil servants and academy

Training	In service; through legal practice	Initial training; judicial school steered by the State	Initial training through practice within public institutions (judicial offices)
Status	As other legal actors (attorneys and clerks).	Separate from the other public administrative corps.	Similar to civil servants

The ideal-types of judicial organization developed in the Western democracies are characterised by different mechanisms of judicial accountability, all of them ensuring the legitimacy of judicial decisions (see tab. 1). These differences not only have an impact on the design of the institutional setting that characterises each political system, but also have an impact on the mechanism of law making, on the extension of the normative creativity allowed to a judge and therefore to the guarantees of judicial independence that have been adopted to ensure the impartiality of adjudication.²¹ Each ideal-type of judicial organization mirrors a specific way of conceiving how law and politics stand one in front of the other, how the constitutional principle should be instantiated in the design of the political institutions. To phrase this point in different terms, the distribution of power within the judicial branch and among the institutions of a political system are but the superficial “face” of a cluster of principles and values that are embedded in the legal and political culture and are embedded in the architecture of the institutions (March and Olsen, 1989; Douglas, 1992).

National judicial institutions reflected in European transnational mirror

The European rule of law promotion has been tailored on the base of two distinctive goals: reshaping the judicial organization of the candidate countries before they entered into the EU and at the same time establishing instruments of coordination among the judicial policies of the member States.

The enlargement of the EU system of governance (Cremona, 2003; Sadurski, 2003) and the creation of a truly speaking European judicial space (European Council, 1999; de Vervaele, 2004) put the transparency, the equality, and the predictability of the judicial decisions at the top of the European political priorities before than making them principled ideas.

²¹ The table reminds the position defended in the book of M. Damaska, which distinguishes between the continental European system where the State is the enforcing agency of rights, and the common law system, where the judicial function is not performed by the State, and therefore is not addressing public policy implementation (see Damaska, 1986).

The EU launched the pre-accession strategy, which mainly addressed the candidate countries, in 1997. In the candidate countries, after the communist regimes broke down, the promotion of the rule of law was the first step accomplished by the EU to stabilize the democratization process and the dismantlement of the totalitarian legacy. The pre-accession strategy played also a policy of rule of law promotion. It aimed at neutralizing the arbitrariness and the discretionary of State's structure (police, intelligence, judiciary, public administration). In order to achieve this aim, from 1997 up to 2007 a considerable amount of financial resources has been devoted to support the judicial and the legal reforms (Czaplinski, 2000; Czarnota, 1999).²² This effort materialized in a number of activities: monitoring, transfer of legal and organizational norms from the European countries to the candidates, training, and networking. In particular, several projects of judicial cooperation promote the transfer of expertise (legal and organizational) from old member States to candidate countries. This expertise consisted mainly in models of court management, systems of ICT, programmes of judicial training (Maitrepierre, 2007; Piana, 2007). Under the Phare scheme programme, judicial schools have been created in all the candidate countries.²³

In 1999 the European Council set a new political agenda and prioritized the construction of a European space of Freedom, Security and Justice.

In doing that, the EU joined in a way the Council of Europe, which has been committed itself since the date of its creation to the establishment of mechanisms of judicial cooperation among the European States. There is some continuity between the instruments of political coordination introduced by the EU and the instruments of policy coordination mainly used by the COE. Both of them converge toward the creation of *new arenas of networking and socialization*, composed by judges and prosecutors coming from the higher courts, as representative of the main judicial institutions.

Between 1990 and 2004 the EU and the COE have been involved in a spectacular activity of networking, whose synoptic view is offered in the table 2.

²² Interview to Dragomir Yordanov, Deputy Director of the Bulgarian Judicial School, Strasbourg, January, 2007.

²³ Interview to Eric Maitrepierre, Vice Director of the Ecole Nationale de la Magistrature, project leader in CEECs.

Tab. 2. Judicial Networks in Europe

Organizational unit	European network	Target of standard setting
Constitutional Court	Venice Commission	Constitutional justice; judicial review
Supreme Court	Network of the Presidents of the Supreme Courts	Case law
Centers for judicial training	Lisbon Network	Judicial training programmes and judicial schools organization
Ordinary judges	CCJE	Institutional accountability, societal accountability
Ordinary Prosecutors	CCPE	Institutional accountability; status of public prosecutors
Public Prosecutors responsible for international judicial cooperation	EuroJust	Criminal policies; judicial administration
Ordinary Judges	European Judicial Network	Judicial administration
High Judicial Council	ENJC	Institutional accountability
Center for Judicial Training	ENJT	Judicial training (only programmes)
Judicial institutions	CEPEJ	Efficiency of judicial systems

The networks are the arenas through which national judicial institutions are asked to coordinate their policies in civil, commercial and criminal fields. They have been merely created with the purpose of providing national judiciaries with a common “space” in which they can exchange information and straighten their mutual trust. Unlike the EU, the Council of Europe promoted and expanded the agenda of networks whose activities consists mainly in the setting of standards of first rule of law (Venice Commission) and then of quality of justice. All the networks are composed by judicial actors.

Only in the CEPEJ, the Commission pour l'Evaluation des Systemes Judiciaires, judges and prosecutors are met with experts of judicial administration and new public management (De Santis, 2008; Pauliat, 2008). Last but not least, together with the Council of Europe²⁴, the European Commission encouraged the creation of judicial networks (Potoki, 2006), *i.e.* networks mainly composed of judges and to a lesser extent of prosecutors.²⁵ These networks set new standards of quality of justice (Fabri, 2005), delivered recommendations regarding the implementation of the judicial independence. In that way they develop stronger routines of interaction. As a consequence, the mutual trust among their members is also reinforced. Transnational communication (Marsh e Dolowitz, 2000) encouraged within the networks²⁶ has allowed judges and prosecutors coming from CEECs to discuss exchange and spread new ideas and legal ideologies.

The membership of these communities and networks turns out to be dramatically important to achieve a better understanding of the potential impact they may have on judicial policies in all member states. Therefore, the pre-accession strategy enhanced the interaction among judicial actors coming from candidate and old member States. This was done by promoting *social learning* (Checkel, 2001) and *lesson-drawing* (Rose, 2000).²⁷

²⁴ As the paper shows the Council of Europe champions the rule of law promotion. It witnesses a strong commitment into the process of judicial cooperation. This is also due to the formal mandate of the Council of Europe. Since its institutional status is equivalent to an international organization, the legitimacy of its policies relies upon the mandate of the member States. See Council of Europe, 2005.

²⁵ In this last year also the Consultative Committee of European Prosecutors – which came out from the Conference of the European Prosecutors – has started a networking activity in the framework of the judicial cooperation promoted by the Council of Europe. Speech given by Vito Monetti, Italian Representative within the CCPE at the Research Conference hosted by the Faculty of Political Sciences of Bologna, 12-13th October, 2007.

²⁶ Interview to a member of the CCJE; on the point, interview to Giacomo Oberto, legal expert of the Council of Europe and judge of the Appeal Court of Turin, May, the 25th 2006.

²⁷ In particular, studies acknowledge that European normative inputs aimed at promoting democracy and the rule of law differ considerably in terms of their compulsory force (Kochenov, 2005; Grabbe, 2002; Schimmelfennig and Sedelmeier, 2004). Some authors are strongly convinced

Judicial actors, moving across national and supranational policy sub-systems, have been vested with the power of taking norms and adapting them to national institutional settings. In particular, legal experts are best placed to fully exploit their competence to interpret inputs before they enter the domestic system (Stone, 1999). Participation in legal epistemic communities and judicial networks accounts for the differences among countries equally subject to external opportunities for imitation and transfer.²⁸

In the late '90s the development of recommendations, suggestions, models, policy solutions, at first conceived for the incoming members, entailed the emergence of a core of standards, which goes in way beyond the rule of law *stricto sensu* and which addresses more generally the quality of justice (Comaille, 2005; Canivet, 2006). These standards are applied to all the member States.

Nowadays, national governments and more significantly judicial institutions can refer to a large array of standards, which comprises legal and organizational norms. They provide guide-lines for the judicial reforms and a common grid to assess, in comparative terms, the quality of justice administration. The norms and the standards are summarized in the tables 3.²⁹

of the salience of conditionality as a mechanism of Europeanisation, (Schimmelfenning and Sedelmeier, 2004). They have stressed the prominent role played by the “*acquis* conditionality” in forcing institutional change in the candidates. Others have contested this conclusion, stating that the “effective membership” depends much more on a domestic capacity to exploit the opportunities for lesson-drawing and social learning (Nicolaidis, 2003).

²⁸ This position is similar to one supported by scholars analysing other policy fields: “socialized to a European model of local development, it is argued, both regional actors and regional institutions are Europeanizing their policies without EU legislation” (Pasquier, 2005).

²⁹ These norms are embedded in an international set of norms. The 22 International Covenants on Civil and Political Rights (adopted and opened for signature, ratification, and accession by General Assembly resolution 2200 A (XXI) of December 16, 1966) and the U.N. Basic Principles on the Independence of the Judiciary, (endorsed by the General Assembly resolution 40/32 of 29 Nov 1985) are directly related to the “Justice” field. The table does not entirely cover the set of normative and cognitive inputs elaborated by the Council of Europe in the field of legal affairs and judicial cooperation.

Tab. 3. Norms and Standards of Quality of Justice: Indicators of a model of constitutionalism

Mechanisms of accountability	Norms and Standards recommended by the EU and the COE
Legal accountability	Centralised control of constitutionality; judicial review handled by specialised bodies (i.e. constitutional courts). Coherence with the artt. 5 and 6 of the European Convention for Human Rights. Respect of the timeframe standards of a fair trial in due time. Artt. 5 and 6 of the European Convention of Human Rights. Every citizen should be ensured about the availability of a legal representative in case she can't afford the costs of legal representation. Organisation of systematic and comprehensive programmes of training in law. Introduction of courses of EC law.
Institutional accountability	The Judicial Council's board should be composed by a majority of judges (but not all of the members should be judges). The Judicial Council has representative and administrative functions. The Judicial Council is entitled to handle all the mechanisms of recruitment and promotion. HJC prepares the budget; the court manager is managerially accountable to the HJC. Creation of a judicial school, centralised, providing programmes of initial and in-service training; the State should provide for the budget for training; the School is accountable to the Judicial Council for the programmes and for the management.
Professional accountability	Legal Training Judges and prosecutors (courses of ICT by experts of public administrations) Adoptions of National and Supranational Codes
Managerial accountability	Court manager; system of e-filing Non judicial staff (<i>Rechtspfleger</i>) Performance assessment for judges and clerks at the court level ICT tools for judges ICT tools for clerks; data set of case law and doctrine
Societal accountability	Front office; systems of e-filing Web sites of judicial institutions; broad and free availability of information about rights of citizens Information about the development of judicial procedures Statistics and surveys available to public

These standards and these legal norms played an important role in developing and promoting a specific view of a legitimate ideal-type of judicial system. De facto, they sketch an ideal-type of constitutionalism, which exhibits a distinctive division of power between the judicial and the other branches of the State and a distinctive way of constraining the discretionary power of judicial actors themselves.

By shifting the attention of the from judicial independence to judicial accountabilities (we stress: at plural), we can better appreciate the path followed by the European policy of rule of law promotion and the actual impact we can

expect it will generate in new and old members. Indeed, the agenda of the judicial networks incrementally moved from the promotion of the guarantees of judicial independence toward the definition of a number of policies of quality of justice (Jean-Jean and Pauliat, 2004) that aim at introducing in the judicial branch a number of mechanisms of accountability, beyond the traditional form of legal accountability to which judges and prosecutors are commonly held to be subjected.

Among the types of accountability addressed by the European influence one may reasonably argue that professional accountability comes out as the most critical of all. Professional accountability is remade throughout the process of European integration not only at the domestic level – i.e. the coordination of the national training programmes. The European judicial networks, created as a spill over alongside the policy process in the enlargement, external relation and recently in the judicial field, make possible nowadays to enhance the socialization of the judges who attend the meetings and the seminars hosted in Brussels and in Strasbourg. In particular, judges who become familiar with the same values and legal doctrine are more incline to cooperate across the domestic borders. They indeed develop a higher degree of mutual trust (Olgati, 2007), which is a precondition for the development of mechanisms of professional accountability.³⁰

Even though the present paper is not the most adequate context in which discusses and develops remarks about the European judicial space – which seems to be brought about in partnership by the EU and the COE - yet, the overall portrait that emerges from the research presented discloses an potential oxymoron in the creation of an enlarged European judicial space (Moore and Chiavario, 2004): whereas national institutions are expected to play a pivotal role in implementing the rule of law at the domestic level, supranational institutions incrementally get empowered because of the role they play in championing extra-legal values³¹, judicial standards and legal ideologies.³²

³⁰ As correctly pointed out by Jiri Priban, legal elites and judicial actors are pivotal in the creation of a reservoir of symbols and values related to the role that law should play in the European political architecture (Priban, 2008, p. 111).

³¹When I speak of extra-legal values means also that I accept the idea that the rule of law promoted throughout the networking and the standard setting comprises a prominent substantive dimension (i.e. the principle of legality seems to be a necessary but not a sufficient condition to define the European constitutionalism). To provide an example, the emphasis put upon the human rights may not be accommodated in a merely and strictly formal and procedural view of the rule of law. From the point of view of the legal scholarship, the European constitutionalism seems to be far away from the positivistic stand that is at the very basis of large part of the continental doctrine (Canehem, 1991).

³² The expansion of the judicial authoritative allocation of values in the EU is a phenomenon well known to scholars, who had acknowledged the distinctive process of constitutionalisation of the fundamental rights of the European citizens that has been put in motion through the jurisprudential activity of the European Court of Justice (De Witte, 2002; Graine de Burca, 2003; Stone Sweet,

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Interpreting the process of standard setting depicted above as simple way of monitoring the judicial policies of the member States would be extremely reductive. Indeed, the promotion of a model of judicial organization that is deemed as the most effective in ensuring citizens about the quality of justice is also a way of discussing and finally influencing the self-representation of the judicial institutions.

The ideal-type of judicial organization that emerges from the scenario depicted above seems to be characterised by three main features:

- 1) the insulation of the judiciary from the influence of democratically legitimated institutions (e.g. the executive and the legislative branches); this is realized throughout the enhancement of the competences of the High Judicial Council, which is supposed to become – where it was not – the sole institution of judicial governance;
- 2) the implementation of policy instruments aiming at enhancing the efficiency of the judicial offices; this shifts the attention of judicial actors from the respect of legal standards to the respect of organizational standards of efficiency;
- 3) the involvement of judicial actors – whom the standards are supposed to regulate – in the definition of the standards themselves; this aspect directly relates to the reflexivity character of the policy coordination mechanism created by the EU and the COE.

The definition of this ideal-type is the outcome of a process of reflexion and deliberation that is only partly inclusive – only few judges may attend the meetings, i.e. the judges who are appointed as representatives of the national judicial institutions. However, this process partly involves the public discussion of national policies that are re-framed and re-phrased in terms that match the semantics and the lexicon of the COE. It is in this respect a process of self-awareness but also of transformation and of rendition of information national judicial systems held in the past on their own and now share – voir rephrase for the sake of the transnational deliberation.

The ideal-type of judicial organization that is promoted by the EU and the COE, centred on the judicial council, ensured in its effectiveness by the activities

2000). More recently the incidental procedure of appeal toward the ECJ introduced in the European Union the grain of a overwhelming revolution, which consisted into creating a the opportunity for the domestic ordinary judges to enact a process of judicial review vis-à-vis the national legal provisions. Last but surely not least the implementation of the European Arrest Warrant, the most prominent action taken by the EU in the direction of integrating the judicial space, foresees the initiative of domestic judicial actors in establishing patterns of horizontal co-operations.

of the judicial schools, and under the persistent focus of a transnationalised monitoring process (CEPEJ) seems to incorporate and to emphasize the self-image judicial actors (and legal scholars, due to the overwhelming importance of the legal scholarship in the civil law countries) manage to shape with foreigner colleagues throughout their mutual interactions and their communication.³³

Despite it is unquestionable too early to disclose and assess the degree of influence this process of standard setting may have on the legal cultures of the member States, it is undisputable that judges and prosecutors involved into it are in the position of bringing at home – in the courts to which they belong – cognitive inputs that retain a the flavour of Strasbourg.

Even if we do not have at our disposal at the moment empirical evidence to develop this point, we would put forth the following hypothesis: the European level of professional accountability (reputation by the group of reference, socialization, ethical codes, etc.) may blur the consistency of the domestic legal cultures, whose core of values and principles ideas is transmitted to junior judicial actors throughout the process of training and bureaucratic socialization (Piana, 2008*b*). Indeed, the incorporation of extra-national values and behavioural standards may create cognitive dissonances, divergences, all the consequences that we can expect from the introduction of alien inputs in an organizational system (the judiciary) that is based on a strong internal cohesion (as it is the case for bureaucratic judiciaries).

The emergence of standardisation in the realm of the administration of justice witnesses the victory of performativity over normativity, as least with regard to the target of the standards. Whereas in the past the legitimacy of adjudication was mostly associated with the lawful nature of the judicial decision making, now European norms addressing the administration of justice set a strict and direct relationship between highly performing judicial offices and legitimate adjudication. This phenomenon stands at the core of a broader process of coordination that seems to characterise the European space of justice, freedom and security. Courts are steadily involved in a process of legal coordination via the recognition of national sentences and the constitutional dialogues (involved basically the ECJ, the national constitutional courts and the ordinary courts through the pre-judicial procedure). Moreover, judicial institutions are increasingly involved in a sort of quasi open method of coordination, whose aim consists basically into setting down standards of good quality of justice. These institutions meet and participate to a reflexive process of mutual recognition, which may be better understood as a combination of self-reflexion and reciprocal

³³There is an implicit Luhmanian reference in this sentence, which can't be developed in this paper. This aspect is more adequately in Piana, 2009.

reflexion. Cognitive resources put into the reflexive game are transformed and multiplied. Ideas are reshaped and what is currently conceived as a good model of judicial administration discussed on the very basis of principles assumed to be common (Piana, 2009).

However, the commonality of these principles seem to be more the outcome of a reflexive process than given *ex ante*. Judicial institutions carry into the networks and the transnational arenas ideas and experiences that make sense in the context of the domestic culture. Ecological conditions of legitimacy may be unlikely deleted. What that remains of legitimate in the standards?

A critical question, as standardisation seems to be a new type of governance, a new way of coordinating – and by consequence to use a kind of power and allocating resources – in a realm in which the EU is in a very uneasy position, in need at the same time of the domestic judicial institutions and of an a-cultural, a-national basis upon which set the foundations of the European space of justice, freedom, security.

A further point that should be made here is about the relationship that exists between the governance and the so called judicial networks (Potoki, 2006; Madsen and Vauchez, 2005). At a superficial sight one may argue that the European governance features a distinctive character, which is to say that it is uncommonly open to integrate networks as a new mode of governance (Heritier, 1999; Slaughter, 2004; Jordan and Schout, 2006). However, at least as far as the judicial sector is concerned, things turned out more complex and variegated. The European institutions adopted several different mechanisms to foster the coordination of the domestic judicial reforms. Surely, they encouraged the networking among domestic judicial actors by mean of financial programs that allow the mobility of judicial actors between their original country and other European countries. This mobility created the opportunity to get in contact with colleagues and legal scholars working in different environments and socialized to different judicial cultures. Whereas the mobility lasts some months – exchanges of judges and prosecutors or participation to training sessions offered by training institutions do not last more than short periods of time – the knowledge acquired and the possibility of keeping in touch with the people met in the other countries are surely more durable in the long term. This yet does not represent *ipso facto* a new mode of European governance. Networking in the judicial sectors became an institutionalized way of coordinating collective action to the extent and as long as the domestic judicial institutions are keen to recognize in their career promotion scheme the international experiences and the international contacts as *atout*. Judges and prosecutors are more willing to invest time and energies in the European arenas the more they are aware that the Europeanization of their

professional profile has or will have a positive pay off in terms of prestige and career promotion. Differently, I am more inclined to think the impact of the European networks and of the processes of standard setting described here above in terms of unbounding effects on the public administration and the institutions of the constitutional States. Traditionally the judicial institutions drew their norms and their values from the law and the domestic legal culture in which they have been embedded. The cohesiveness and the coherence of the collective actions that took place within the judicial institutions depended for centuries on the maintenance and the compactness of the normative orientations of the actors that belonged to them. By involving few judicial actors in processes of resocialization that take place abroad – in Brussels or one of the capitals of the European countries – and by producing with steadily increasing intensity standards of quality of justice, of judicial independence, of judicial accountability, of rule of law, in supranational and transnational arenas, the European institutions found their distinctive way to penetrate the compact machine of the sovereign States and unbound their public institutions. Standards so produced and norms so diffused do not penetrate the domestic States from the above, as they would have done if they were set down by regulations or directives. Rather they enter the public sectors horizontally and punctually, somehow randomly and in a way that it is not fully in the control of the European institutions (Piana, 2007a and 2007c). Horizontally because of mechanisms of best practices transfer and lesson drawing (Radaelli, 2005); punctually because of the narrow space influenced by these standards and norms once they are implemented in one court, in one prosecutorial office, rather than by the whole magistracy; randomly because from the point of view of Brussels it is not possible to control, lead, steer, the way these norms of soft law, legally non binding are adopted, used, curbed often by the domestic institutions. Yet, these last three points, horizontal, punctual, random character of the governance through standards and networking, ask for a deeper and extensive assessment: whether positive or negative, this should be left to the voice of the empirical research.

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