In Search of the Optimal Court Administration Model for New Democracies*

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Abstract

In this paper, the author focuses on court administration in a strict sense, which encompasses the technical, organizational and material conditions of court operations. The author argues that the best model in this respect, especially for new democracies, is the so-called autonomous model. This model is based on the idea that the competence of court management and administration (i.e. court business) should generally be assigned directly to the judiciary. This model may co-exist with various concurrent solutions concerning other important matters (e.g. accountability of judges, methods of judicial appointments).

1. There is no uniform definition of court administration in the literature. In particular, the delimitation between court administration and court governance in model terms is extremely difficult to delineate.¹ In the strict sense, court administration covers the technical, organizational and material conditions under which courts operate, such as the

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establishment of judicial agendas, the supervision of budgets and the supervision of extrajudicial staff. It also covers the internal functioning of courts, which may – to a greater or lesser extent – relate to the sphere of the dispensation of justice. In a wider sense, court administration also concerns many activities related to the functioning of the entire court system. Thus, the second category also applies to the decisions concerning the structure of courts, the process of creating courts, certain types of supervision of judges, disciplinary proceedings, etc.

2. In this paper, I disregard the solutions adopted for the appointment of judges, the legitimacy of the judiciary and its responsibility, including disciplinary proceedings. I emphasize, above all, the issue of court administration in the strict sense of the term. After a brief presentation of possible court administration models, arguments in favour of the autonomous model will be presented. This model can function independently of the differences in the aforementioned solutions. I also disregard the problem of correlating this autonomous model with the problem of credibility of the third power in the historical context of a new democracy – that is, the verification of the judicial environment at the beginning of a political transformation in a situation where at least some of its members were connected to the overthrown authoritarian, or totalitarian, system.

3. Regardless of the system of government adopted in a democratic state, the separation of the judiciary from the legislature and the executive is necessary for implementing the principle of the rule of law. Today’s democracies have developed a number of safeguards to ensure both the independence and autonomy of the judiciary and the high competencies of people responsible for the dispensation of justice. Such guarantees are offered not only by provisions of the Constitution but also by provisions of judicial procedures.

In many countries, councils of the judiciary are institutions tasked with safeguarding the principle of judicial independence. I believe that the activities of councils should be included in court administration in a broader sense. The judicial council model created mainly in Southern European countries has become popular in many others, including post-authoritarian countries in Latin America and Central and Eastern European countries. Councils can serve as a forum for discussion on the functioning of courts and planned reforms and contribute to the development and implementation of the necessary
mechanisms to ensure the transparency of the activities of the third power.\textsuperscript{2} According to the European Network for the Councils for the Judiciary (ENCJ), established in Rome in 2014, which associates several judicial councils operating in Europe, the councils are supposed to play an important role in ensuring the proper functioning of the justice system. According to ENCJ, the council should consist of judges or, in the case of its mixed-up composition, judges should constitute no fewer than half of the council members.\textsuperscript{3} Regardless of their institutional composition or structure, councils are intended to ensure that a number of competencies related to the judiciary are exercised independently of the executive and legislative bodies. I am of the opinion that a mixed composition may be an important advantage of this type of body; then the council becomes a platform for discussion and working out a position with representatives of the legislative and executive powers as well as representatives of different legal jobs. In this model, the council goes beyond the entity which is only a kind of self-government of the judges.\textsuperscript{4}

\textsuperscript{2} Generally speaking, in constitutional systems where judicial councils function, one may distinguish two models. The first one occurs in some Nordic states and is characterized by the fact that there is a specific organizational merger of the council as a collegial organ and a unit dealing with administrative matters of courts. In the second model, which occurs in some Southern European states (Spain, Italy, and also France), the judicial council does not possess any competencies in the scope of court administration, but it plays a crucial role in the process of judicial appointments and disciplinary proceedings of judges. However, in many countries, hybrid measures exist which are hard to qualify to one of these two models.

\textsuperscript{3} B.C. Smith rightly argues that ‘[e]ven the establishment of a judicial council, designated to distance the appointment of judges and the management of the judiciary from the political process, will not guarantee judicial independence if the executive controls its membership’. In this context, he uses the examples of Malaysia and Kazakhstan. See B.C. Smith, \textit{Judges and Democratization}, Routledge, 2017. p. 56. However, it seems that these arguments may be more relevant at the beginning of the process of democratic transition. In Poland, for example, similar views were presented to justify the capture of the judicial council by the ruling party as well as to explain other measures taken towards the judiciary, while the facts are completely different. The overwhelming majority of Polish justices were appointed after 1989 and they are in their forties.

\textsuperscript{4} On one hand, this allows for articulating a position on behalf of the whole community of judges; on the other hand, it is also important for other functions, including quasi-auditing functions, such as agreeing on positions on proposed reforms or the inclusion of political – by definition – powers (i.e. the executive and the legislature), in activities aimed at strengthening and safeguarding the independence of the third power.
Although in many democratic countries, such as Austria, Germany, Finland, Luxembourg, the Czech Republic and Latvia, there are no judiciary councils, these institutions seem to have many advantages. They can provide a kind of buffer for limiting the influence of political factors on judicial bodies. The literature explains that judiciary councils aim to strengthen the autonomy of judges while preserving the external accountability of this power so as to strike a balance between these two values. Arguments that are critical of councils are sometimes raised from academia. These include the allegation that judiciary councils limit the accountability and checking of judiciary bodies and petrify the status quo in the interests of the most prominent representatives of the judiciary. The alternative in this case should certainly not be to increase the competencies of the government administration in relation to the judiciary, especially in relatively less stable political systems, where the legal and political culture leaves much to be desired. This can lead to a deliberate undermining of the independence of courts and the autonomy of judges for current political gain. M. Bobek believes that the relatively strong position of the Department of Justice towards courts does not necessarily mean that the judicial system is less independent or effective, since ‘the transformation of the judicial branch is primarily about building ethical consensus and accountability and not about institutions’. However, everything has to be considered in a certain context. The risks of a possible pathological

5 In these countries, the processes for recruiting judges and court administration are primarily the responsibility of the Ministry of Justice.


8 M. Bobek and D. Kosař refers to the case of Slovakia, where the council was dominated by prominent judges with a communist background. They juxtapose this with the situation in the Czech Republic, where the lack of a judicial council and a most powerful Minister of Justice contributed to the necessary reforms of the judicial system. In the same context, B.C. Smith mentions the cases of Romania and Indonesia, where, as he emphasizes, judicial councils have represented rather corporate interests of certain judges, so that their reform and control function may have been questioned. See. B.C. Smith, supra, pp. 149-150.

emancipation of the judiciary and the danger of its direct politicization should be balanced. The question is, ‘Which dangers are greater, especially now that populism is growing even in stable democracies’? In this sense, the answer is obvious. The ‘assault’ on the operation of courts (which we are unfortunate to witness in Poland\(^\text{10}\) and Hungary), aimed at subordinating them to politicians, may be an irresistible temptation, and references to the idea of democracy (understood in its simplified sense) serve, then, only as an effective propaganda trick and a smokescreen\(^\text{11}\). Political practice may obviously undermine the significance of all reasonable, normative solutions. However, it should be remembered that normative regulations can either contribute to the crystallization of a higher political and legal culture or lead to the consolidation of certain pathologies. Therefore, greater safeguarding of the independence of the judiciary is of great importance in this context.

4. Of course, in many democratic countries, court administration – both in narrow and broad senses – is sometimes also entrusted to entities associated with the executive. This may raise doubts as to whether such a solution is compatible with the principle of the separation of powers and independence of courts and judges. In particular, new democracies have not had the opportunity to develop traditions that guard them against abuses. Therefore, explicit constitutional and legislative provisions seem all the more necessary in these countries to ensure more consistent separation between the judicial bodies and the other two powers in order to limit political abuse. In stable countries, a high


legal and political culture limits the scope for possible abuse. However, this differentiation between old and young democracies is only partly justified. The point is that even in countries with a stable democracy, the legal and constitutional culture can turn out to be an insufficient safeguard against undesirable practices. This is even more evident at a time of growing populism and smear campaigns against judges and courts. Moreover, populist forces in new democracies can – and often do – allow certain formal regulations which provide for the executive to exert a significant influence on the judiciary to function in ‘old’ democracies to legitimize the activities aimed at politicizing the judiciary. To do so, they tend to refer to Western models viewed, of course, only formally, without looking at the current standards of the legal and political cultures in this respect. That is why I am of the opinion that a more formal approach should be implemented in both old and new democracies.

5. On the matter of court administration in its strict sense, we can distinguish three main models, which have their own subtypes.

From the general theoretical point of view, the so-called executive model includes a wide amalgamate of systemic and internally heterogeneous solutions. This model was developed is the oldest one and, as such, it is still widely used worldwide, with some modifications. At the entity level, the court administration competencies may be delegated to a minister, responsible employees of a ministry’s department or a government agency subordinate to,

12 As the former Polish Chief Justice, the late S. Dąbrowski, emphasizes, ‘The system works fairly well under conditions of a stable democracy and an absence of threats to the autonomy of judges. The defect of this system is that if there is a crisis of democracy, guarantees of the independence of the courts and the autonomy of judges may prove inadequate […]’. It is pointed out in the literature that it is easy to imagine a situation in which the Justice Minister’s supervision over the courts comes dangerously close to indirect influence on the merits of the dispensation of justice. These rights vested in the Justice Minister do not arise out of the Constitution, and as competencies of the executive branch affecting the judicial branch, they represent a major departure from the constitutional principles’. S. Dąbrowski, ‘The Boundaries of Permissible Interference in the Judicial Branch by the Executive and Legislative Branches’, in T. Wardyński & M. Niziołek (Eds.), Independence of the Judiciary and Legal Profession as Foundations of the Rule of Law. Contemporary Challenges, Warsaw, LexisNexis, 2009, p. 411.

13 This is only a proposal. One can find other systematizations in the literature. In this paper, I accept the scheme included in N. Fox, J. Firlus and P. Mikuli, ‘Models of Court Administration: An Attempt at Comparative Review’ in P. Mikuli (ed.), supra, p. 187 ff.
and supervised by, the government or the minister. Sometimes, the structure of a special agency and its relationship with the ministry may be of such a character that one may have some doubts as to whether it still adheres to an executive model.\(^{14}\)

At the same time, the so-called partner model of court administration assumes that administrative activities are performed by entities that are independent of the government, but may constitute either a part of the state administration or have a hybrid nature – which is generally difficult to classify from the point of view of the principle of separation of powers. In this approach, there can also be an agency that is separated from the Department of Justice, but is formally subordinated to a respective minister; its competencies can include widely understood administrative matters, such as the establishment of a budget for the judiciary. In the partnership model, the detailed scope of delegated tasks, as well as organizational issues, may be the subject of bilateral arrangements between the executive and representatives of the judiciary in the form of frameworks documents.\(^{15}\) Thus, the systemic status of a unit responsible for court administration may vary and fluctuate from a very close relationship with the Department of Justice to a quasi-independent agency, but not, at least directly, subordinated to the judicial power.\(^{16}\)


\(^{15}\) An example of this is Her Majesty’s Courts and Tribunal Service in England and Wales. It is financed by a part of the budget allocated to the Department of Justice. According to the framework document, the Lord Chancellor is obliged to make every effort to reach an agreement with the Lord Chief Justice on the financing of the Service. The framework agreement clearly states that neither the Lord Chancellor nor the Lord Chief Justice may interfere directly or indirectly with the day-to-day work of the Service. The Scottish Courts Service, however, is an office that is not included within the structure of the department, nor is it an agency subordinated to the Scottish executive. It is currently (since 2010) independent, although it remains within the structure of the state administration; therefore, it forms a part of the Scottish executive. In the latter case, the partnership model is subject to particular modification, moving towards independent, but extra-judicial, court administration.

\(^{16}\) As an example of the latter, one may point to the Irish Court Service, which is a separate institution whose board is composed mainly of judicial members; however, it remains responsible before the Minister of Justice.
In turn, the third model can assign the competency to manage and administer courts (court business), in a general theoretical sense, directly to the judiciary, given the following:

1) Administrative activities may be carried out by individual courts on their own behalf or by offices attached to them; this solution is used at the level of the highest judicial bodies.

2) Administrative activities may be carried out and supervised by a separate office connected only to the judiciary.¹⁷

In this second type, it should be emphasized that a characteristic feature is that members of this office (entity) are, in principle, exclusively judges selected with a normatively specified parity.¹⁸ An important role in the model of autonomous court administration by the judiciary is played by the legal status of administrative employees, including officials of the court staff, such as clerks. The method of their selection (recruitment) and the material content of the employment relationship are determined without taking into account the requirements typical of the civil service.¹⁹ Judicial officials are deemed to be officers and

¹⁷ In this case, this unit should depend on the judiciary’s power, subject to specific mechanisms. For instance, the head and members of the board of such institution might be appointed by bodies of judicial self-government or by a judicial council. The creation of a separate unit is preferable from an efficiency perspective in the case of lower courts, due to their dispersion.

¹⁸ N. Fox, J. Firlus and P. Mikuli, supra, p. 195 ff. The United States offers an example of a country with an autonomous model. The administrative activity of courts is carried out and supervised by a separate office connected only to the judiciary. In federal courts, the Administrative Office of the U.S. Courts is such an entity. The office is headed by a director, who is responsible for the supervision of all administrative matters relating to the clerical staff of the federal courts. The director is appointed and dismissed by the Chief Justice after obtaining the opinion of the Judicial Conference of the United States. This is an annual meeting convened by the Chief Justice and attended by, among others, chief judges of all judicial circuits. The Conference is the body that oversees the activities of the Office and determines the policy relating to the administration of the federal courts. The task of the Conference in this respect is primarily to review and analyse the work of courts and prepare recommendations for them, aimed at harmonizing the procedures and effectiveness of proceedings. The Conference is also obliged to carry out studies on currently binding court procedures. The Administrative Office is responsible for the integrated court management and financial planning system.

¹⁹ N. Fox, J. Firlus and P. Mikuli, supra, p. 199.
employees of the judicial branch. A normative expression of this trend may be the adoption of a separate act on the staff of the agency subordinated to, and supervised by, the central judicial authority.

Obviously, an organ responsible for court administration is subordinated to the judicial power, but it must cooperate with other state authorities belonging to different branches of government. These relationships can take various forms, such as the provision of current information and cooperation in preparing and implementing the budget. The budget and funds allocated for the judiciary are also subject to approval in the legislative process of the parliament.

6. Each of the analysed models has various advantages and disadvantages. As far as the executive model is concerned, it can be argued that the executive – being the one responsible for the administrative functioning of the state and for the implementation of financial policy – should also be able to have a real impact on courts as organizational units. However, the principle of separation of powers and the independence of the judiciary seem to be most important and should prevail in this case. This is what leads me to question this model. First and foremost, there are no clear guidelines for the separation of the jurisdictional and administrative spheres of the activities of courts. The partnership model seems to offer an interesting solution, but the participation of judges, or even their representatives, in the process of bargaining and making mutual concessions with the executive may hamper the authority of courts and may prove inefficient. Even the establishment of an independent agency is not always an optimal solution due to the

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20 See e.g. § 332 Section (f.4) of 28 U.S. Code circuit executive; § 332 Section (h.4) of 28 U.S. Code circuit executive and court staff within the United States Court of Appeal for The Federal Circuit; § 601 of 28 U.S. Code Director and Deputy Director of Administrative Office.


22 Ibidem, p. 198.

23 This includes annual reports addressed to Congress by a Chief Justice on the proceedings of Judicial Council of United States (§ 331 of U.S. 28 Code); copies of annual report of the activities of the Administrative Office and state of business of court are submitted to Congress and Attorney General (§ 604 Section (4) of U.S. 28 Code).

24 N. Fox, J. Firlus and P. Mikuli, supra, p. 98.
unauthorized interference of a partner with its composition and directions of action. It seems that the autonomous model raises the fewest doubts.

7. The advantage of the autonomous model over the others can be justified as follows. First, this model is most in line with the principle of the independence of the judiciary in the organizational sense; it protects young democracies, in particular, from attempts to undermine the independence of the judiciary by taking measures which may, at least indirectly, affect the sphere of jurisdiction. Second, the autonomous model is universal in nature, as it is independent of the solutions adopted for the appointment of judges, promotions, etc. Even if we were to consider it desirable for the judiciary and the other two powers to have close relations in this respect (by referring to the need to ensure ‘democratic legitimacy’ or ‘accountability of judges’), there is no excuse for depriving the judiciary of its autonomy in the field of administrative matters. After all, it would be just as absurd, even under the conditions of the parliamentary system, for parliament to interfere with the current administrative activities of the government by, for example, laying down its rules of procedure or making decisions on current expenses, orders and other activities of the office providing services to ministers. Third, the autonomous model does not preclude the introduction of appropriate auditing elements for courts’ administrative activity, such as for the necessary maintenance of the discipline of public finances or compliance with other criteria, like reliability and economic efficiency. Relevant institutions, such as audit chambers and auditor courts, may fulfil the competencies in this respect.