Chapter 1
A Comparative Analysis of Judicial Power, Organisational Issues in Judicature and the Administration of Courts

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1.1 Introduction

The prevalence of personal freedom and expectations with regard to a fair process require a state of legal organisation to be a system that increases the likelihood of achieving these two concepts. Because of the special significance of the freedom of judicial decision, judicial autonomy and personal freedom, the quality of work of the judicature is simultaneously an indicator of the quality of the constitutional state. Practical and jurisprudential problems and political disputes related to pretrial detention demonstrate the significance of the question. However, the fact that organisational ties of judicial administration are hidden behind all of these often remains in the dark (Róth 2003).

For example, how and by whom judges responsible for weighing and ordering pretrial detention are selected are not irrelevant, nor are the type of administrative system governing their selection and the guarantees that exist to prevent the evaluation of unwanted factors. These belong under the direct effects of judicial organisational regulation. The organisation conditions the prevalence of these rights indirectly as well: the complex system of internal independence, organisational and managerial efficiency and quality affect practice, the quality of procedures and fairness in countless ways. It is difficult to deny that the anomalies that bar fair proceedings are closely connected to the shortcomings of administrative regulation. The contradictions and limitations of the Hungarian judicial administration model are obvious (Fleck 2008a). A comparative overview can confirm this experience and can shed light on further tensions that make the developmental potential of the model doubtful.

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The organisational system of judicial administration bears exceptional significance from the perspective of the quality of rule of law. One of the most formidable elements of the internal and external adjudication of a state is the intactness of the third branch of power, its effectiveness and its ability to guarantee individual rights. The conspicuously high level of inconsistency, the dynamism and the need for organisational change evident in the administration of the courts today teaches several lessons. On one hand, the classic principle of separation of powers and the stability of judicial independence do not rule out that the administrative solutions considerably deviate from one another. On the other hand, the organisational models are forced to adjust to environmental challenges, their own operational experiences, incidental failures and internal tensions. This process of adaptation is driven by well-defined principles: accountability and transparency, both having become equal to independence. The transformational crisis of the post-communist states coincides with the new wave of change in modern rule of law states. As a result, they must not only simply realise difficult to harmonise programmes but also command naturally nonconcurrent processes at a much faster pace. The codification in itself of the formal guarantees of judicial independence reveals nothing about the success of these processes; the economic, political, mental and cultural conditions of the prevalence of independence cannot be produced in a proactive manner. This process is seemingly more prolonged than the deployment of the organisational models. The basic lack of understanding concerning accountability stems from the fact that it is part of a system of expectations that has gained significance in modern constitutional states during the past decade and has become such a principle that has necessitated institutionalism. This *wave of accountability* hit the new democracies at a phase when the internalisation of the classic values of independence was underway. The sometimes astounding, while other times latent, causes of failure are complex, but organisational regulation reflects the majority of these perfectly.

1.2 The Significance of Judicial Power and Organisational Issues

The significance of judicial power in a constitutional state can hardly be debated; the guarantees of freedom and the predictability provided by an independent judiciary are the central hallmarks of a modern democracy. Just as a citizen with rights, the capitalist economy is dependent upon security and guarantees and, as a final measure, the protection of independent forums. Transitional societies' efforts to build constitutional states accurately demonstrate the importance of this: attempts to establish judicial and organisational independence did not lag behind, but traditions and power mechanisms having developed under dictatorships and limited autonomy brought considerable deviations in the uniformity of principles.

Diversity emerged in organisational structure, as well as in the administrative model. Smaller or greater organisational changes and reforms are typical of mature

democracies as well; the process of adapting to economic and social changes arrived at the regulation of administrative structure and competence. These reforms aim to establish an effective, accessible, transparent and responsible system, without jeopardising judicial independence and instead further developing it. Although the scope and volume of the transformations is difficult to measure, with regard to European nations, the European organisation – European Commission for the Efficiency of Justice – which was established to support the efficiency of judicial administration provides an insight. According to the Commission's latest report, comprehensive judicial reform is currently underway in 15 countries, and independence and transparency are under reform in 9 countries; in 40 countries, organisational and structural changes concerning the distribution of power are currently underway, and public prosecution is undergoing reform in 7 countries (CEPEJ 2010). Both new and older democracies can be found among countries undergoing reform. Even more changes are occurring in the legal, infrastructural and financial areas of judicial administration. This dynamism can be explained by the global, well-defined characteristics of the challenges. Thus, although the world of modern constitutional states is characterised by significant divergence, the directions (independence, transparency, accountability, efficiency) of the changes are distinct. These characteristics are what international organisations advocate as well. Global challenges (the increased significance of the legislature, difficulties in institutionalising accountability, the needs concerning the efficiency of management), as part of the transformational crises of post-communist societies, add an interesting twist. Here, the contradictions and shortcomings concerning the basic principles of the state's organisational system cannot be separated from the reform of judicial administration (TÁRKI 2009).

The significance of the question, the scope of changes, the institutional environment and deviation from traditions all have consequences in terms of methodological approach.

1.3 The Perspective Framework of the Comparison of Judicial Power

The broader perspective concerning judicial organisational solutions emphasises homogeneity and defines similarities in trends and the fading differentiating characteristics of traditional legal families (convergence). This approach has helped the formulation of international and professional recommendations that enforce principles with relevance to the courts. However, in order to interpret the differences, this approach needs to be set aside. After observing the political benefits of global recommendations, in order to get a valid picture of the sociological nature of judicial administration, comparison on a regional, a subregional and on a micro-level is also necessary.

Following global recommendations necessary for commanding great transitions, through closing the formal state of building rule of law, the time of understanding can return. And this can provide an opportunity for the failures and their causes to be revealed. Therefore, in this area of comparative law, expedience is achieved by 'focusing' often: we must turn to interpreting history and the internal balance of power, while keeping general, European expectations, legal cultures and relevant organisational norms in mind. As the experts of the field summarised: 'We are not convinced that any one indicator would serve as an ideal proxy for the myriad conditions that lead countries to adopt judicial councils. Our preliminary conclusion, then, is that there is no evidence that judicial councils promote independence' (Garoupa and Ginsburg 2009, p 130).

The exploration of the specifics of individual cases in post-communist states, especially the Visegrad Four – which in many respects have exhibited similar historical and organisational dilemmas – can give us a chance to not just look, but to see as well. During the past few years, analyses have emerged enabling policy distribution that is based on the perspective and corporative needs of professional judicial organisations (e.g. Consultative Council of European Judges) to be overcome. In fact, the need for a differentiated approach has also become evident in international recommendations that account for regional characteristics (Fleck 2008b).

A solid theoretical foundation could help the normativism of global comparison and epistemological uncertainty, but intermediate theories (e.g. theory of judicial independence, organisational theory of courts) do not support the analysis of the interwoven organisation of the judiciary. Courts apply theories supported by empirical research focusing on long-term effects, litigation trends and patterns in the use of courts to interpret social change (Boyum and Mather 1983). The increase and expansion of judicial power have been the primary areas of research during the past two decades, which has resulted in historically inspired theoretical foundations (Feely et al. 2008).

Analyses of dispute settlement procedures focus on the role of the third party who solves the problem (theory of the third party) (Black 1998). Analysis and interpretation of the court as an organisation, the distribution of power, the hidden framework beneath the hierarchically structured formal world, communication channels and decision-making processes are the areas organisational psychology and legal sociology are concerned with. Theories reflecting on these problems should offer a conceptual framework for describing organisational models, for aiding the analysis of actual operation, for clarifying the sociological relationship between hierarchy and independence and for clarifying the corporativism phenomenon.

In the following, I argue that legal culture and changes in judicial power do not leave judicial administration untouched; these in fact institutionalise administrative modifications. Aside from this, two high-impact elements cannot be overlooked: inherited factors and international influence. Informal practices that significantly influence legal culture must be taken into account when making formal structural changes. Otherwise, it is perplexing and incomprehensible why widespread, ambi-

tious and costly organisational reforms led only to limited results (Solomon 2007). In most cases, formal changes were not enough to shift the attitude, thinking and mentality of the judicial board. We can address institutional failures with answers that are cultural in nature. Attitudes and informal norms concerning legal regulation are more stable than the institutions. 'Local legal cultures' remain untouched or prove to be survivors, for example, the role of judicial management and the relationship between the courts and the prosecutor. For example, Peter Solomon highlights the marked rarity of acquittal in Russian courts and the closeness of the positions of the judge and the prosecutor (Solomon 2007). Literature on the failures of regulating law highlights that informal norms are capable of undermining both the law itself as well as the operation of formally established organisations (Galligan 2003). This is especially true in states that adopt institutional models from other legal cultures. The institutions guaranteeing judicial independence are especially dependent upon the mental and habitual capabilities of independence of the judges. These obviously do not develop through a simple legislative order. An organisational solution for judicial self-governance is without tradition in Central European legal systems. An overview of the organisational rules of the courts also suggests that such unwritten norms and capabilities cannot be expected of new democracies. In such states, it is especially true that only power imbalances are capable of maintaining operational balance. Hence, the common misunderstanding is that judicial independence and other constitutional expectations of the judiciary can only be achieved through complete administrative autonomy. This faulty logic was followed by international recommendations that considered complete judicial self-governance one of the main guarantees of establishing rule of law (Piana 2007).

Despite the former Latin American failures, the absence of democratic traditions and weakness in the character of independence were interpreted as organisational traits that could be overturned by switching to a different model. Following systemic changes, the scope of the states was defined by 'highly intensive globalisation', the exportation of organisational models and the adoption of legal institutions (De Sousa Santos 2002).

From the history of Hungarian reform, clearly the political elite's lack of concepts and administrative weaknesses ceded the role of model creation to judicial organisations, which in turn effectively advocated its own corporative interests. Strengthening judicial power organisationally emerged on the democratising half periphery as a programme of democracy consolidation. The corporative independence of judicial organisation is in itself the phenomenon of the crisis caused by state control and the distribution of powers and not the answer to it.

1.4 Challenges and Changes in the Administration of Courts

Comparative analyses of judicial administration in transitional societies focused on constitutional courts, on one hand because of more accessible empirics and on the other hand, because of its obvious constitutional-building effect and relative

success. Meanwhile, the effect constitutional courts of post-communist states had on everyday reality was a question addressed only much later (Zubek and Goetz 2010). Following studies that analysed judicial practices in individual countries, comparative analyses emerged about the post-communist Central European countries. These studies present all the advantages of a regional focus and serve as a valuable starting point for a multidimensional comparison and for the interpretation of the cultural elements of judicial administration (Matczak et al. 2010). This revolution in perspective and methodology was brought about by discovering the gap between formal institutional changes and changes in practice – in other words, legal sociological motivation made it possible.

Formerly, for states preparing for EU accession and for international organisations, the task was to ensure formal institutional compliance and monitoring. To achieve this, the traditional comparative legal approach was appropriate. Today, however, the constitution, the decisions of the constitutional court and the weak enforcement of European law have become the depressing reality (Falkner 2010).

The staggering enforcement of principles and the consequences which resulted from institutional solutions implemented with great exertion have opened a new chapter for analysis in the 'dead letter' countries. Aside from general problems in judicial administration (e.g. inconsistent practice, cases dragging on, preparedness of judges, absence of litigation culture), the faltered enforcement of expectations of independence and accountability manhandled the success of the quick transition. Emphasis and explanations shifted to various elements of legal culture (organisational culture, lawyers' traditions, following norms and litigation culture) (Hesselink 2001). Based on democratic transitions, European integration and international agreements that influence these, a slight convergence can be discovered in judicial administration, but significant differences in semantics are hidden behind similar terms. The constitutional setting of judicial independence is similar in nearly all countries' constitutions, but the enforcement of the conditions of independence varies. International agreements and international judicial practices do not offer guidance concerning organisational dilemmas that influence the prevalence of independence. The interpretation of independence and its application to organisational models is part of member state autonomy (Badó 2006). Convergence is suggested not only by agreements and constitutional declarations stressing the importance of independence but also by several trends in organisational regulation and legal practice.

Besides the persistence of traditional differences in the operation of judicial administration in different legal families, substantive elements have moved in the continental direction in United Kingdom, while continental legal systems have shifted towards the legal development of case law.

The spread of the Southern European judicial self-governance model was especially dynamic, and accountability – though often incompatible in many senses – became a distinctly general expectation. Transparency received an unquestionable role and organisational solutions to guarantee objectivity in the selection of judges received even more significance than in the past. However, the convergence of principles does not always lead to institutions becoming similar.

1.5 Stepping Out of Tradition

Considered the cradle of common law and characterised by institutions upheld by traditions, England has made significant changes in the organisational foundations of judicial administration. For literature concerned with judicial administration, this is important because it clearly shows the sociological forces behind organisational changes. In the past few decades in England, the legal profession – and especially the judicial board – has expanded significantly, and with this, the characteristics of the continental career system have emerged. In 1970, there were 356 full-time judges and by 2005 that number increased to 1,356. The dramatic increase was primarily in lower levels; the number of part-time judges increased from 132 to 2,414 in the same period. The expansion of the legal profession in general can also be sensed in the number of lawyers and law students (Bell 2006). In England, the part-time judge position is traditionally the starting point of training, the field of practical socialisation (education by practice). The need for internal training has existed since 1963 (sentencing discussions, sentencing conference), but the Judicial Studies Board was not established until 1979. But the need to adapt European human rights practice brought the real challenge. For long, administration did not follow continuous professionalisation, changes in organisational culture and the rapid expansion of the profession itself. Here, the importance of traditions is unquestionable. Operation depends on the personal independence of the judge and the dominance of informal rules; institutional independence is not imperative, and judicial power is not interpreted as a third branch of power.

After several decades of slow modifications, radical change in institutional regulation emerged at the end of the 1990s. With the enactment of the Human Rights Act in 1998, the courts found themselves in a new role. This role was much more political than the former and thus could be interpreted as an increase of power. The relationship between the judiciary and other branches exercising power changed (Malleson 2007). Earlier, the European Communities Act of 1973 meant a similar radical change, according to which judges were granted the power to repeal acts contrary to community law. In practice, however, this institution did not become significant and parliamentary sovereignty turned out to be unquestionable. But this too began moving towards change, not in the least resulting from the influence of the international judicial community. After time, the redistribution of power became irreversible. More intense exertion demanded administrative and managerial reform and procedural rationalisation. The report of Lord Wolf written in 1999 demanded more formality, professionalism, discipline and administrative effectiveness, based primarily on the principle that informal governance has become incompatible with the increase in manpower and workload. In the past, selection and administration resembled an exclusive club membership. Since 1994, application and the formal interview have existed, but the testing of judges entered as a foreign element. That said, selection was characterised as obviously lagging behind in comparison to both the public sphere as a whole and in comparison to the private sector. Strong social segregation became anachronistic with regard to changes in social structure and

mobility principles. The Ethnic Minorities Advisory Committee was established in 1991 within the framework of the Judicial Studies Board (after later reform, the Ministry of Justice operated as an advising body: Advisory Panel on Judicial Diversity).[1] By 2005, the Constitutional Reform Act[2] was born, which established the status of the Lord Chancellor, established the High Court and developed new rules of judicial selection.

The gradual transformation, which began earlier, was one of the major motives of constitutional reform. This also affected the internal relations of the judiciary. The far too direct connection between the branches of power became untenable; the symbolic representation of this was the tri-functional role of the Lord Chancellor (member of the Cabinet, head of the judiciary and the presiding officer of the House of Lords). The result of the transformation was a court that interprets his role like continental traditions do. The head of this branch presides independently, the President of the Courts of England and Wales – administration escaped from the grasp of government, and with this, independence strengthened in terms of organisational administration. The intermediary role of the Lord Chancellor became questionable. This came at a time when conflicts between the government and the courts were emerging.

The position was not simply filled by the 'first among equals' prestigious lawyer, but the position became political and could no longer be associated with the selection of judges and judging. Following intense debate, the Lord Chancellor (Lord Falconer) and the Lord Chief Justice (Lord Woolf) reached a consensus, which divided power between the courts and the executive. Cooperation and mutual consultation was required of the two branches of power. It required consensus in nearly all decisions, for example, the Lord Chancellor had the authority to decide on the number of judges but only after consultation with the Lord Chief Justice, because the traditions of partnership must be preserved. The Lord Chief Justice has the authority to take disciplinary action against judges, but the right to sanction requires consent from the Lord Chancellor. According to English perspective, 'two separate but equal branches working together to manage the court and the judiciary'. The informal, strict administration and the increased significance and responsibility of the courts, as well as the lack of permanent administration, would lead to administrative issues and would strain the power of senior, higher-level judges – who formerly had significant influence in the management of the courts. The selection of judges, considered the most distinctive feature of this legal family, underwent the most significant changes. Following open and intense debate, the supported solution agreed upon most closely resembles the Canadian model. The task was delegated to the Judicial Appointments Commission. The Chairman is a layman, so that he is not dominated by judicial or legal interest in the selection of successors. When judicial independence was strictly personal, organisational independence had no significant role – impartiality and neutrality of the judge

[1] See http://www.justice.gov.uk/index.htm

[2] See http://www.legislation.gov.uk/ukpga/2005/4/contents

were essential. The above changes forced the emergence of a new type of central administration: Her Majesty's Court Service was established. According to the report of this office, 'HMCS is an agency within the Ministry of Justice. We are responsible for managing the administration of the courts across England and Wales, with the exception of the Supreme Court. In order to do this, we work closely with partners across the criminal, civil, family and administrative justice systems. The 2008 partnership agreement between the Lord Chancellor and the Lord Chief Justice provides for the effective governance, financing and operation of HMCS to ensure the independent administration of justice. The agreement makes it clear that HMCS staff owe a joint duty to the Lord Chancellor and the Lord Chief Justice for the efficient and effective operation of the courts'.[3]

1.6 The Models of Judicial Administration

Competition between the branches of power is a key element of judicial administration and in judicial reform in general, i.e. laying out the functions of central administration. The solutions are quite varied, and consensus concerning the extent of the government's opportunity and responsibility does not exist. However, it can be said that a strong tendency is evident, according to which some administrative tasks are taken from the executive power. But a great deal of variety exists concerning authority, composition and the relationship to other branches of power. The division of authority and the separation of powers is a decisive factor concerning the operation of judicial administration as a whole. In transitional, democratising societies, the need for the establishment of judicial independence inclines handing over central administrative authority as a whole, minimising the chance of ever-important accountability. In comparative literature, the institutional establishment of independence is an analysed issue, rather than the prevalence of accountability. Based on experience, judicial councils having too much power can create a distinctive imbalance and ultimately develop an environment unfavourable for judicial independence. Judicial councils operating today have very different functions. The first and most obvious dividing line can be drawn between common law and continental legal systems (Garoupa and Ginsburg 2009). The model that developed in some of the countries in the southern region of the continent, those having experienced dictatorships, had great influence on Latin America through the mediation of international organisations. In countries that chose to preserve an external model, the logic behind establishing judicial councils was transparency and a more effective division of resources. They most typically received authority in the questions regarding the selection and promotion of judges, which is where governmental elements also surfaced. In the United States, many states have established the so-called merit commissions, which institutionalised the

[3] http://www.hmcourts-service.gov.uk/cms/files/HMCS_Annual_sReport2009-2010_web.pdf

traditionally political selection procedure, though such bodies obviously have less significance since selection does not operate as a career system. The establishment of judicial councils is spreading to the Third World as well: Egypt, Jordan, Lebanon, Morocco and Palestine have all stepped in this direction as a result of international pressure. In the following, we will analyse the judicial administrative systems of several countries from the central division of authority perspective. From endless opportunities and perspectives for comparison, I have highlighted central administration. This captures the relationship between the division of powers and the weight of judicial power and ultimately the connection between independence and accountability. Our basic hypothesis is that the defining dividing line is not between traditional ministerial (external) systems and administration built upon (internal) judicial councils. Rather, it is between complete separation and models built on the division of authority. The latter provides favourable conditions for independence and the balance of accountability. Therefore, it would be misleading to discuss southern and northern judicial models; less separates the Scandinavian judicial administration model from the German or Austrian system than from Hungarian or Romanian judicial organisation. During the past few decades, countries which preserved external administration have handed over significant authority to judicial organisations. The executive power has maintained significant authority in several areas in countries that chose judicial administration based on a judicial council.

1.7 External Administration and Judicial Participation

Traditions and the historical ways of development have a significant role. Switzerland, for instance, is in this sense an extreme example, because strong democratic legitimacy prevails over judicial power, political influence and liability to the parliament have not been questioned, the selection of judges and even their political careers are accepted, and prejudice to independence does not even arise. Dependence on certain ways, as well as historical traditions in less extreme circumstances, shall also be considered.

In Europe, the administrative models of Germany and Austria can be considered the most unambiguous versions of external administration. However, the disciplinary procedures against judges are carried out by judicial municipality organs in these countries as well, and these organs have certain powers in relation to the selection of judges too. The interpretation of German constitutionalism precludes the possibility of the executive power 'touching' the essential elements and the substance of judicial functions (decision-making). Strong constitutional traditions gave stability to the classical interpretation of the separation of powers, even in spite of challenges and a changing environment (increase in the significance of judicial power). A part of this tradition is that independence is not a privilege, but the institutional protection of judicial decision-making. Any interference with the internal relations of judicial work relating to establishing the content of decisions such as interpretation, the application of procedural tools, or the conduct of trials

is illegitimate. To these, only the special rules of disciplinary procedures can be applied, excluding any kind of executive influence. Different models are used within the country in connection with the selection of judges, and major differences exist among the provinces in this sense, but the participation of judicial councils in the process is nonetheless typical, either with or without a competent minister. The decisions relating to the judicial status are generally centred in the hands of judicial bodies (e.g. professional tribunals like the 'Dienstgericht'). Besides internal and external independence, administrative effectiveness and independence and balanced operation are also essential elements of the system. Abuse of executive powers is not typical; the debates are about how quality control can be exercised by using administrative tools. 'Judicial independence has most often been raised as a defense against supervisory measures. In general, there is less interference by the other branches of government than by the judiciary itself' (Seibert-Fohr 2012).

In Austria, there also are independent judicial committees participating in the selection of judges, in internal quality control and in regular judicial monitoring. Similarly to the German model, ensuring the independence and smooth operation of the courts and the appointment of judges is the Ministry's task.

We could also refer to the explanatory strength of historical elements, the unique conception of sovereignty and the traditionally limited power of the courts, such as in the case of France. The powers of central administration are allocated between by the Conseil Supérieur de la Magistrature and the Ministry, which the two organs exercise together. Administrative tasks are carried out by judiciary officials with specialised professional knowledge, sitting in the six directorates and other divisions of the Ministry. However, disciplinary liability and the selection of judges are not under the authority of the executive branch. Since 1883, the High Council for Justice (CSM) has been promoting the functions guaranteeing independence of the president, just as a sort of 'watchdog'. The selection of and disciplinary procedures against judges are within the competence of the Council (Garapon and Epineuse 2012).

Because of continuously changing public opinion, scandals and conflicts, although reforms seeking to strengthen the independence of the High Council of Justice emerge, shared authority is protected by strong traditions. This tradition does not consider the judicial branch an organically separate element, but an organisation close to the government. To balance this, the classical guarantees of personal independence are strong. The president is the preserver of constitutionalism and judicial independence, and the Constitutional Council (Conseil Constitutionnel) is the one responsible for filtering out the elements that could pose a threat to independence. The French type of judicial administration and the administrative model based on judicial councils differ significantly.

Belgium, where the state organisation often develops from scandal to scandal, has a strong tradition of independence as well, which is kept functional by unwritten rules. Since 1998, however, this is also strengthened by the constitution. The other goal of the constitutional reform of the judicial system was to strengthen accountability; therefore, besides establishing the High Council of Justice, the evaluation system of judicial work was also rationalised.

In 2008, it was revealed in the so-called Fortis case that the court decision was influenced by the government. It not only resulted in the resignation of the government but also led the Commission of Inquiry of the Parliament and the High Council of Justice to redefine the relationship between the three branches of power.[4] The Council, unlike most of the other judicial councils, is an external supervisory tool, independent of judicial power and under the direction of the Ministry. It deals with the selection, promotion and evaluation of judges. It is more than a simple distribution of work or authority: the Ministry and the High Council of Justice (which also has a consultative role) are not counterbalances to one another (Allemeersch et al. 2012). This makes the external supervision of internal administration, the external handling of complaints and the management of audits effective. The achievement of greater objectivity and higher quality in the selection of judges was the reason for change. As such, the High Council of Justice is not part of judicial power, nor does it belong to any of the branches of power, and is therefore not a self-managing organ. This is reflected in the composition of the body as well: work is internally distributed between the 44 members of the Council; half of the members are chosen by a two-thirds majority vote by the senate.

The regulation of divided authority resembles a 'puffer' function, which enables professional representation of interests but without giving space to corporate dominance. For the sake of internal independence and more efficient administration, the authority of court presidents is limited. The Council has introduced a formal central and transparent complaint procedure which, as part of external control, serves to strengthen public confidence. The reform was the culmination of a decentralisation process, the aim of which was to enhance accountability and effectiveness in administration, in such a way as to not jeopardise 'classical' independence. Based on the above, there obviously is a substantial difference between the Belgian model and those based on the administrative dominance of judicial councils.

In *The Netherlands*, the Council of Justice (Raad voor de Rechtspraak) was established in 2002. It carries out tasks related to the selection of judges and the budget and also provides for the evaluation of judges. It has analysing and consulting functions serving to increase quality. The five members of the council, who are nominated by the minister and appointed by the monarch, answer to the government. The characteristics of an intermediary or a 'puffer' can also be found here: the Council is the intermediate body between the minister and the judiciary, providing the Ministry with information on the operation of the courts (de Lange 2012). The Ministry has a general political responsibility for the operation of the judiciary system. The status of the Council of Justice is ensured not in the constitution, but in the Act of 2001 on the judiciary system. There is no strict separation of powers in the constitution; the system of checks and balances has a stronger tradition in the Netherlands. The Council of Justice is a body established in the framework of a

[4]See www.dekamer.be, www.hrj.be, Commission of Inquiry, High Council for Justice, Report of the special investigation into the functioning of justice following the Fortis case.

public management reform, based on the Scandinavian model, but in accordance with the country's own traditions. The Dutch solution does not in any respect belong to the systems which are based on the administrative dominance of judicial councils.

In *Sweden* the National Courts Administration (Domstolsverket) is an independent administrative body; its president is nominated by and answers to the government. In a country with strong bureaucratic traditions, a high level of trust and a firm cooperational culture, this independent organisation operating under the government deals efficiently with the selection of judges and the other tasks related to judicial status. In accordance with historical traditions, in Scandinavia it is not the courts who are deemed to be the most important preservers of rights. The expression 'northern council model' is therefore not applicable, because based on the above the shift to self-administration cannot be conceived. The situation is the same with respect to the judge-selecting bodies established in Finland in the year 2000.

Estonia, with its recent dictatorial past, shifted from clear external administration in 2002. The administration of the courts is a mutual task of the Ministry of Justice and the Council for the Administration of Courts, with the latter consisting primarily of judges (Ligi 2012). Just like in the case of other countries prior to accession, the European Union had a major effect in connection to this. The reforms, however, were rather motivated by efficiency problems, low prestige, an immense workload and the elimination of the administrative burdens imposed on judges. It was not independence alone that played a major role in institutional development, and as such, a unique form of 'mutual' administration (co-administration) was established. The Ministry is responsible for the operation of the courts, and the court managers, appointed by the minister, carry out the strictly administrative functions at local level. The managers are not lawyers, but the judges and the head of the court de facto participate in their selection. In administrative questions such as the number of judges or Chief Justice appointments, the manager shall decide in agreement with the Council. The cooperation between the manager and the Chief Justice reflects the distribution of work between the Ministry and the Council. This stems from the fact that the Chief Justice is the one responsible for issues concerning judicial work. The agreement of the Council is needed for the issuance of regulations concerning the court structure and internal relations within the system. The Council has no apparatus; in administrative terms, it is served by the Ministry. Although the above described system is criticised, and mostly by judges claiming that the influence of the Council is too weak, the prevalence of its independence is usually not questioned. Plans to establish a more powerful judicial council and a Ministry with more limited authority already exist, reflecting the style of the international judicial lobby (Citizens' Coalition for Economic Justice).

Concerning central administration responsibilities, traditional external administration divides powers in a variety of ways between the executive and judicial branches. The next chapter shows that the systems based on the administration of judicial councils are of even greater variety. Powers in this field are not clear either, but are divided, just as in the above described examples.

1.8 Judicial Councils and Remaining Governmental Powers

If we disregard the cases in which judicial councils were introduced as complementary to the decision-making competence of the executive branch, we should first become acquainted with the Italian and Spanish models. The division of powers is typical in this category as well, with a slight difference in variation.

Italy is one of the states that define the character of systems with judicial councils; because of the preponderance of corporative interests and the absence of efficient administration, the judicial system is the subject of constant debate. Pushing judicial interests, however, does not only work through the broadly competent judicial council, but through the automatic promotion system, the influence of judges working in ministerial bureaucracy, the permeability of the borders between judicial and political careers, as well as the strong role of judicial advocacy. Four departments of the Ministry deal with the general supervision of the courts, the initiation of disciplinary procedures, the selection procedure of chief judges, and the exercising authority concerning the budget. These activities are actually carried out by judges within the Ministry, under the influence of intense politicisation, the protection of interests and corporative traditions. Although the power of the judicial council is expansive by nature, for example, concerning the training of judges or the delivery of opinions on legislation, the operation of the council is public and the decisions on the status of judges can be challenged. As a result of the judiciary's ability to push forth its interests, the absence of accountability and a performance evaluation-based promotion system caused severe problems in terms of efficiency and quality. In spite of the above, the division of powers is still typical due to the stability of ministerial competence, even despite de facto judicial participation.

In *Spain*, which was often a point of reference in the search for institutions during the post-communist era, the court system underwent a significant transformation. Following the democratic turn and 2 years after the Constitution of 1978 was ratified, the act – influenced by the Italian model – modifying the judiciary system was introduced, granting almost full authority to the General Council of the Judiciary (Consejo General del Poder Judicial). However, the operation of the courts, the apparatus, the maintenance of the offices and court buildings, as well as financial administration remained with the executive branch. After a few years, this model also produced certain tensions, and the absence of efficiency and accountability turned into an explicit desire for reform, later into a political programme and finally into an amendment of relevant legal regulations. The improper operation of the Council of the Judiciary jeopardised the prestige of the judiciary and public confidence; and so it became the subject of political debates.

Following the establishment of the internal administration model, mending it appeared difficult, but they tried to remedy the unwanted consequences. In the first phase of the reform, the act on the judiciary system and then the procedural reforms were prepared and drafted simultaneously with the Constitution. These reforms of political nature primarily served the purpose of laying the foundations of the rule of law and arranging the relationships between the branches of power. The arguments

for efficiency, increasing administrative capacity and improving quality achieved success with the help of vigorous media and scientific attention and criticism. In the beginning, several resource-intensive measures were taken in response to the serious deficiencies in efficiency and coherence: the number of judges was increased in 1988, the Academy of Judges was established in 1994, and later further amendments were made to procedural rules.

The second phase of institutional development enriched the financial and human resources of the judiciary branch with new investments, but the results of this were limited due to the absence of comprehensive planning. The recognition of problems did not end with lobbying for resources; a coordinated long-term plan emerged, in which a select few enlightened members of the Council of the Judiciary played a key role. By 2001, the political parties in parliament formed a consensus and the 'Pact for Justice' was born, which viewed judicial administration as a public service. Learning from former failures, the next steps were based on the consensus of the affected parties. In 1985, the amendment to the act which called for the appointment of practising lawyers for the unfilled positions of judges failed because the selecting committees (composed mainly of judges) significantly limited the entrance of outsiders into the system. Similarly, the system developed to measure efficiency and enhance the work discipline was boycotted by the judges on grounds of judicial independence, just as the abolishment of compulsory legal representation in minor cases provoked resistance from the bar associations.

With the participation of the Council of the Judiciary, the *White Book of the Judiciary System* was published in 1997, based on which a proposal for reform was announced (Proposals for the Reform of the System of Justice).

A parliamentary committee supervised the implementation of the political agreement. In content, this reform resulted in a substantial characteristic change of the Council: like the eight non-judge members, the other 12 of the 20 members are now also elected by the Parliament. To preserve the principle of judicial self-administration, the legislative branch selects the 12 candidates from a list drawn up by the judicial bodies, consisting of 36 candidates. The President of the Supreme Court presides over the 21-member Council. The Council was moved under parliamentary control, and although political responsibility does not have dismissal consequences, all members may be questioned and reporting is not formal. The Council's administrative actions may be challenged at the Administrative Board of the Supreme Court, based on the principle that judicial remedy shall be available against all administrative decisions. Stemming from the unfavourable experience of the former 15 years, the possibility of external control also appeared alongside the dominance of self-administration concerning administrative regulation in the high-level court. In terms of administration, management of the judiciary system became more balanced. The central element of Spanish judicial administration is that although the Council has significant power, ensuring the administrative operation of the courts is the Ministry's task and is a stable power exercised by the executive branch. The Council of the Judiciary is obliged to report to the Parliament and its decisions may be challenged at the competent court. This demonstrates that in important cases the counterbalances between the branches of power do actually work.

The most serious issue in systems operating with the judicial council's preponderance of power concerns how accountability of the councils can be established. Would the composition of Council or changes in the selection or appointment of the members be capable of making central administration responsible to the judicial board, the legal profession and society (Guarnieri 2007)? The variety of organisational regulations in post-communist countries seems to justify that there is no chance for that without the division of central administration powers.

1.9 Post-communist Versions

The practice of new democracies regarding the establishment of the rule of law was determined by the need for judicial independence, but the actual content of it remained uncertain (Piana 2009). This uncertainty did not appear in the diversity of organisational solutions, but rather in the uncoordinated relationship between independence and accountability. Due to historical experiences and the misunderstanding thereof, the one-sided euphoria for independence obscured the connection that autonomy does not create transparency nor does it ensure efficiency and quality, and therefore the balance between accountability and independence is disrupted. Referring to independence as a general and unquestionable immunity began serving as a defence against critics attacking incompetency, the unchanged approach to the role of judges and isolation (Kosar 2010). The institutionalisation of strong organisational independence hid the fact that the mental changes had not actually occurred. Thus, the status of independent courts without independent judges became the determining context of the structural reforms, as part of the process of building democracy without democrats. Organisational reforms which build upon autonomy without any counterbalance remove all obstacles from the escape route of accountability. Because of acquired infirmities, salvaged traditions and mental routines, the grand organisational reforms have not closed the process of judicial reform. In those countries where central administration as a whole was not handed over to the judicial-majority body, friction between the judicial and executive powers kept institutionalised solutions to the separation of powers in a dynamic conflicting state. However, in countries that considered the reform finalised, operational defects of the judiciary remained beneath the surface, which no appropriate tools were developed to handle. First, this was because the judicial power considered itself independently authorised to develop such a strategy and it was unable to rise above its own corporative interests. The rule of law phraseology served to protect the organisational interface and authority.

The mental heritage that proved to actually be serious was the reason self-restrictive tipping back of the unbalanced states could not supervene.

At the time of transformation, international institutions paid less attention to consequences, but as the Hungarian example reveals, neither the legislature nor the political elite have concepts available for the necessary corrections; in fact, arriving

at the realisation that adjustment is necessary is difficult in itself. In Hungary, 12 years had passed after the introduction of the new administrative model before administrative reform reappeared on the agenda; the OIT put forth recommendations not relevant to central authority as a whole, which were generally accepted by the legislature. But in 2011, the right-wing government moved to displace administrative authority as a whole, or the majority of it, back to government – without regard to the fact that the rule of law necessitates certain responsibilities to be executed by judicial bodies (Fleck 2008a). During the era of post-communist transitions, the relationship between judicial independence and accountability was understood as opposing values. This stemmed from the fact that during the dictatorship, through administrative tools and while violating independence, the government interfered in substantive issues as well. Thus, through the transition, the judiciary – its significance having greatly increased – emerged as the 'least dangerous power' and as a safeguard of the rule of law. On one hand, this was based on the recognition of the adapted relationship between the branches of power and on the other hand on undifferentiated treatment of the dictatorial past.

From the direction of judicial reform in the affected countries, it can be concluded that balancing independence and accountability is always present in debates concerning authority. But in countries where administrative authority was delegated solely to judiciary-ruled councils, these two values turn against one another. In general, it can be said that independence and accountability are two sides of the same coin, but in final organisational solutions (clear external administration and full judicial administrative autonomy) they become mutually exclusive requirements and each prevails at the expense of the other.

The dangers of corporativism and political influence can only be avoided through the division of authority. The following overview serves to illustrate how states with similar goals produced different organisational solutions or different approaches to finding organisational solutions.

Institutional diversity is a characteristic of traditional, old or older democratising states as well. At the same time, monolithic regulation does not exist in the central administration of courts; in Europe it is only present in Hungary and Romania, obstructing rule of law modernisation in both. The story of the Hungarian regulation of the judicial administration serves strong illustration for the fate of the monolith administration (Fleck 2012). The newly elected Parliament in 2011 radically changed the administration of the courts; the judicial council, which was the central element of the reform in 1997, was abolished and a politically elected person has been charged with the task of administration. Between 1998 and 2011 many lawyers formed strong criticism of the structural shortcomings of the judicial self-administration. The most important objections were the lack of accountability, the administrative weakness and the opacity of the judicial selection; these features of the judicial administration brought with them serious efficiency problems. Thus, the politicians of the newly elected government overemphasised the efficiency argument. According to the new and deeply questionable model and its political protagonists, a strong central administration can enhance the formal efficiency and

by this also the popular support. Hungarian lawmakers missed the point again: the strategy of balancing did not play a role; sharing administrative authority has not emerged. The pure and corporatist judicial administration was forced to give way to a strong central administration without relevant judicial control. Neither the accountability nor the openness seems to be solved; moreover judges have lost their ability to have a say in selecting the high administration. The former system, because of some serious organisational fault, was a façade self-government, and the present system cannot be described as judicial self-government; thus, it raises also the infringement of independence. As such it cannot be efficient in the long run.

In *Romania*, the High Judicial Council was established in 1991 to govern judicial appointments and promotions, while other authority remained with the Ministry – burdened by many administrative deficiencies and little efficiency. Weakness in administration was sought through increasing the competence of the Council: starting in 2004, all central administrative authority and power was delegated to this body. The sharp turn from subordination to complete autonomy meant immediate total isolation and impenetrable, corrupt, nepotistic operation; and because of a history widespread national intelligence, it also meant possible blackmail and abuse of power. The fully empowered High Judicial Council failed to add self-restricting operational elements. In fact, the Chairman elected by the Council in 2010, as a former judge, was accused of espionage by the Minister of Justice, while his appointment was protested against by lawyers' organisations as well (Coman and Dallara 2012). It is generally known that, during communist rule, strong political subordinancy prevailed, while after communism was overturned, it became the fully accepted stance that the rule of law depended upon judicial independence. This was reinforced by Romania's intention to join the European Union; European institutions expected solutions to problems with their legal systems through a clear switching of administrative models. They established the fully empowered judicial council accordingly and eliminated everything counterweighing judicial power (Parau 2012).

The body immediately became a powerful obstacle to judicial reform. Isolation and the removal of power from the minister resulted not in independence but in supremacy, unaccountability and impenetrable influence. In fact, automatic assignment – introduced to counter the still existing widespread corruption – did not bring results either, because transparency was not dominant in developing the parameters for case assignment and thus left opportunity for manipulation. Therefore, small, necessitated organisational changes or reforms cannot remedy an enduring and uncontrolled central power. The judicial council, referring to the protection of judicial independence, silences judges wanting to unveil corruption. Characteristic of international influence, during 2003–2004 two plans existed regarding judicial administration. Under preparation by the Romanian Ministry, beyond extending the power of the Council, the minister would have had authority in the selection and promotion of judges. However, the second version turned into reality, which was advocated by the European Commission and drafted by the chairman of the judicial council. This was the undifferentiated understanding of independence, which was considered acceptable by the Commission. The threat of the suspension

of accession negotiations left the government with no other choice. Since 2004, the exclusive interpretation of judicial independence has been further strengthening the authority of the judicial council and the repression of political influence, even if that means possibly having to battle against corruption. The case of Romania demonstrates perhaps the most clearly that complete administrative autonomy immediately strangles necessary reforms; monolithic administration hinders the development of the rule of law judiciary and leads to further tensions.

In *Poland*, establishment of the Supreme Judicial Council emerged already in 1989, but was not entered into the Constitution until later. However, central administrative authority is divided between the Ministry and the Council. The Ministry is responsible for the operation and budget of the courts, while the authority to appoint the head of court is practised jointly. The judicial council is not a governmental body; its primary responsibility is the protection of independence, as well as to present opinions about judicial candidates awaiting appointment and opinions about the courts' budget (Bodnar 2012). Ministerial control remained strong; the Constitutional Court is forced to resolve issues that arise from time to time as a result, during which the court gradually alters the competence of each. Since 2001, the Ministry has been responsible for training and also provides the resources necessary for this. The goal of organisational changes is to strengthen administrative capacity. Behind the debate concerning central authority and organisational control, the administrative power of the court president remains significant.

In *Slovakia*, the judicial council was established in 2002 but differs from the usual composition in that of the 18 members only 8 are judges. Autonomy is highlighted in that the local judicial councils have a significant role in the selection of judges (Kosar 2010). The judicial council decides in all matters concerning personnel and training, but in budget-related and financial questions, it has a consultative role, and its authority is divided with the minister concerning the appointment of head of courts. In fact, the authority to promote the presidents of the courts remained in the hands of the minister, as well as the appointment of the courts' vice presidents. Removal of judges can take place based on recommendation from the judicial council or can occur by recommendation from the head of a superior court, but it can also take place without any of these. Organisational problems arising from this issue are commonplace. An ad hoc commission was established in 2004 to resolve nomination and reappointment issues, but even this solution was not capable of solving the conflicts surrounding the status of court presidents. In 2006, the minister concurrently dismissed seven heads because of their managerial inabilities. The Slovakian model clearly demonstrates that a crucial power such as the authority to select and reappoint a head of court has the ability to dominate conflicts surrounding the operation of the institution. The balanced solution still waits, but the conflicts are open, so seeking a solution is continuous.

In the *Czech Republic*, several institutional approaches developed to resolve similar conflicts but without ever leading to a final solution. Although in 1999, plans for an internal administration model and a judicial council developed, it was not supported by political consensus. Thus, external administration remained, along with minister's authority to nominate and reappoint judges, as well as

the surrounding conflicts. During the first phase after the fall of communism, widespread lustration selected the apparatus of judicial administration as well. In 2001, while central administration remained intact, judicial selection, promotion and trainings underwent changes in order to increase efficiency. The most significant institutional innovation was the court director, which was introduced to strengthen administration. To serve as a self-administrative counterbalance, in 2002 all courts with more than ten judges established judicial councils. The councils have an advising role in personnel-related and local administrative matters, but its success ultimately depends on the head of the given court, since he is not obligated to follow the advice of the council. The establishment of the Academy in 2005 by the Minister of Justice was also part of the reform, which provides obligatory training for judges. Judges are appointed by the President of the State, based on recommendations by the minister. During a heated debate, the question arose as to whether or not the president may deny an appointment. According to a 2008 decision by the Administrative Court, the executive power has an obligation to state reasons for rejection, but Klaus completely disregarded this ruling (Kosar 2010). Another case which led to serious conflict involved the president denying the appointment of two candidates because he considered them too young for the profession. According to the Administrative Court, only the absence of regulation concerning judicial appointment may give basis for denial of appointment. According to the President of the State, one should be at least 30 years old to be appointed to a judicial post. Following the conflict, the age requirement was added by the legislature to the legal requirements of becoming a judge. Passive behaviour by the president is also unlawful; he cannot unnecessarily delay making the appointments. In reality, presidents of the courts have a decisive role in the selection of judges; the minister does not typically filter the presidents' candidates. However, decisions related to personnel can be challenged in front of the court (Bobek 2008). In 2006, the Constitutional Court attempted to resolve the conflict concerning the reappointment of the heads of courts, deeming their reappointments unconstitutional. As a result of the insufficiencies of the internal system of administrative competence, this led to further dissatisfaction in the eyes of the executive power, whose interest lies in efficient administration. The practice of the disciplinary courts was unprincipled and weak, so the lack of responsibility was institutionalised and it was unheard of that the authority related to responsibility be delegated to disciplinary courts. According to another Constitutional Court decision made in 2007, the President of the State cannot appoint judges to the Supreme Court without the consent of the President of the Highest Court. In 2003, decreasing the pay of judges became impossible and a 2002 decision stated that training cannot be obligatory for judges. Meanwhile, in 2008 a Supreme Court decision brought in a serious plagiarism case involving a Supreme Court judge which stated that the judge could not be held responsible. Many accountability failures enraged public opinion, such as the judge who missed trial and later falsified the court records, and his punishment was limited to decreased pay (Kosar 2010). As a result, in 2008 the legislature established the disciplinary court. It consists of a six-member panel, only three of whom are judges and the other three are the prosecutor, a lawyer and a legal

scholar. In parallel to this, judicial leaders' appointments became fixed term. Conflict developed surrounding the President of the Supreme Court as well: the President of the State wanted to remove the President of the body but was prevented from doing so by the Constitutional Court. However, eventually the Ministry and the presidents established cooperation concerning the nomination of judges, and the training remained in the hands of the presidents. In the Czech Republic, the external model of administration remained, but as a result of the conflicts and through contribution from the Constitutional and the Administrative Court, the counterbalances of administration have gradually developed.

Because of corporativism and fear of the uncontrollable abuse of judicial power, a central judicial council was never established. However, the administrative rights of the executive power have changed as a result of resolving these conflicts: its rights have shaped to fit judicial independence and the currently developing constitutional balance.

An element of organisational regulation of the courts, the scope of central administration and the division of authority paint a varied picture. The examples introduced highlight how organisational dilemmas are embedded into social and political environments but with the clear advantages of a balanced division of authority. The exact solutions cannot be simplified into models, especially not into easily transferrable models. The reasoning behind comparison is to clarify that solutions and different levels of cooperation among the branches of power can be functional; if there is significant global displacement concerning the issues surrounding judicial administration, then that is the appearance of more intensive forms of the division of authority. Solutions opposing these accumulate serious contradictions and functional anomalies, which poses a threat that not subtle forms of cooperation will evolve, but instead retaliation and radical reversal.

Finally, I cite from institutional-building international organisations, affected by new and differentiated presentation comparable in number to the problems introduced, which advocated this very balance in the face of former international documents. After thorough comparison, in the interest of strengthening judicial independence concerning central administration, the Organization for Security and Co-operation in Europe recommends the realisation of a more prudent regulation of authority and of internal division for states in Eastern Europe, Southern Caucasus and Central Asia.[5]

[5] 'Judicial Councils are bodies entrusted with specific tasks of judicial administration and independent competences in order to guarantee judicial independence. In order to avoid excessive concentration of power in one judicial body and perceptions of corporatism it is recommended to distinguish among and separate different competences, such as selection (see para 3–4, 8), promotion and training of judges, discipline (see para 5, 9, 14, 25–26), professional evaluation (See para 27–28) and budget (see para 6). A good option is to establish different independent bodies competent for specific aspects of judicial administration without subjecting them to the control of a single institution or authority. The composition of these bodies should each reflect their particular task. Their work should be regulated by statutory law rather than executive decree'. Retrieved from OSCE website, http://www.osce.org/odihr/73487

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