



Court Administrators and the Judiciary - Partners in the Delivery of Justice

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Abstract:

This article examines several topics relating to the administration and governance of courts in democratic societies. It includes a summary of the development of court administration as a profession, highlighting Australia and the United States. The summary includes a discussion of how judges and court administrators must work together and coordinate their efforts in key areas of court administration and management. The article also reviews separation of powers issues, highlighting the problems that emerge in systems in which oversight and administration of the courts is vested in the executive branch or power of government, most commonly in a justice ministry. It reviews the practical advantages of having courts governed and managed through institutional mechanisms failing under judicial power rather than the executive power.

Keywords: Court administration, history of court administration, court administration in Australia, relationship between judges and court administrators, separation of powers, institutional independence of the judicial system

1. Introduction

Court administration is a subject of vital importance not only to those who are engaged in the task of administering justice, but also to the broader community. It is difficult to imagine a society or community which is not dependent upon the rule of law for its happiness and prosperity. Without the rule of law, there is either anarchy or despotism. And of course the rule of law depends upon the effective administration of justice by the courts created for that purpose.

It is now generally recognized that the effective administration of justice depends critically upon a successful partnership between the judiciary and those responsible for the administration of the courts. It has not always been thus, as the brief historical review later in this article shows. That review also highlights the unintended consequences of developments in many common law jurisdictions which entrenched the executive model for court administration.

The next section of this article examines some examples of the more recent reforms in court administration and the clearly emerging trend towards greater administrative autonomy and judicial control. This is followed by an examination of two of the emerging objectives of recent court administration reform — case management and 'New Public Management' ('NPN') principles — and how these have necessitated a close working collaboration between judges and court administrators. In this context, the last section addresses the question of whether there is in fact a bright line which demarcates the judicial function from the administrative function in contemporary court administration, and the implications for the executive model of court administration.

Before turning to that, however, some preliminary comments are apposite.

2. The Importance of a Successful Partnership between the Judiciary and Administrators

Contemporary recognition of the vital importance to the community of effective collaboration between the judiciary and those who provide administrative support to the work of the court is encapsulated in the United Nations Office of Drugs and Crime ('UNDOC') publication, *Resource Guide on Strengthening Judicial Integrity and Capacity*:

Although most of the discussion on judicial competency and ethics focus on the role of judges, there is a growing recognition of the importance of the role of court personnel. Non-judicial court support personnel, who frequently make

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up the bulk of judiciary's employees, are crucial to any reform program that aims at strengthening integrity and capacity of the justice system. Courts cannot carry out their functions without these personnel. They are responsible for administrative and technical tasks that contribute to the outcome of cases and the efficiency of the judiciary. Perhaps most importantly, these officials typically serve as the initial contact point and the dispenser of information to nearly all who come into contact with the judicial system. This initial contact forms citizens' impressions of the system and shapes the confidence that they place in the courts. This role places court employees in an ideal position to promote innovation and help improve services to the public, thereby raising the stature of the court in the public eye.²

3. The Importance of an International Perspective

There is much to be gained from taking an international perspective of issues relating to court administration which many face many times a day in the course of their work. An international perspective provides the opportunity to step back from the daily grind and place the issues in a broader perspective. This can only enhance our capacity to analyze and respond effectively to the more significant underlying issues.

Some years ago, at an international conference concerning the judicial function, I made the observation that:

The issues which we share in common ... are vastly greater, and more significant, than the issues which are specific to our individual jurisdictions. The rule of law is a universal concept, and the skills required to maintain the rule of law effectively derive from our shared humanity, and depend much more upon the way in which we interact with our fellow human beings in the administration of the law, than the language we use, the precise structure of our particular judicial system, or, often, the content of the laws we administer. ... The rule of law depends upon the independence of the judiciary. Judges must be free to administer the law without fear or favor, free from interference. The challenges to judicial independence are many and varied ...³

For reasons which I develop later, one potential source of challenge to the independence of the judiciary lies in the arrangements that are made with respect to the administration of the courts in which the judiciary serve. An international perspective of the manner in which that challenge has been addressed can only inform and enhance our response to this challenge in our particular jurisdictions.

4. The International Association for Court Administration

The importance of an international perspective upon issues relating to court administration was recognized 10 years ago when the International Association for Court Administration (IACA) was created. It is interesting to note that the need for such an organization was presciently anticipated by Professor Carl Baar when, after addressing the third Asia Pacific Courts Conference in Shanghai in 1998, he observed that: 'It is a mark of the coming century that judges and courts in many countries, despite their diversity, meet together to share their commonly-understood problems and celebrate their emergence as distinct and significant institutions.'⁴

As Professor Baar observed, the characteristics of court administration have a universality which transcends the particular political, social, cultural, ideological or governance characteristics of any particular jurisdiction:

Courts not only share functions that both reinforce and check the exercise of public power, but also share common institutional characteristics and concerns. These are often summarized in the twin concepts of judicial independence and impartiality. ... [T]he fundamental clash of political theories does not seem to have produced a fundamental clash between judges — whether in liberal regimes, Marxist regimes or regimes based on Asian values or apartheid — over the institutional principles underlying the courts, and the need to protect the principles of independence and impartiality

² United Nations Office of Drugs and Crime, *Resource Guide on Strengthening Judicial Integrity and Capacity* (2011) 21 (citation omitted). The UNDOC notes, at 21 n 11, that: Among other functions, court personnel manage court facilities, assist with case management, protect evidence, facilitate the appearance of prisoners and witnesses, and perform a variety of other functions that help avoid postponements and ensure a professional and timely adjudication process. They also help judges conduct thorough legal research and draft decisions, and they ensure that decisions are properly announced and published, thus supporting consistency in decision-making. Court personnel also process and maintain case files to preserve the record for appeal; and promote judicial independence through competent budget and finance controls, and by fostering strong public relations and transparency in court proceedings.

³ Chief Justice Wayne Martin, 'Judicial Training in a Globalised World' (2014) 2 *Judicial Education and Training* 8, 8–9.

⁴ Carl Baar, 'The Emergence of the Judiciary as an Institution' (1999) 8 *Journal of Judicial Administration* 216, 216.

in practice. This phenomenon is all the more remarkable because the emergence of judging as an activity requiring independence and impartiality is relatively recent.⁵

The importance of the arrangements made in any particular jurisdiction for the administration of the courts of that jurisdiction so as to achieve judicial independence and impartiality, both real and apparent,⁶ is a theme to which I will return.

5. Court Administration — A Brief History⁷

The quaint history of the administration of the common law courts of justice shows not only how much the administration of these courts has changed, but also the presumably unintended effect which the elimination of sinecures, nepotism and corruption had upon the capacity of the judiciary to control the courts' administration. A colorful picture of the administration of the courts at Westminster in the 18th and 19th centuries is provided by former Justice Bruce McPherson of the Supreme Court of Queensland:

Like most other things associated with courts, an account of their staff begins some way back in time. Until well into the first half of the [19th] century, the offices and officers of both Chancery and the courts of common law in England were impressive in number and variety, and included such indispensable functionaries as a purse-bearer, a chaff-wax [whose duty was to prepare wax for sealing documents] and a sealer, not to mention the bag-bearer [who literally attended court with a bag containing the books, documents and pleas] to the *custos brevium* [the keeper of the writs]. Antedating as they did a permanent paid public service, court offices were a saleable commodity that lay in the disposition of the Lord Chancellor or the Chief Justice of the particular court in question. Holders of office were remunerated by fees exacted from litigants as the price of many useless services that were seldom, in fact, performed. Vested interests of purchasers of those offices were thus at stake, and reform came gradually because it was thought necessary to compensate those whose offices were abolished. After 1810 much was done to abolish sinecures, and by 1837 legislation had been passed providing for masters, clerks and messengers of court to receive fixed salaries. Although they were still remunerated out of court fees, what remained after paying their salaries was directed into consolidated funds, and officers were made liable to removal for accepting 'gratuities' in return for their services.⁸

As Justice McPherson points out, these reforms travelled to colonial Australia. Significantly he observed:

As the means of ending past abuses, they have naturally been welcomed. Attention is less often given to the fact that they also served to diminish the extensive control that powers of appointment, remuneration and dismissal of court officers gave to the judiciary.⁹

Later, I refer to the more recent phenomenon by which the courts of Australia, in common with the courts of many countries, have been subjected to contemporary principles of public administration often collected under the slogan 'New Public Management' ('NPM'). For present purposes it is sufficient to note that, like the reforms of the 19th century, while driven by the best of motives and intentions, they risk the unintended consequence of diminishing the capacity of the judiciary to control the administration of the courts in which they serve.

5.1. An Historical Anomaly

There is a curious historical anomaly which should also be noted. As Professor Baar observed:

Only in the last two centuries has it been possible in the English-speaking world to talk about courts without using the term 'courts of justice' to differentiate judicial bodies from the royal courts surrounding European monarchs. In this century, many former British colonies still retained executive control over the exercise of judicial power.¹⁰

Judicial independence and impartiality are relatively recent concepts. In the English language the word 'court' reflects the close connection between the judiciary and the monarchy at a time when executive and legislative power were both reposed in the monarch. Even in relatively recent times in the United Kingdom, the most senior member of the judiciary was a member of both the executive government and the legislature, and the members of the highest court were all

⁵ Ibid, 220–221.

⁶ 'Justice must not only be done, but must also be seen to be done.'

⁷ My apologies for the common law focus of this section, but considerations of space do not permit a broader comparative analysis.

⁸ Justice B H McPherson, 'Structure and Government of Australian Courts' (1992) 1 *Journal of Judicial Administration* 166, 175 (citations omitted).

⁹ Ibid, 176.

¹⁰ Baar, above n 4, 221 (citation omitted).

members of the legislature. It is hardly surprising that the same approach was taken in many British colonies. In many of those colonies, the Chief Justice had full executive authority and served as one of the officials administering the colony under the supervision of the Governor.¹¹

As the Canadian Judicial Council has observed, this had a particular effect upon the administration of the courts of Singapore:

In colonial times, there was no separation of executive and judicial authority; as a result, the chief justice sat in cabinet. Thus court administration was under the authority of the chief justice in British times, and remained with the chief justice after independence. Singapore court officials have never known any other system, taking for granted and taking seriously their responsibility for managing the Courts and introducing a wide range of innovations in technology and organization.¹²

Hence the anomaly. When the common law courts were closely aligned with the executive, the judiciary had the practical capacity to control the administration of the courts. In many jurisdictions, the steps which have been taken to separate the judiciary from the executive, in the interests of judicial independence, have had the consequence of significantly reducing the capacity of the judiciary to control the administration of the courts, thereby diminishing judicial independence in a very real and practical sense. The courts of Singapore provide a notable exception, as anyone with even a passing interest in court administration will attest, given the innovation and efficiencies which have been achieved by the administrators of the courts in that country under the direction of the judiciary.

In other common law jurisdictions, this anomalous loss of judicial independence has been addressed by the creation of governance structures which have restored the power of the judiciary to direct and control the administration of the courts in which they serve.¹³ However, in many common law jurisdictions, the anomaly remains and under the 'executive model' of court administration, most personnel engaged to administer the court and support the exercise of the judicial function are to a degree controlled by, but always ultimately answerable to, executive government and not to the judiciary. In the increasing number of jurisdictions in which that model of court administration has been abandoned, it has been recognized that not only does it diminish judicial independence, in a real and practical sense, but it is also inefficient economically and managerially, for reasons which I develop later.

5.2. The Executive Model

Justice Bruce McPherson's interesting history of court administration in Australia provides some colorful examples of the inevitable tensions created by the executive model of court administration. The obvious areas of tension concern staffing and budgetary resources.

5.3. Staffing Tensions

In 1889 the executive government of Queensland purported to create the new office of 'taxing officer' of the Supreme Court of Queensland without the prior approval of the judges. During the course of argument in the litigation which followed, Chief Justice Lilley (a former Premier and Attorney General) was moved to volubly enunciate the independence of the court when he observed: 'The Supreme Court is not under any department; it is under the Judges. The Crown comes into the court as a suitor, and as nothing else. It cannot come here to command, nor can it put in any officers to interfere with the functions of the court.'¹⁴

In the judgment later delivered, speaking on behalf of the Full Court, Lilley CJ asserted judicial control over all court staff in these terms:

¹¹ Traces of this approach to colonial governance remain, even in contemporary Australia. See Rebecca Ananian-Welsh and George Williams, *Judges in Vice-Regal Roles* (9 September 2014) Judicial Conference of Australia <http://www.jca.asn.au/judges-in-vice-regal-roles-september-2014/>.

¹² Canadian Judicial Council, *Alternative Models of Court Administration* (September 2006) 106 ('*Alternative Models*').

¹³ Such as the judicial council model adopted in South Australia and Victoria, and in a modified form in Ireland, or the limited autonomous court model adopted by the Federal Courts of Australia and the Canadian Supreme Court, or the executive/guardian model adopted by the other Federal Courts of Canada (see Canadian Judicial Council, *Comparative Analysis of Key Characteristics of Court Administration Systems* (6 July 2011) ('*Comparative Analysis*'). I use the term 'judicial council model' as employed by the then Lord Justice Thomas, for the Council of Europe, in *Councils for the Judiciary – Preliminary Report: States without a High Council* (March 2007); that is to mean 'a body run by the judiciary which enables the judiciary to administer the courts with a professional management structure': at 5.

¹⁴ McPherson, above n 8, 173 quoting 'Supreme Court Tuesday, September 10 – Monthly Full Court', *Brisbane Courier* (Brisbane), 11 September 1889, 1, 3.

Now, it matters not what rank a person holds in the Supreme Court, whether called a clerk or registrar, if he is lawfully appointed to carry on the administration of justice or the administration of the Court in any way, however humble, he is an officer of the Court subject to the jurisdiction of the Court; all these officers, from the registrar down to the humblest clerk in the office, is subject to the authority of the Court, controlled by it in the discharge of his duties in the Court, and any interference with them is an interference with the Court itself, and cannot be allowed. The importance of this state of the law can hardly be overestimated.¹⁵

However, there is reason to suspect that this is more wishful thinking than an accurate statement of the true position under the 'executive model' of court administration. For example, as Justice McPherson points out,¹⁶ a little earlier in New South Wales in 1883, the Prothonotary, Mr T M Slattery, acted in accordance with the direction of the judges of the court and refused to report to government with respect to his administration of intestate estates. He was dismissed by the government of the day, even though he was obeying the directions of the judiciary.¹⁷

It should not be thought that tensions under the executive model of court administration between the executive control of administrative staff and the independence of the judiciary are confined to the annals of history. Within the last 30 years, a Registrar of the District Court of Western Australia, who had both quasi-judicial and administrative responsibilities, vacated his office as a consequence of a dispute relating to his asserted independence from executive direction.

5.4. Budget Tensions

Not surprisingly, many examples of tension between the executive and the judiciary under the executive model of court administration can be found in the area of budgetary constraint. Justice McPherson provides two examples, each related to the expenses of circuit travel.

In 1887 a long-running dispute over the circuit expenses of the northern judge came to a head when the government unilaterally altered the rules by including in the estimates a reduced sum specifically to cover expenses in the north. No-one told Cooper J about it until the money was about to run out; but the government was in the end forced to relent in the face of his threat to close the circuit, release the prisoners awaiting trial, and return forthwith to his base in Bowen.

The Premier responsible for the confrontation was none other than Sir Samuel Griffith. As Chief Justice of the High Court, he had the chance in 1906 to sample the effects of executive frugality when Federal Attorney-General J B Symon elected to cut court expenses by reducing the number of associates and telephones and refusing to install bookshelves for the High Court in Sydney. His contention that the High Court should confine its sittings to Melbourne led Griffith to adopt Cooper's expedient of cancelling the court sittings due to take place there. The conflict ended only with the fall of the government of which Symon was a member. The judges won their point, the High Court remaining resolutely peripatetic until the creation of a permanent seat in Canberra under the *High Court of Australia Act 1976*.¹⁸

My reference to historical examples should not be taken to suggest that tensions between the executive and the judiciary with respect to budget under the executive model of court administration are historical. To the contrary, I suspect that virtually every head of a court administered under that model would be able to provide endless examples of tension arising from disputes over the provision of resources. I will relate one example from the many I could provide, chosen because it relates to the same subject as Justice McPherson's historical examples — namely, circuit expenses.

Some years ago now, a senior official advised me that a circuit to the north of our State would have to be cancelled because there was insufficient funding remaining within the relevant budget item for the current financial year. Trials had been listed for the circuit, cases had been prepared, witnesses and jurors summoned, etc. A little like Justice Cooper in 1887, I responded by advising the official that while of course I accepted that the provision of the resources necessary to enable the court to function was a matter for executive government, he or any other official minded to give me a written direction to cancel the circuit should understand that the direction would be attached to a media release which I would issue immediately. Happily the direction never came and the circuit proceeded.

5.5. A Threat to Independence

There is a more fundamental point which underpins these apparently superficial examples. As Professor Baar points out, whatever may have been the case in the past, the importance of judicial independence and impartiality now has a universality which transcends politics, ideology and culture. In countries with a written constitution like Australia, it is often

¹⁵ *Byrnes v James* (1889) 3 *Queensland Law Journal* 165, 168–169.

¹⁶ McPherson, above n 8, 178.

¹⁷ A classic example of the adage 'no man can serve two masters'.

¹⁸ McPherson, above n 8, 172 (citations omitted).

recognized as a fundamental characteristic of the constitutional structures for the governance of the country. But can a court which lacks the capacity to decide where and when it will sit, because it depends upon executive government for resources, truly be said to be independent? Can a court which lacks the capacity to appoint and fully control its staff truly be described as independent? Can a court in which most staff are appointed and ultimately controlled by the most prolific litigant in the court truly be said to be impartial?

5.6. Managerial Efficiency and Accountability

There is another dimension to these issues. That dimension concerns the relationship between managerial efficiency and accountability. One does not need to be an economist to understand that holding the person responsible for the allocation of resources accountable for the outcomes achieved by the utilization of those resources is likely to improve efficiency. Most budgets operate on precisely this principle. Disconnection between the authority to allocate resources, and accountability for the outputs from those resources is a recipe for inefficiency and waste.

Because systems for the administration of courts are infrequent topics of conversation amongst members of the general public gathered in bars, restaurants, or indeed anywhere, members of the community understandably hold the courts accountable for their performance. So, when the time which it takes to process a routine application for probate of a deceased estate blows out from two weeks to ten weeks because of staff shortages, the families affected by their incapacity to access the deceased estate so as to put food on the table complain to me, not to the department of government responsible for providing the staff. Very few of those correspondents would be aware that the department has the exclusive responsibility for providing human resources to the court, and that there is nothing which I or any other member of the judiciary can do if adequate resources are not provided. This means that, in a very real sense, the departmental officials who make decisions with respect to the allocation of human resources are not accountable for the consequences of those decisions and those who are held accountable lack the authority to discharge their responsibilities. If one were designing a governance structure for a public enterprise from scratch, it is hard to imagine a worse model.

The problems of efficiency and accountability to which I refer persist even if we assume public knowledge of the arcane structure for the administration of the courts under the executive model. That is because of the bifurcated nature of responsibility under that model. So, when a citizen complains to executive government about delays in the courts, the responsible minister customarily responds by referring to the independence of the judiciary and the inability of executive government to dictate the manner in which the courts allocate and list cases for trial. When that same citizen writes to me complaining about delays in trial times, I reply referring to the fact that executive government decides the level of resources to be provided to the courts, and that the court can only do so much with the resources which have been provided. The citizen exasperated by this passing of the buck from one branch of government to another might be forgiven for thinking that nobody is responsible, or at least that nobody is accepting responsibility.

6. Court Administration Reforms – Some Examples

6.1. The United States

In the United States at least some commentators have suggested that reforms in court administration during the last century were driven more by notions of managerial efficiency and economy than by the objective of institutional independence. Gordon Bermant and Russell R Wheeler assert:

The idea of a truly independent judicial branch, administratively responsible and competent, even if not administratively autonomous, emerged only in the twentieth century as a product of the Progressive Movement's effort to rationalize government and make it more efficient.¹⁹

Support for this proposition can be found in the writings of Professor Roscoe Pound. In 1906, he called for the unification of courts in the states in order to facilitate the development of systemic court administration controlled by judges rather than local political elites.²⁰ In 1914, Pound elaborated what has been described as the 'principle of real administrative autonomy for the judiciary'.²¹ However, it seems clear that Pound's justification for providing the judiciary with administrative autonomy was economy and efficiency, not judicial independence. Referencing state court systems, he wrote (with others):

¹⁹ Gordon Bermant and Russell R Wheeler, 'Federal Judges and the Judicial Branch: Their Independence and Accountability' (1995) 46 *Mercer Law Review* 835, 855.

²⁰ However, by 1940 he was able to record only individual experiments in some states: Pamela Ryder-Lahey and Professor Peter H Solomon, 'The Development and Role of the Court Administrator in Canada' (January 2008) 1(1) *International Journal for Court Administration* 31, 31 citing Roscoe Pound, *The Organization of Courts* (1940).

²¹ *Alternative Models*, above n 12, 61.

the court should be given control of the clerical and administrative force through a chief clerk, responsible to the court for the conduct of this part of its work. We have hampered the administration of justice by the extreme to which we have carried the decentralization of courts. In many jurisdictions the clerks are independent officers, over whom the courts have little or no control. ... Each clerk's office [in most states] is independent of every other. It is no one's duty to study the system, suggest improvements, or enforce them when made. What responsibility will do in this connection, when joined to corresponding power, is shown in the Municipal Court of Chicago, where the system of abbreviated records is said to have effected a saving of \$200,000 a year. Moreover, if courts are to do the work demanded of the law in large cities ... and in industrial communities, they must develop much greater administrative efficiency, and must be able to compete in this respect with administrative boards and commissions.²²

Whatever the motivation, in 1939, the US Congress passed legislation creating the Administrative Office of the United States Courts. The office was responsible for administering the federal courts, including determining their budget, under the control and supervision of what is now known as the Judicial Conference of the United States.²³ The independence of the US Federal Courts from executive interference extends even to their budget, which is prepared by the Administrative Office and approved by the Judicial Conference, before being sent to the office of the President, who has a statutory obligation to forward it to Congress without change.²⁴ However, similar progress in state court systems lagged behind their federal counterparts; according to Alexander B Aikman, it was not until 1947 that an administrator was engaged to assist a US State Chief Justice to bring professional services to the court.²⁵ According to Aikman:

It is only since the mid-1950s that courts, the 'third branch', actually have started to create a coherent institution ... Extraordinary strides in court administration and in courts themselves have been made since 1947. The judiciary has gone a long way toward establishing itself as a viable, truly independent, responsible, and accountable, branch of government. Part of the growth and maturation is attributable to the growth and maturation of court administration.²⁶

6.2. Canada

In Canada the 'emergence of the court administrator ... was tied to the movement to unify and streamline provincial courts that began in the late 1960s and reflected a realization that courts had fallen behind the rest of government in the process of administrative modernization'.²⁷ However, it seems that the modernisation of court administration in Canada 'made some judges nervous that functions that mattered to the administration of justice were being performed by staff that were subordinate to the executive branch'.²⁸

These concerns were addressed in a major report sponsored by the Canadian Judges Conference and the Canadian Institute for the Administration of Justice and published in 1981 — *Masters in their Own House: A Study on the Independent Judicial Administration of the Courts*.²⁹ In that report, the authors called for the establishment of court services departments accountable to provincial judicial councils. However, it seems that the movement towards greater judicial control of court administration was impeded by the decision of the Supreme Court of Canada in *Valente v The Queen*³⁰ in which it was held that the independence of the judiciary did not require court administration to be subject to judicial control, but that only functions directly related to the adjudicative process, such as the assignment of judges, the scheduling of trials and the allocation of courtrooms was required to be under the control of the judiciary.³¹ Notwithstanding that decision, while most provincial and territorial courts in Canada remain governed under the executive model, at the federal level, the Supreme Court of Canada has achieved what has been described as limited autonomy, and the other federal courts are administered by what is described as the executive/guardian model.³²

6.3. Australia

A similar structure has emerged in Australia. The federal courts have a degree of autonomy, administered by Registrars/CEOs who are responsible to the judiciary but within a budget set by the executive. South Australia and

²² Sue K Dosal, Mary C McQueen and Russell R Wheeler, "Administration of Justice Is Archaic" —The Rise of Modern Court Administration: Assessing Roscoe Pound's Court Administration Prescriptions' (2007) 82(5) *Indiana Law Journal* 1293, 1301 quoting Charles W Eliot et al, The National Economic League, *Preliminary Report on Efficiency in the Administration of Justice* (1914) 17.

²³ *Alternative Models*, above n 12, 62.

²⁴ *Ibid.*

²⁵ Alexander B Aikman, *The Art and Practice of Court Administration* (2006) 2 (citation omitted).

²⁶ *Ibid.*

²⁷ Ryder-Lahey and Solomon, above n 20, 31.

²⁸ *Ibid.*, 34.

²⁹ Jules Deschênes (with Carl Barr), Canadian Judicial Council, *Masters in their Own House: A Study on the Independent Judicial Administration of the Courts* (1981).

³⁰ [1985] 2 SCR 673.

³¹ Ryder-Lahey and Solomon, above n 20, 34.

³² See *Comparative Analysis*, above n 13, 39–99.

recently Victoria have moved to the judicial council model, while the other states and territories remain under the executive model.

6.4. Europe

As many would know, Ireland moved away from the executive model in favour of a modified judicial council model about 15 years ago, and among the non-common law countries, the Scandinavian countries of Denmark, Norway, and Sweden, as well as Holland have been prominent in segregating court administration from executive control. Many other countries in Europe have created judicial councils.³³

6.5. International Standards for Court Administration

Various international organizations have directed their attention to the relationship between court administration and the independence of the judiciary over the last few decades. In 1980, the International Bar Association embarked upon a project to develop an international code of minimum standards for judicial independence,³⁴ which included requirements relating to court administration. In 1983, the Montreal Declaration on the Independence of Justice adopted standards similar to those formulated by the International Bar Association,³⁵ and included a provision that 'the main responsibility for court administration shall vest in the judiciary'.³⁶ In 1995, the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* was adopted at a conference of Supreme Court Chief Justices from the Asia Pacific region.³⁷ It contains prescribed minimum standards for judicial independence after allowing for national differences within the various countries represented in the LAWASIA organization. In relation to judicial administration, the Beijing Principles provide:

The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.

The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.

The budget of the courts should be prepared by the courts or a competent authority in collaboration with the courts having regard to the needs of the independence of the judiciary and its administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.³⁸

In 1997, the Chief Justices of the Australian States and Territories issued a 'Declaration of Principles on Judicial Independence' which referred with approval to the Beijing Statement of Principles.³⁹ The question of whether the current arrangements for the administration of all of the Australian courts comply with the Beijing Principles is a fair question for debate, but the competing arguments lie beyond the scope of this paper.

6.6. Models of Court Administration

I have already referred to the emergence of different models of court administration in differing jurisdictions, prompted in some cases by a desire to reinforce judicial independence, and in others by a desire to improve economy and efficiency. There have been a number of very helpful surveys of different models in different jurisdictions. Notable amongst those surveys are the comparative analyses of key characteristics of court administration systems presented to and published by the Canadian Judicial Council in 2011, and the preliminary report requested by the Council of Europe on Councils for the Judiciary which was presented by the then Lord Justice Thomas in 2007.⁴⁰ Other authors have made important contributions to this analysis.⁴¹

Differing taxonomies have emerged in the course of these comparative analyses, but they usually identify the extent to which the administration of the court is under the control of the executive and the extent to which the administration is

³³ Thomas, above n 13.

³⁴ Shimon Shetreet, 'The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration' in Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (1985) 394.

³⁵ Ibid, 395,

³⁶ *Montreal Declaration on The Independence of Justice* (10 June 1983) article 2.40.

³⁷ It was amended on 28 August 1997.

³⁸ *The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, Beijing (19 August 1995, as amended in Manila, 28 August 1999) articles 35, 36 and 37.

³⁹ Published in (1996-97) 15 *Australian Bar Review* 176.

⁴⁰ See *Comparative Analysis*, above n 12; Thomas, above n 13.

⁴¹ See, eg, Tin Bunjevac, 'Court governance: the challenge of change' (2011) 20 *Journal of Judicial Administration* 201.

subject to control and direction by the judiciary. It is unnecessary to replicate these helpful analyses in this paper. It is sufficient to note that in different jurisdictions, different methods have been adopted in an attempt to enhance judicial independence, improve efficiency and reduce cost. It is clear from the various reviews to which I have referred that in both common law and civil law jurisdictions, a clear trend towards greater administrative autonomy and judicial control is readily apparent.

7. Two Emerging Objectives - Case Management and New Public Management

Over the last few decades, in most jurisdictions two significant objectives have emerged which have had a profound effect upon court administration, and upon the relationship between the judiciary and court administrators. Those two objectives are the proper management of individual cases and the application of the principles of public administration embodied in the expression 'New Public Management' ('NPM').

7.1. Case Management

In common law jurisdictions, traditionally, the emphasis upon the adversarial process resulted in the progress of the case being largely left to the parties. If they took no action, the court took no action. Predictably enough, in the civil side of the court's work, this produced massive backlogs of cases which had been lying stagnant for many years.

In civil law jurisdictions, although the court has traditionally taken greater responsibility for the progress of each case, responsibility for each case is allocated to a particular judicial officer. Caseloads varied between judges, as did attitudes towards expedition and timeliness, which could be idiosyncratic. Overall supervision by the court as a whole was limited.

In both common law and civil law jurisdictions, the last few decades have seen an appreciation of the need to introduce better systems for the management of cases, across the whole jurisdiction of the court, so as to improve timeliness, consistency of process, and efficiency. In many (probably most) common law jurisdictions, there has been a significant cultural shift toward proactive intervention by the court in the progress and resolution of individual cases. In many jurisdictions, this cultural shift has been accompanied by the introduction of procedures for the referral of cases to alternative dispute resolution (ADR), which has become the dominant means for the resolution of civil disputes.⁴²

The number of cases which have to be managed in most jurisdictions has meant that judges have had to turn to court administrators for the introduction of systems and technology to support the new approach. In a very real sense, the judges and the administrators have become partners in the achievement of a common objective - the just and fair resolution of all cases before the court in the shortest possible time and at the minimum cost.

The impact of the introduction of case management upon court administration in common law jurisdictions has been cogently expressed by Ryder-Lahey and Solomon:

Over time the emphasis in judicial administration in the USA shifted from improving the organization and structure of courts to enhancing their accountability, performance, efficiency, and effectiveness. This shift came from the realization that improvements in structure alone would not achieve the goal of efficient and effective courts. Of primary concern was addressing the problems of case backlog and delay, including the potential of caseflow management and mediation. Judges also came to recognize that administrative efficiency of courts required professional managers and staff capable of working with judges in formulating and executing policies at the court.

Caseflow management became in the 1970s a central concern among judges, lawyers and especially court administrators. The increasing caseload in many courts and the accompanying growth in court delay made the achievement of efficiencies imperative and provided fertile soil for the introduction of changes in scheduling and allocation of cases and of major reforms in the processing of cases. Changes in scheduling required wresting control of the calendars of courts away from local lawyers, prosecutors, and elected clerks of courts, and the assertion instead of judicial control. By 1984 the bar recognized the potential benefit of time standards governing the progress and disposition of cases.

Ultimate responsibility for caseflow management rested officially with judges. Judges had the authority to seek assistance from the court administrators and get these administrators actively involved in the pursuit of caseflow management innovations. Such innovations included new systems of allocating cases among judges (not by

⁴² In the Supreme Court of Western Australia, for example, less than 3% of the cases lodged with the court are resolved at trial – the majority are settled, many following mediation. This ratio is comparable to many superior courts in the common law world (Chief Justice Wayne Martin, 'Managing Change in the Justice System' (18th Australian Institute of Judicial Administration ('AIJA') Oration in Judicial Administration, Brisbane, 14 September 2012) 6).

specialization but by the complexity of cases and the time needed for resolution); and new ways of tracking and managing cases from initiation to disposition. Thus, caseload management came increasingly to imply the use of early screening and disposition, and various forms of alternative dispute resolution. In some courts new posts like 'case manager' or 'trial coordinator' were established, in addition to or as substitutes for 'court administrators'.

Arguably, it was the new body of knowledge about caseload management that gave court administrators a distinct professional identity. Court administrators fully versed in the latest techniques of caseload management, including the use of computers, offered something to the operation of courts that persons with legal training did not.⁴³

A similar point was made in the UNDOC's *Resource Guide on Strengthening Judicial Integrity and Capacity*:

Case management, performance evaluation and technological developments increase the organizational complexity of courts and require new professional skills and abilities that do not necessarily fit the traditional professional profile or job description of judges. This led to the increased prominence of the position of court administrator that in many jurisdictions has authority over all non-judicial court management and administration functions. More specifically, functions that are typically assigned to such court executives or managers include long-range administrative planning, finance, budget, procurement, human resources, facilities management, court security, emergency preparedness planning, and employee discipline in addition to the ministerial and judicial support functions. These new court professionals liberate the chief judges of the courts from having to invest considerable time and energy on non-judicial functions for which they have not been trained. As a consequence, chief judges of the courts can focus on the judicial functions for which they have been trained and can work to implement more far-reaching strategies aimed at guaranteeing a high quality of judicial decisions and dispute resolution. Finally, since the overall functioning of a court depends heavily on the interplay between judges and administrative staff, it is important to set up a system capable of building a shared responsibility between the head of the court and the court administrator for the overall management of the office.⁴⁴

7.2. New Public Management ('NPM')

The adoption of case management techniques over the last four decades corresponds to a broader change in the approach to public administration which has been applied to many agencies and branches of government in many countries. Although in most countries the courts are regarded as an independent branch of government, separate and distinct from the executive branch, they have not been exempted from the modern principles of public management.⁴⁵ Those principles, and their application to the judiciary, have been described by Swiss researchers, Professor Yves Emery and Lorenzo De Santis:

Nowadays, organizations within the judicial branch are targets for modernization strategies inspired by the NPM. The new public management (NPM) movement started in the Anglo-Saxon world in the 1970s prior to spreading elsewhere. Its main claim is the superiority of private-sector managerial techniques over those of the more traditional public administration ...

All public organizations are accountable to the citizens and governments for the way that they spend their money. NPM techniques are aimed at rendering public institutions more efficient and thus, more valuable for the population (so-called 'value for money') and consequently are supposed to help politicians achieve good management of public resources by enhancing the legitimacy of public institutions. Not surprisingly, as NPM is the son of two opposites, namely the new institutional economics and the business-type managerialism, it created lively debates in both research and practice. As for its methods, Hood [in 'A Public Management For All Seasons?'] defines seven doctrinal components: professional management in the public sector, the use of measures and standards of performance, emphasis on outputs, disaggregation of units, greater competition, stress on private-sector styles and on greater discipline and parsimony in resource use. Others emphasize the centrality of quantitative measurement together with notions such as efficiency, effectiveness and economy. When applied to the judiciary, this led the chief justice of New South Wales to declare that, 'there is clearly a trade-off between efficiency and expedition on the one hand, and fair procedures on the other hand'.⁴⁶

⁴³ Ryder-Lahey and Solomon, above n 20, 32–33.

⁴⁴ UNDOC, above n 2, 40.

⁴⁵ See, eg, Professor Andreas Lienhard's examination of the benefits and risks of NPM, from the perspective of Swiss constitutional and administrative law, and including the feasibility of applying NPM to the organisation of the justice system (Andreas Lienhard, 'New Public Management and Law: The Swiss Case' (Winter 2011/12) 4(2) *NISPAcee Journal of Public Administration and Public Policy* (Special Issue: Law and Public Management Revisited) 169, especially at 183-184).

⁴⁶ Yves Emery and Lorenzo Gennaro De Santis, 'What Kind of Justice Today? Expectations of "Good Justice", Convergences and Divergences between Managerial and Judicial Actors and how they fit within Management-Oriented Values' (June 2014) 6(1) *International Journal for Court Administration* 1, 1–2 (citations omitted).

However, the vital point is that there is no need to trade off judicial independence in order to improve managerial efficiency. To the contrary, they can be aligned. This alignment between judicial independence and the achievement of managerial efficiency in accordance with NPM principles is well demonstrated in a monograph commissioned by the Australasian Institute of Judicial Administration in 2004, in which three senior academics in the field of management reviewed the operation of Australia's courts from a managerial perspective.⁴⁷ The thesis of the monograph was put succinctly in an address by one of the authors a few years later:

the courts play a role as an arm of government; and the courts should assume control over court staff and court budgets if they are to be independent of the other arms of government.

(And this is the managerial perspective) Courts also play a role as providers of services. In performing this role, the Executive holds the courts responsible to produce certain services. Principles of sound management demand that those who are to be held responsible to produce must be given the power to fulfil the tasks demanded of them. If the courts are to be held responsible for the production of services they must be given the power to manage their own staff and manage their own budgets.

This managerial perspective means that the perception of a conflict between sound management and the proper role of the courts as an arm of government is illusory. Both principles demand that our courts should be responsible for managing their own staff and should be free to allocate the funds allocated them by the Executive.⁴⁸

However, the application of NPM principles to the courts comes at a price. As Richard Foster PSM has noted:

notions of accountability and performance tend to come laden with the nomenclature of business and bureaucracy — inputs, outputs, objectives, outcomes, policies, programs and key performance indicators. Such language can sit uncomfortably with the judiciary and it often falls to the senior court administrator to assist them in understanding their accountabilities and responsibilities.⁴⁹

So, like case management, the application of NPM principles to the courts has necessitated a collaborative partnership between the judiciary and those responsible for the administration of the court not only in the management and the administration of the court, but also in the design and application of data collection systems which enable the court to report to executive government and the broader community upon the outcomes which have been achieved by the utilization of public resources.

7.3. Another Threat to Independence

However, there are real dangers if too much emphasis is placed upon the statistical reporting of outcomes. Those dangers include a potential threat to the fundamental objective of the judicial branch of government, which is the provision of justice. That threat arises if judges are influenced in their management of individual cases by a desire to improve statistical outcomes, rather than a focus upon the needs of justice in each individual case. As Chief Justice Spigelman has famously observed many times in this context, 'Not everything that counts can be counted';⁵⁰ nor indeed does everything that can be counted matter.

I know from personal experience that there is an almost irresistible tendency to collect data that can be collected easily and to assume, without careful analysis, that the data collected reveals useful information about performance and efficiency, when often it does not. This danger emphasizes again the vital need for a full partnership between the judiciary and the administration. If that partnership is to be successful, the judiciary must discharge the responsibility of identifying precisely what matters in the management of the court by reference to the fundamental objectives of the court. The responsibility of the administrator is to design and implement systems which collect information on the extent to which those fundamental objectives are being achieved. If those systems capture useful information, it can be used to inform decisions as to the processes and procedures which might better achieve the things that really matter, and to report to executive government and the community on the extent to which the court has achieved its fundamental objectives. This can only occur if there is a common understanding between the judiciary and the administration as to the fundamental objectives of the court. If wrong or inaccurate measures of performance are used by executive government to inform

⁴⁷ John Alford, Royston Gustavson and Philip Williams, *The Governance of Australia's Courts: A Managerial Perspective* (2004).

⁴⁸ Philip Williams, 'The Governance of Australia's Courts: A Managerial Perspective' (AIJA Courts Governance Seminar, 31 May 2008) 1.

⁴⁹ Richard Foster, 'Towards Leadership: The Emergence of Contemporary Court Administration in Australia' (February 2013) 5(1) *International Journal for Court Administration* 1, 5.

⁵⁰ See, eg, Chief Justice J J Spigelman, 'Quality in an Age of Measurement: The Limitations of Performance Indicators' (Sydney Leadership Alumni Lecture — The Benevolent Society, Sydney, 28 November 2001) 1.

decisions with respect to the amount or the allocation of the resources provided to the court, the quality of justice delivered by the court will be diminished.

Courts are not Businesses

There are other dangers in an over-rigorous application of NPM principles to the judicial branch. Principles adopted from the private sector, designed to improve the profitability of a business venture, cannot be applied without modification or analysis to a court. A court is not a business venture.⁵¹ Courts are indispensable to the rule of law, and the value of the rule of law, or the provision of justice in an individual case, defies quantification on a balance sheet.

A Business Case?

Despite this fairly obvious proposition, the ubiquity of NPM principles in contemporary public administration can require any proposal for the expenditure of funds to be justified by a 'business case', even though, obviously enough, a court is not a business. The notion of a business case can be readily understood in the private sector, where the fundamental objective of deriving profit requires that expenditure should only be incurred if it produces an acceptable rate of return. The concept has no ready or apparent application to an enterprise in which the fundamental objective is the delivery of justice. Nevertheless, it has been suggested that, for example, every appointment of a judicial officer should be justified by a 'business case'.

It may be possible to make some sense of a 'business case' in the context of a court if there are service and performance parameters which can be measured objectively and against which expenditure can be assessed. So, if the failure to appoint a judge will result in an increase in the median time taken to resolve cases in the court, the consequence of failing to appoint a judge can be assessed, albeit not in terms of revenue or profit. However, that assessment is only useful if one places an economic value upon the timely disposition of cases. But if 'justice delayed is justice denied', can an economic algorithm be usefully applied to the quality of justice provided by a court? And, if the failure to appoint a judge not only delays median times to resolution, but increases the workload of the judges to the point where the quality of justice provided in individual cases diminishes, how is that to be measured in a 'business case'?

7.4. Where does Judging End and Administration Begin?

In the preceding section of this paper I have assessed the impact which contemporary attitudes towards case management and NPM principles have had upon the relationship between judges and court administrators. I have concluded that the emergence of those objectives has necessitated a close working collaboration. In that context, in the last section of this paper I will return to the vital topic of judicial independence and address the question of whether there is in fact a bright line which demarcates the judicial function from the administrative function in contemporary court administration. The answer to that question has profound implications for appropriate court governance structures. For example, the executive model, although in retreat, presupposes that there is a clear delineation between the judicial function, which is the exclusive province of the judicial branch of government, and the administrative function, which is under the control of the executive. If that assumption is flawed, then so is the model.

The contemporary relevance of this issue, in the context of the emphasis upon a managerial approach to court administration, is neatly encapsulated in the following passage:

The question of independence of the judiciary, due to a more performance-orientated administration of justice, is often brought forward by the heads of the courts. They keep protesting against the reduction of their initiatives and influence in favor of managers who have a direct relationship with the central administration. Such a tension between judges and managers is not peculiar to England, France and the Netherlands, and may prevail at a European level. The question is to know where the action of « judging » begins, and where the action of « administering » ends.⁵²

In his review of court governance systems, Lord Justice Thomas noted that the distinction between matters which were the subject of judicial responsibility, and matters of administration, was 'never clear cut and there has been no success in drawing the line'. He went on to observe: 'This is a factor which has to be considered when deciding whether administrative services can be provided to the judiciary which are not ultimately answerable to the judiciary as opposed to the executive.'⁵³

At different ends of the spectrum of functions performed in a contemporary court, the allocation of responsibility is clear-cut. The adjudication of a case after trial is the clear responsibility of the judiciary, and nobody would suggest that the

⁵¹ At least not since the abolition of sinecures dependent upon extracting maximum fees from litigants.

⁵² Loïc Cadet et al, 'Better Administering for Better Judging' (December 2012) *International Journal For Court Administration* (Special Issue) 1, 6 (citations omitted).

⁵³ Thomas, above n 13, 17.

judiciary should take responsibility for the engagement of cleaning contractors or the acquisition of pens and paper. However, there are many areas between the two ends of this spectrum in which the allocation of responsibility is far from clear. I will endeavor to make that proposition good by considering a variety of functions performed in a contemporary court. The topics are not meant to be exhaustive.

Judicial or Administrative Functions?

1. Accepting or Rejecting Documents Filed at Court

Most courts have specific requirements which must be satisfied before a document will be accepted for filing. The standards will commonly cover matters of form⁵⁴ and substance. Usually those standards will be prescribed by the judiciary and implemented by administrative staff at the front counter or registry of the court.

The manner in which the prescribed standards are implemented can have a profound effect upon the character of the justice dispensed by the court. If those standards are enforced pedantically, with a zealous eye to detail, legally represented parties will suffer delays while documents are redrawn and will incur additional cost, and parties without legal representation may find this practical barrier to justice insurmountable and give up. On the other hand, if the prescribed standards are disregarded by court staff, and documents are accepted that are not properly attested or verified, the quality of justice delivered by the court will be diminished. The creation and maintenance of an administrative culture which strikes an appropriate balance between these two extremes can only be achieved by close collaboration between the judiciary and court administrators. The judiciary must clearly enunciate the manner in which they would like the balance to be struck, having regard to the objectives of the court, in terms of accessibility by self-represented litigants and the maintenance of appropriate standards with respect to reliability and authenticity of documentation. The administrators must implement systems for training and supervision which enable the desired balance to be consistently achieved.

Analysed in this way, it would be facile to suggest that the role of either the judiciary or the administration is more important than the other in the discharge of this important function. Nor would it be accurate to describe this function as falling exclusively within the province of either the judiciary or the administration.

2. Case File Maintenance and Management

In most courts, responsibility for the maintenance and management of case files rests with administrative personnel. Responsibility for the IT systems that are now increasingly engaged to perform or support this function also usually rests with administrative personnel. However, the manner in which this function is performed can have a significant effect upon the quality of justice delivered by the judiciary. If documents are misfiled, or take a long time to reach the relevant file, the quality and efficiency of the judicial function will be diminished. Perhaps more significantly, in most courts there will be systems employed so as to identify documents of particular significance, or which require a prompt or even urgent judicial response. The quality and efficiency of those systems will have a significant effect upon the quality and efficiency of judicial work. For that reason, the judiciary must be involved in the specification and oversight of those systems. This is another area in which it would be invidious to suggest that either the judiciary or the administration has a more important role than the other, or to assert that the function is exclusively judicial or exclusively administrative

3. The Administrative Disposition of Cases

Most courts exercising civil jurisdictions will have procedures by which cases can be resolved administratively - for example, if a party fails to respond to court process, or if the moving party fails to take any action in the case for a prescribed period. Often those processes will be implemented administratively, without reference to a judicial officer. However, they usually result in an order of the court which finally disposes of the case. The processes have characteristics which are both administrative and judicial, in the sense that they result in the final disposition of the case. The effective implementation of these procedures is a matter in which the administration and the judiciary have a joint interest.

4. Allocating Cases to Judicial Officers

Systems used to allocate cases to judicial officers vary widely. At the risk of over-generalization, in courts with docket-based systems of case management, the process requires each case to be allocated to a particular docket. In courts which do not operate dockets, the process will require each hearing to be allocated to a judicial officer.

The systems used to allocate cases or hearings also vary widely. In some courts, the judiciary perform this function. In others, the function is entirely administrative. In many courts, like mine, the systems involve both judicial officers and administrative personnel.⁵⁵

⁵⁴ Font size, lay-out of the document, manner of execution, etc.

Even in those courts in which allocations are performed entirely by administrative personnel, it is obvious that the judiciary have a vital interest in the efficient and impartial performance of the function, and must take responsibility for the methodology employed. So, whatever systems are used to allocate cases, this is another function which cannot be said to lie exclusively within the province of either the judiciary or the administration, nor can the role of either be said to be more important than the other.

5. Effective Utilization of Information Technology

Courts increasingly rely upon information technology to dispense justice. There are now very few areas of activity which do not depend heavily upon IT support. IT systems support electronic filing, case management, the listing of cases and notification to the parties, the research and information resources available to the judiciary, trials are commonly conducted using audio visual systems and digitized data, and IT systems support the preparation and publication of reasons and orders of the court, court hearing lists and information for the public on court procedure and statistics.

In most courts, judges have come to rely heavily upon IT managers who are part of the administrative resources of the court for the design, implementation and operation of the various systems which support the judicial function. Close collaboration between the judiciary and relevant IT personnel is essential if the systems are to achieve their objectives. This is yet another area in which the judiciary and administrative personnel have equally important roles and responsibilities and which cannot be said to lie within the exclusive realm of either.

6. Data Collection and Analysis

The comments I have already made with respect to the significance of data collection and analysis in the context of New Public Management principles demonstrate the importance of this function to each of the judiciary and the administration, and the important roles which each must play in this area. It is yet another area of joint enterprise or partnership.

7. Budget Management

The relationship between the management of the budget and resources available to the court and the effective performance of the judicial function is obvious. Illustrations can be seen in the examples I cited of tension arising in relation to circuit expenses. The level of resources available to support the judiciary, in terms of personal staff, research facilities, clerical and administrative support will obviously affect the quality and efficiency of the justice provided by the court. In most courts decisions will have to be made as to the allocation of limited resources between competing areas of court operations. If the court is to achieve its fundamental objectives, the choice between competing priorities must be made by close collaboration between the judiciary and administration. This is yet another area of joint enterprise or partnership.

8. Designing, Constructing and Maintaining Court Buildings

Contemporary research shows a clear relationship between the design and quality of court buildings and the quality of justice delivered in those buildings. This is hardly surprising. Appropriate building design should give all court users - public, media, litigants, witnesses, security and administrative personnel and judiciary - safe and secure access to the spaces and facilities which they need to achieve their objectives.

In the past there has been a tendency to consign responsibility for the design, construction and maintenance of court buildings to administrative personnel because it is usually executive government which bears the cost. In that process, the judiciary are sometimes seen as 'stakeholders', to be consulted by the project team in the same way as other court users, like the legal profession and the media are consulted.

However, in more recent times, in most jurisdictions a more enlightened approach has been taken, in which the judiciary and court administration are viewed jointly as 'the client' by the architects, builders and treasury officials responsible for delivering the project. Experience has shown that this approach delivers much better outcomes in terms of buildings that provide the functionality required for the efficient delivery of justice. So, this is yet another area in which joint enterprise is essential.

9. Recruiting, Supervising and Retaining Court Staff

In most courts, responsibility for the recruitment, supervision and retention of court staff rests with administrative personnel, although in some courts the judiciary may have a role in the appointment of the chief executive officer. Nobody would seriously suggest that judicial officers should be involved in the recruitment or supervision of base-level clerical

⁵⁵ In the Supreme Court of Western Australia, civil cases managed by a judge on a docket are allocated by a judge. Criminal trials are mainly, but not exclusively, allocated under the supervision of a judge. Administrative staff list civil cases that are not managed on a docket and various miscellaneous cases for hearing.

staff. However, the manner in which those staff are recruited, trained and supervised can have a significant effect upon the quality of justice dispensed by the court, as the example I have already cited in relation to shortages of staff in the probate section of my court illustrates. As the judiciary are held responsible for the outcomes produced by the administrative personnel of the court, they should also have the responsibility and the authority to determine policies with respect to recruitment, training and supervision of administrative staff in collaboration with those responsible for the implementation of those policies.

10. The Development of Policy with respect to Court Administration and Procedures

As with any other complex organization, courts must constantly review policies relating to administration and procedures to take account of changing circumstances and opportunities for improved efficiencies. Any effective process of procedural reform must give weight to the fundamental objectives of the court, as assessed by the judiciary, but must also give weight to administrative efficiency, which is best assessed by those responsible for the administration. This is yet another area in which joint collaboration is essential.

11. Managing the Relationship between the Judiciary and Court Users

Courts are increasingly regarding themselves as service providers, with a responsibility to continually improve the quality of their service. This is evident in the development of systems for the assessment of the quality of the service delivered, such as the International Framework for Court Excellence, developed in a joint enterprise between the courts of Singapore, the United States and Australia.⁵⁶ Even the most superficial glance at that framework will show the importance of the respective roles performed by the judiciary and administrative personnel in service delivery.

In most jurisdictions, communication between the judiciary and court users is constrained to communication within the court process - during hearings and in the publication of reasons for decision, although heads of jurisdiction will often act as a spokesperson for the court. Management of the daily interface between the court and its users is largely the responsibility of administrative personnel, although the judiciary have an obvious and direct interest in that process. The culture which characterizes interaction between court personnel and court users will have a significant impact upon the public assessment of the quality of justice provided by the court. This is yet another area which requires close collaboration between the judiciary, who must take responsibility for providing the cultural settings or parameters which are to govern the interface between the court and the public, and the administrative personnel who are responsible for implementing those standards.

8. Is There a Bright Line between the Judicial and the Administrative Function?

In the preceding section I have not attempted to cover all the many and diverse functions performed by a modern court. However, the functions which I have specifically assessed cover many, if not most of the more important functions which lie between the extreme ends of the spectrum which I earlier posited - namely, adjudication in court at the one end, and buying stationery at the other. The analysis strongly suggests that all of these important functions must be regarded as the joint responsibility of the judiciary and the administration if they are to be effectively performed. The analysis reinforces the views of Lord Justice Thomas and Cadet et al as to the difficulty of assessing where judging begins and administering ends. It leads me to conclude that while there are ends of the spectrum of court activities which can be classified as exclusively judicial or exclusively administrative, there is a large range of important functions between those ends of the spectrum which are neither.

The consequences which follow from that conclusion are, I suggest, obvious. Earlier portions of this paper assessed court administration from the perspective of judicial independence and managerial efficiency. I suggested that the achievement of those objectives has resulted in a demonstrable trend towards systems of court administration which provide the court with a degree of autonomy and independence from executive government. The assumption which underpins the executive model of court administration, to the effect that all functions which are performed by a court can be classified as either judicial or administrative is demonstrably false. The fact that the effective performance of many of the functions performed by contemporary courts requires close collaboration between the judiciary and administrative personnel should inform the creation of court governance structures which embody a partnership in which each of the partners has different but equally important roles in the achievement of their common objective: the delivery of justice.

⁵⁶ With assistance from the European Commission for the Efficiency of Justice, Spring Singapore and the World Bank (International Consortium for Court Excellence, *The International Framework for Court Excellence* (2nd ed , March 2013) pp 3, 4).

Biography:

The Honourable Wayne Martin AC was appointed as Western Australia's 13th Chief Justice on 1 May 2006. He joined the Independent Bar in 1988 and was appointed Queen's Counsel in 1993. From 2001–2003, he took on the role of counsel assisting the HIH Royal Commission in Sydney. The Chief Justice was President of the WA Bar Association between 1996 and 1999, and Chairman of the Western Australian Law Reform Commission from 1996 to 2001, when the commission completed the *Review of the Criminal and Civil Justice System in Western Australia*. The Chief Justice was also a member of the Council of the Law Society of Western Australia, and was President of the Society when appointed to his current office. In 2007, the Chief Justice was awarded WA Citizen of the Year for the Professions. In 2012, the Chief Justice was awarded a Companion (AC) in the General Division of the Order of Australia for eminent service to the judiciary and to the law, particularly as Chief Justice of Western Australia, to legal reform and education, and to the community. Amongst other positions and appointments His Honour is also Lieutenant Governor of Western Australia and Convenor, Asia Pacific Region, for International Organisation for Judicial Training.



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