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# ***Court Governance In Context: BEYOND INDEPENDENCE***

By Tin Bunjevac

## **Introduction**

There is a growing trend in some of the world's most advanced western democracies of entrusting certain "framework" aspects of court administration to independent judicial agencies. This trend was highlighted in my recent study of the models of court administration, in which I examined court governance systems in seven Australian and international jurisdictions.<sup>1</sup>

This article will focus on the reasons behind the establishment of such agencies and the need for judges and policy makers to clearly identify the problems, aims and drivers for reform before embarking on a mission to adopt a particular "model." At first, this may seem like an obvious proposition; however, recent experience in overseas jurisdictions demonstrates that it is not easy to reach a consensus on even the most basic issues affecting the administration of justice in courts.

The difficulty of reaching a consensus, especially among judges, is symptomatic of an underlying organizational "atrophy" that needs to be better understood by judges and policy makers, because it highlights the fact that judges and courts, while representing the third arm of government, have practically no common institutional or analytical infrastructure to assist them to develop policy, or present a unified position on behalf of the "judicial organization" as a whole.

The key findings in my study mirror the conclusions of three seminal reports commissioned by the Australasian Institute for Judicial Administration (2004), the Canadian Judicial Council (2006) and the Council of Europe's Commission for the Efficiency of Justice (2003), that there is a *structural deficiency* in the organizational design of the executive model of court administration, which represents a significant obstacle to the strategic long-term planning of the courts' activities and is not optimal for judicial independence, efficiency and quality.<sup>2</sup>

This leads to the next key finding, that without some common organizational infrastructure and radical changes in the manner in which courts are managed internally, it is difficult to see how judges and courts will be able to respond to the ever-growing challenges of today (such as exponentially growing demand, client expectations, legal complexity, stakeholder criticism, workplace stresses and systemic delay), let alone contemplate some systematic *improvements* in the quality of the administration of justice in the future.

The focus of the court governance debate has shifted from theoretical concerns about the potential threats to judicial independence from the executive branch, to attempts to identify urgently-needed institutional solutions that are capable of better organizing and protecting judges and courts from multiple external, real and existential threats to judicial independence, authority and relevance.<sup>3</sup>

In the next section of this paper, I will explore each of the introductory themes in more detail. I will firstly outline some of the key challenges and problems facing the judicial organization in Australia and the consequences that those challenges are likely to have for the work of judges and courts. I will then describe the key aims, competences and composition of the proposed independent judicial agency, which is based on the so-called "Northern European Model." The proposed model is largely inspired by the Swedish and Dutch judicial agencies, although I will also make references to the relevant features of the South Australian, Irish, English and other models that are described in more detail in my study.

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<sup>1</sup> Bunjevac, "Court Governance: the Challenge of Change" (2011) 20 (4) Journal of Judicial Administration 201. The study examined the Victorian, South Australian, Australian Federal, Irish, English, Canadian and Dutch models of court administration.

<sup>2</sup> Alford, Gustavson and Williams, *The Governance of Australia's Courts: A Managerial Perspective*, (AIJA, 2004); Professors Carl Baar, Lorne Sossin et al, *Alternative Models of Court Administration*, (Canadian Judicial Council, 2006) (CJC). Council of Europe, Commission for the Efficiency of Justice (CEPEJ), *Councils for Judiciary in EU Countries*, (Strasbourg, 2003).

<sup>3</sup> See Fabri M and Langbroek P (eds) *The Challenge of Change for Judicial Systems* (IOS Press, Amsterdam, 2003). For a Graphic illustration of this problem see "Non-Muslims Turning to Sharia Courts to Resolve Civil Disputes", *The Times Online* (21 July 2009), <http://business.timesonline.co.uk/tol/business/law/article6721158.ece> (viewed 9 March 2011). The UK-based Muslim Arbitration Tribunal (MAT) states that 5% of its cases involve non-Muslims who are using the tribunal because "they are less cumbersome and more informal than the English legal system".

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## Problems, Aims and Drivers for Reform

### Realization of the need for change

The operational and external challenges that courts and judges are facing are significant, if not extraordinary, when compared to the operational challenges that other large organizations are facing. Judges and court staff are overworked, stressed and under increasing pressure to improve court performance from litigants, politicians, the media and other stakeholders.

In most of the jurisdictions that have gone through the painful process of structural reforms, there was a growing realization that the society had become increasingly diverse, more demanding and more complex, and that the problems could no longer be addressed by utilising the traditional, passive approaches to court administration, with which judges were most familiar and comfortable.<sup>4</sup> Eventually, many judges realized that, they too, needed to organize themselves better and rely on others in the performance of their duties. However, they also realized that, in order to achieve those goals effectively, they needed the support of an organization.

The realization that the traditional (judicial) approaches to court administration require a thorough reassessment ought to be placed in the broader institutional context of the administration of justice. The legislature has already exhausted most of the options available in its arsenal: record amounts of money have been invested in the courts; many more judges have been appointed; additional new tribunals have been established, numerous procedural and substantive law reforms have been introduced; yet the problems have continued to grow in scope, intensity and complexity.

I will illustrate this briefly by reference to the contemporary problems of delay in the two largest Australian states of New South Wales (NSW) and Victoria, which have a combined population of 13 million inhabitants.

### Pressures, Delays and Backlogs

A recent landmark comparative study of the civil litigation systems in NSW and Germany found that the median case processing time from filing to disposition was 7.68 months in the Regional Court of Stuttgart compared with almost two years (23.44 months) in the NSW District Court and almost three years (35.12 months) in the NSW Supreme Court. The authors of this “most comprehensive and interesting comparative study in a generation” examined 240 broadly comparable cases in terms of the causes of action, remedies sought, complexity of the evidence and quantum of damage.<sup>5</sup>

The differences between the two jurisdictions were just as significant in relation to other aspects of litigation:

- number of appearances required to resolve the matter
- cost of legal representation
- accessibility of the courts
- user satisfaction surveys of legal practitioners which indicated that:

100 aspects of civil litigation were judged to be “in need of reform” by solicitors in NSW

Only 16 aspects of civil litigation were judged to be “in need of reform” by practitioners in the German state of Baden-Württemberg.<sup>6</sup>

The situation is similar in Victoria, where many litigants (and their families) have to wait up to three years to have their dispute finally resolved by the courts.<sup>7</sup>

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<sup>4</sup> On the phenomenon of judicial individuality and administrative passivity see McGarvie R, “The Foundations of Judicial Independence in a Modern Democracy” (1991) 1 JJA 3. See generally also Friesen E, Gallas E and Gallas N, *Managing the Courts* (Bobbs-Merrill, 1971), p 140; Pammer W and Kramer J, “A Pygmalion in Judicial Responsibility: Toward a Management Ethos Among Judges” in Hays s and Graham Jr C (eds) *Handbook of Court Administration and Management* (Marcel Dekker, 1993), 205; For a more recent comparative study see Ng, GY, *Quality of Judicial Organization and Checks and Balances* (2007, Intersentia, Antwerpen - Oxford)

<sup>5</sup> Marfording A, and Eyland A, “Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany” [2010] UNSWLRS 28. See Richard Ackland, “We should look to Germany for Justice” (Sydney Morning Herald, 1 October 2010) at <http://www.smh.com.au/opinion/society-and-culture/we-should-look-to-germany-for-justice-20100930-15zcz.html>

<sup>6</sup> Marfording, above n. 5. The study identified numerous organizational and procedural shortcomings, particularly in pre-trial procedures, which caused the majority of the delay, due to excessive adversarialism, lack of pre-trial judicial preparation, issues associated with document management systems, problems associated with the master calendaring procedures, as well as a lack of early preparation by the parties’ lawyers. This resulted in fewer opportunities for early settlement, multiple amendments to pleadings, proliferation of issues, excessive delay and increased cost to parties.

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Based on these two examples alone, it is fair to say that the quality of justice has declined. Or to paraphrase Professor Phillip Langbroek, the speed of work in the courts is not the speed of today's Australian society.<sup>8</sup>

So what are the main causes for this situation?

### **Increasing Litigiousness and Complexity of Society and the Law**

The latest Report on Government Services shows an enormous increase (>30%) in annual lodgements since 2003 and persistent delays across all court tiers in state jurisdictions.

The law itself has become much more complex, leading to greater specialization among practitioners. This also means that judges require specialised training to keep up with the new developments.

The Australian society is one of the most multi-cultural societies in the world, which is a great asset to this country. However, this also means that courts constantly require the services of translators and interpreters, which is very expensive and time consuming.

The increase in the uses of modern technology, such as listening devices, has added significantly to the complexity and length of trials.<sup>9</sup> For example, the average length of higher criminal court trials in Victoria has increased from one week in the 1980s to three weeks in more recent times.<sup>10</sup>

### **Higher Service and Quality Expectations**

There are also much higher service and quality expectations by litigants and other justice system stakeholders (eg government agencies, repeat-players, media and politicians). Modern-day litigants are demanding that their matters should be handled in a more efficient, "client-friendly manner," with greater precision, cost-effectiveness and transparency, in plain and understandable language and with greater legal uniformity across all jurisdictions.

### **Modern Organizational Quality Expectations**

The 2003 study by CEPEJ identified new organizational expectations of the judges and courts:

- more efficient streamlining and integration of the working processes in courts
- judicial precision during procedures
- permanent training of judges and administrative staff
- uniformity in applying substantive and procedural law
- better coordination between courts and other justice system stakeholders
- greater transparency and client orientation
- correct treatment of parties (deportment)
- better functional integration of judges and administrative staff
- avoidance of long waiting periods.

### **Demands for Greater Organizational Transparency and Accountability**

Professor Kate Maleson argues that judges have extended their influence into areas previously considered "political", with the paradoxical effect that the political life has become more "judicialized."<sup>11</sup> Maleson calls this transformation a "new judiciary." She argues that additional new forms of "soft" accountability must be offered by the judiciary to counter its growing influence in public policy.<sup>12</sup>

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<sup>7</sup> See Robert Clark MP, "Coalition to Slash Court Delays," 23 November 2010, at <http://www.robertclark.net/news/coalition-to-slash-court-delays>. According to the Attorney-General, "it is no secret that Victoria has the longest waiting lists in Australia when it comes to: Supreme Court appeals, County Court trials, Children's Court matters; and Magistrates' Court matters."

<sup>8</sup> Langbroek P, "Two Cases of Changing the Judiciary and the Judicial Administration: The Netherlands and Guatemala" (Paper presented at the World Bank Conference on Empowerment through Law and Justice in St Petersburg, Russia, 8-11 July 2001)

<sup>9</sup> Supreme Court of Victoria, Courts' Strategic Directions (2004), at pp 52.

<sup>10</sup> See State of Victoria, The Attorney-General's Justice Statement, (2004) at 46.

<sup>11</sup> Voermans W., "Judicial transparency furthering public accountability for new judiciaries" (2007) 3 (1) Utrecht Law Review 148

<sup>12</sup> Kate Maleson, The New Judiciary: the Effects of Expansion and Activism, (Ashgate, 1999). The "soft accountability" methods are to be contrasted with the traditional "hard accountability" methods such as the availability of appellate review, scrutiny of judicial decisions by the media and the public nature of proceedings in courts.

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Accountability in court administration has been described as a two-way channel of communication between the court and its stakeholders. It includes “those systems and strategies [employed by the courts] that instil the values and interests of the appropriate stakeholders within organizational behaviour.”<sup>13</sup>

Examples of the soft accountability mechanisms include greater internal administrative transparency, more diverse representation of the judiciary, as well as sensitivity towards stakeholder interests and the needs of a changing social environment.<sup>14</sup>

### **Judicial Individuality and Administrative Passivity**

Judicial individuality may be regarded as a strong attribute for the purposes of judicial independence, but when it comes to preparing courts - large and complex organizations - to adapt themselves to societal changes, judicial individuality can be considered a weakness.<sup>15</sup>

Remarkably, according to a recent study, judicial individuality became especially pronounced when courts started to experience a steady rise in caseloads and increasing complexity in the law. Despite this, most judges showed little inclination to coordinate their work activities with other judges and professional court staff. One of the reasons for this was that there was simply too much “individuality and loyalty to the smallest unit within the organization”.<sup>16</sup>

While judicial individuality has very deep cultural and intellectual origins in all western countries, the situation is made worse by the poorly defined rules of internal administrative organization in courts.

### **Poorly Defined Rules of Internal Administrative Organization**

A number of Australian state courts have developed their own internal administrative divisions, in order to achieve more efficient and functional delegation of responsibilities among judges. In some jurisdictions there are judicial administrators or “judges-in-charge” who are responsible for “steering” the internal lists and divisions in a more business-like manner.

However, in most cases, there are no formal rules that facilitate or clarify the powers and functions of the chief judges or judges-in-charge, in relation to other judges or in relation to the court administration as a whole. This stands in sharp contrast with other, especially American, jurisdictions in which the responsibilities, powers and functions of the various judicial officers, bodies or committees are very clearly and transparently set out.<sup>17</sup>

Some courts, such as those in Victoria, are still governed by Councils of Judges, which were established in the 19th Century, and consist of up to 100 judges. This runs contrary to the modern court administration and public administration theories according to which any governing organ with more than 15 members “inevitably gives rise to serious problems of administration and of internal operation.”<sup>18</sup>

### **Structural Governance Issues Affecting Court Performance and Strategic Planning**

There is also a far-reaching management separation between the administrative and judicial functions in courts that affects their efficiency and their ability to better integrate internal working processes.<sup>19</sup> The judicial governance arrangements operate in relative isolation from the court administration, which is controlled by the executive. Similarly, court CEOs and administrators typically have very little input in judicial governance.

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<sup>13</sup> See Francesco Contini and Richard Mohr, “Reconciling Independence and Accountability in Judicial Systems” 3(2) (2007) Utrecht Law Review 26.

<sup>14</sup> See e.g. the 245 pages of the rules of judicial administration of the Judicial Council of California: [http://www.courts.ca.gov/documents/title\\_10.pdf](http://www.courts.ca.gov/documents/title_10.pdf). Rule 10.6 serves as an illustration of the general principle of internal administrative transparency: Business meetings of the Judicial Council are open to the public except in certain circumstances.

<sup>15</sup> See Langbroek, above n.8; Friesen et al, above n 4.

<sup>16</sup> Ng GY, “Quality of Judicial Organization and Checks and Balances” above n 4.

<sup>17</sup> See the detailed rules of judicial administration of the Judicial Council of California: [http://www.courts.ca.gov/documents/title\\_10.pdf](http://www.courts.ca.gov/documents/title_10.pdf).

<sup>18</sup> Church T, “Administration of an Appellate Leviathan: Court Management in the Ninth Circuit Court of Appeals” in Hellman A (ed), *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts*, 229. The author refers to the findings of the Hruska Commission Report of 1973. In relation to the boards of public entities, see the Commonwealth of Australia, *Review of Corporate Governance of Statutory Authorities and Office Holders*, (“Uhrig Report”) (2003) at 96. “[...] a board of between six and nine members (including a managing director if there is one) represents a reasonable size. Boards with members within this range seem to be more easily able to create an environment for the active participation in meetings by all directors.”

<sup>19</sup> Alford et al, above n 2; CJC, above n 2; CEPEJ, above n 2.

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One of the consequences of this bifurcated arrangement is that judges are not adequately involved in court administration planning, due to a lack of access to analytical and business infrastructure that would enable them to undertake data collection, research, analysis and planning that is required in order to meaningfully participate in such activities.<sup>20</sup> Furthermore, courts do not have a set budget or sufficient discretion over expenditures or management of court personnel. Funding requests often require approvals from officers who are embedded in an external bureaucracy that is physically separated from the courts and often has its own internal priorities.

As a result, there is a “misalignment” between policy and operational needs in the areas of court administration, budgeting, human resources, judicial management and case management.<sup>21</sup> Judges are not in a position to strategically plan the operations of the organizations in which they control the most critical “outputs.” Arguably, this makes it difficult for judges to assess whether the existing judicial administrative structures, arrangements and operations are the most effective and appropriate for the court as a whole.

Essentially, neither judges nor court administrators have the required degree of authority as to be fully responsible for the outcomes.

In sum, there are significant organizational obstacles for the strategic long-term planning of the courts’ activities in the executive model of court administration.

### **Rethinking Judicial Independence, Efficiency and Quality of Justice<sup>22</sup>**

According to CEPEJ, the problems identified above raise two distinct types of questions.

1. Are the existing management arrangements appropriate?

Based on the above discussion, the answer to this question is overwhelmingly negative.

Not only is there an inherent structural and operational divide in the traditional executive model; there is also a significant functional and interpersonal divide between the judicial and non-judicial officers in courts. This greatly reduces the opportunities for the creation of deeper delegation patterns, workflow integration and meaningful professional support for judges in their legal work.

To achieve these aims, more integrated and hierarchical administrative arrangements are needed to give the courts more internal possibilities – particularly in financial and personnel matters – to “drive the essential processes more effectively and efficiently from intake to judgment.”<sup>23</sup>

The answer to this problem is the system of “integrated management,” which means that the judicial, administrative, human resources and financial operations should be integrally managed by the courts’ themselves (or, depending on their size, the individual court tiers). For, this system “brings judges into an appropriate working relationship with professional administrators.”<sup>24</sup>

Integrated management allows the courts to strategically plan their operations and thus provides an effective answer to the identified structural deficiencies inherent in the traditional departmental model of court governance, which is characterised by a misalignment between authority and responsibility, and a bifurcated and diffused system of internal organization.<sup>25</sup>

Integrated courts are more capable of evolving into professional organizations, which are generally characterised by a more vertical and central command of all administrative processes. On the judicial side, this organizational arrangement promotes innovation, leads to better internal workflow integration and the creation of deeper patterns of work delegation.<sup>26</sup> These processes can be contrasted with the traditional judicial arrangements in the executive model, which operate like organizations of professionals, that are mainly based on the individual professionalism of judges and weak horizontal

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<sup>20</sup> CJC above n 2, at pp 15.

<sup>21</sup> Alford et al, n 2, at pp 85. The authors call this a misalignment between authority and responsibility.

<sup>22</sup> See in more detail, Bunjevac above n 1, at pp 206 and CEPEJ above n 2, at pp 100-102.

<sup>23</sup> CEPEJ, above n 2, at pp 101. Bunjevac, above n 1, at pp 206.

<sup>24</sup> Black M, “The Federal Court of Australia: The First 30 Years – A Survey on the Occasion of Two Anniversaries” (2007) MULR 37

<sup>25</sup> Alford et al, above n 2.

<sup>26</sup> See Sage C, Wright T, Morris C, Case Management Reform: A Study of the Federal Court’s Individual Docket System (Law and justice Foundation NSW, 2002)

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administrative arrangements that are aimed at reaching a consensus among judges on all aspects of court administration.<sup>27</sup>

We have a highly successful example of “integrated management” in the Australian Federal Courts (which are managed by the chief judges), although in my study I proposed a small collegiate board of administrative judges together with a chief court administrator. In corporate governance theory, that arrangement would be the equivalent of a board of executive directors.

There is little doubt that the system of integrated management is more flexible, responsive and organizationally superior to a model where an external bureaucracy (including a judge-led one) is involved in the day-to-day operational decision-making for the courts (such as the UK or the Irish models).

2. How can the quality of justice be improved in the future?

The second series of questions relates more broadly to the courts’ capacity to innovate and effect future improvements in the quality of the administration of justice in a more demanding social, technological and legal environment. “How can judges and courts respond to the increasing complexity of the law, clients’ new demands, large backlogs of cases, politicians and the media, and remain polite, responsive, transparent, user-friendly, and still continue to contemplate improvements in the quality of the administration of justice?”<sup>28</sup>

Based on the above discussion, the answer to this question is that judges and courts require the systematic support of a dedicated service organization – an independent judicial agency – which can contribute to the expansion of the judiciary’s own organizational capacity, and promote the efficiency, client-orientation and quality of courts as important public institutions.

### **An Independent Agency for the Judiciary**

#### **A non-departmental public body within the judicial arm of government**

Indeed, there is a growing trend in some of the most advanced western democracies, such as Sweden, the Netherlands, Denmark, Norway (as well as Ireland, England, South Australia and Canada) of entrusting key framework aspects of court administration to independent (judicial) agencies that operate at arm’s length from the Minister of Justice.

An independent judicial agency is a new kind of public body (*sui generis*), because it operates broadly within the judicial arm of government, but is not necessarily dominated by the most senior judges. It is the judicial arm of government’s equivalent of a “non-departmental public body.”

The proliferation of such agencies based on the so-called “Northern European Model”<sup>29</sup> is not merely a coincidence; it is believed that this type of intermediary institution is best-positioned to protect the independence of the judiciary, and improve the efficiency and ability of the courts to serve their clients and respond to the external challenges.

The principal tasks of the proposed judicial agency are to provide courts with the necessary funding, support, know-how and infrastructure in areas in which the courts themselves may be lacking the necessary organizational, technical or even professional expertise.

At the same time, as the successful examples of Sweden and the Netherlands demonstrate, the proposed judicial agency should not be centrally managing the court administration for the courts, especially not their internal personnel and financial operations. This is an important feature of the proposed model, although the division of responsibilities between the courts and the judicial agency must be carefully structured to suit the needs of the courts in each particular jurisdiction.<sup>30</sup>

The judicial agency that I have proposed, which is based on the Dutch model, would also perform an important role in supporting the judiciary’s professional and organizational needs, as well as assisting the courts achieve greater

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<sup>27</sup> See Bunjevac, above n, 1, pp 206. Also Albers P et al, Geïntegreerde rechtbanken: het vervolg, evaluatierapport herziening rechterlijke organisatie (onderdeel 2), IVA, (1994), pp 72-73 and pp 90-92 (“Integrated Courts - Evaluation Report Part II”)

<sup>28</sup> See Bunjevac n 1, at pp 206 and CEPEJ, above n 2, at pp 100-102.

<sup>29</sup> Voermans W, “Councils for the Judiciary in Europe,” (2000) 8 Tilburg Foreign Law Review - Constitutional Law 121

<sup>30</sup> This issue was identified 20 years ago by Church T and Sallmann P, in *Governing Australia’s Courts* (1991), at pp 73.

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organizational excellence. This is in recognition of the fact that the judicial task in particular has become much more complex in recent times, as noted above.<sup>31</sup>

## **Independent Agencies in the General Public Sector**

### **Differences between independent public bodies and government departments**

While independent authorities exist in many shapes and forms, and can even operate inside government departments,<sup>32</sup> they also share a number of common characteristics that clearly distinguish them from the departments:<sup>33</sup>

- First, they usually have (complete) managerial autonomy due to a differentiated governance structure from that of the traditional vertically integrated ministries. (“differentiated governance structure”)
- Secondly, independent agencies provide an effective answer to any constitutional or political concerns, especially in areas in which there is a pronounced need for independence from the executive. (“independence from executive”)
- Thirdly, the agencies often have a different internal “control environment”, due to available relaxations or modifications of the legal rules that apply to ministries (such as in relation to personnel, finances, reporting or management).<sup>34</sup> (“different control environment”)

Taken together, these three key characteristics of institutional and managerial autonomy are said to add to the “legitimacy, transparency and expertise of decision-making,” and have the potential to achieve greater “coherence between function, form and managerial autonomy.”<sup>35</sup>

According to the OECD, independent agencies may be established in appropriate areas to address some of the problems identified with the traditional “departmental model” of public administration, including a lack of efficiency, political interference, a need for functional specialisation, a lack of innovation and a lack of focus on the citizen and service delivery.<sup>36</sup>

### **Independent judicial agencies based on the Northern European model**

#### **Reasons for establishing an independent agency for the judiciary**

One can immediately notice that most of the above-mentioned concerns correspond to the identified problem areas in the traditional departmental model of court administration, such as the need to protect judicial independence, the need to achieve reasonable efficiency and the need to improve the quality of the administration of justice through greater client orientation, responsiveness, organizational specialisation, innovation and legal quality.

Indeed, the reasons behind the establishment of independent judicial agencies in the northern European countries are mainly pragmatic:

- First, it is believed that an independent and specialised agency that is broadly responsible for budgetary affairs, developmental, and operational support of the courts, promotes the self-responsibility, unity and quality of the judiciary at a systemic level, while at the same time acting as a protective “buffer” between the courts and the executive.
- Secondly, it is believed that this organizational arrangement promotes the self-responsibility, efficiency and quality in the courts themselves, due to the expertise and support offered by a dedicated “general and technical” organization that is responsible for creating the appropriate organizational conditions in which the individual courts can improve their own administrative capacity.

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<sup>31</sup> See Bunjevac, above n. 1. It has been suggested that judicial governance is an emerging scholarly discipline intersecting the fields of law, sociology, organizational science, public administration and economics. See Ng, GY, “A Discipline of Judicial Governance?” (2011) 7(1) *Utrecht Law Review* 102.

<sup>32</sup> OECD, *Distributed Public Governance*, (2002), at 12-16. Over the past two decades, the UK and the Netherlands in particular have implemented a systematic policy of changing the organizational structure of central ministries and introducing semi-independent agencies, but without creating separate legal bodies in most cases. The English approach is exemplified by Her Majesty’s Courts and Tribunals Service, which is a semi-autonomous “next steps” agency within the Ministry of Justice.

<sup>33</sup> OECD (2002) above n 32; OECD (2007), “Organizing the Central State Administration: Policies & Instruments”, *Sigma Papers*, No. 43, at pp 12-14.; and pp 16-35; OECD *Global Forum on Governance Public Governance, The Governance of the Wider State Sector: Definitions and Issues* (2001).

<sup>34</sup> OECD (2007), above n 33, at pp 41; OECD (2002), above n 32, at pp 12-15.

<sup>35</sup> OECD (2007), above n 33, at pp 21. OECD (2002), above n 32, at pp 14.

<sup>36</sup> OECD (2007), above n 33, at pp 40. Other identified weaknesses include “a possible lack of core competency, excessive risk aversion, limited innovation and limited implementation of performance management, a culture of managing down with little focus on citizens, and political interference.” See also the Uhrig Report, above n 18, at pp. 7 and pp 31: Statutory authorities are usually created where there is sufficient need for efficiency and independence.

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- Thirdly, it is believed that the overall increase in the judiciary's self-responsibility, efficiency and quality in the Northern European model is attributable to the clear division of responsibilities between the agency and the courts themselves. The agency actually has very few responsibilities vis-a-vis the courts' internal operational management, because the courts, for the most part, continue to operate independently of the judicial agency using the system of integrated management.<sup>37</sup>

### **Differences between the Northern European and South Australian Models**

On initial inspection, the South Australian Judicial Council model, with its central Courts Administration Authority could be classified as a variant of the Northern European model, due to the Authority's corresponding role in the budgetary, management and administration affairs of the courts. However, upon closer analysis, that institutional comparison may be somewhat misleading, for a number of reasons.

First, the South Australian Judicial Council is essentially a judicial governing body, rather than a Sui Generis independent agency that is positioned within the judicial arm of government.<sup>38</sup> This is clearly reflected in the composition of the Judicial Council, which is essentially of a "governmental" character.

The second distinction is that the South Australian Courts Administration Authority in practice plays a more central and direct role in the operational management of the individual courts, than is the case of Sweden or the Netherlands.<sup>39</sup>

### **Historical Origins - Sweden**

Sweden was the first Northern European country that introduced an independent courts administration authority, the Swedish National Courts Administration (SNCA) in 1975. Sweden has a unique system of public administration, which is characterised by a constitutional tradition of functional decentralisation and devolution of responsibilities from government ministries to independent administrative agencies.

The Swedish government is primarily responsible for allocating budgets and defining basic operational objectives for the agencies, while the agencies are independently responsible for implementing government policy and legislation in their area of responsibility. As a result of this constitutional arrangement, Sweden has relatively small ministries and large independent administrative agencies.<sup>40</sup> Importantly, the agencies' independence is protected by the constitution against any interference by the ministries in their operations.<sup>41</sup>

Against this background, it should come as no surprise to learn that Sweden was the first Northern European country that decided to entrust the organization of court administration to an independent administrative agency.

### **Governance Elements of an Independent Agency for the Judiciary**

The essential governance elements of the Northern European agency for the judiciary include:

- Broad stakeholder representation at the governing (supervisory) board level
- fixed term appointments on merit
- exceptionally high level of organizational transparency and public accountability to compensate for diminished ministerial responsibility
- broadly and flexibly defined tasks and powers.

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<sup>37</sup> CEPEJ, above n 2 at pp 108.

<sup>38</sup> From a purely theoretical perspective, it can be argued that the choice of an independent judicial agency based on the Northern European Model was motivated by a desire to create more favorable organizational conditions for the courts independently of any "arm of government." This is certainly the rationale for establishing other independent non-departmental public bodies that are designed to perform discrete functions at arm's length from the executive arm of government. For these reasons the South Australian model appears to be conceptually much closer to the American model, rather than the Northern European model.

<sup>39</sup> See generally, Bunjevac, above n 1. This is perhaps an unfair comparison of the models, because of the differences in size of the respective jurisdictions. The entire South Australian courts administration system, with less than 800 employees, is smaller than the Magistrates' Court of Victoria. It is therefore understandable that the Authority performs a central role in the operational management of the courts.

<sup>40</sup> Levin, P. T. "The Swedish Model of Public Administration: Separation of Powers – The Swedish Style", (2009) 4(1) JOAAG 38. See also Torbjörn Larsson, "Sweden" in OECD (2002), above n 32, 181, at pp 184. A related feature of this arrangement is that the significant investigatory and preparatory work which is required to pass a government bill is not performed by the ministries themselves, but by "commissions of inquiry" that are established by the government. According to the author, approximately 250-300 such commissions are initiated every year.

<sup>41</sup> OECD (2002) above n 32 at pp 30 and pp 181ff; See also Levin above n 40.

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## Diverse Representation on the Board

Diverse representation on the governing board of an independent judicial agency is an important feature in practically all of the Northern European countries, because it serves to promote the “public accountability” of those institutions. For example, in Norway, the board has nine members, including four judges, one court executive and two lawyers who are appointed by government, together with two representatives of the public, who are appointed by Parliament.<sup>42</sup> In Ireland there are 17 members on the board of the Irish Courts Service, including nine judicial members and eight representatives from the government, trade unions, members of parliament, lawyers’ associations, etc.<sup>43</sup>

In contrast, the board of the Dutch Judicial Council is more compact. When it was established, the board had five members on the governing board, including three judges, but this number has been reduced to four, as it was considered to be more effective to have a smaller governing organ.<sup>44</sup>

The practice of having non-judicial or government-appointed members on the board is considered to be an advantage in practically all of the jurisdictions, because of its potential to offer greater legitimacy, external expertise and social perspective to the decision making processes of the organization. It is also reflective of the modern philosophy of the court system, according to which “the courts are by their very nature a shared responsibility between the judiciary and government.”<sup>45</sup>

## Fixed Term Board Appointments

Fixed term board appointments are also considered to be an advantage, because they are based upon candidates’ professional expertise and merit. If a board member is not performing well, that person can be replaced at the end of the term.

From the point of view of institutional governance theory, fixed term appointments are used where it is desired to achieve a separation between “ownership” and “management” of an institution. In the long term, this can lead to greater professionalization and depoliticization of court administration.

In contrast, permanent or extensive factional appointments, are not considered to be ideal, because the appointees may not have the required skills, legitimacy and authority. Such arrangements may even be “susceptible to politicisation and syndicalism.”<sup>46</sup>

There are a number of mechanisms available to ensure that the appointments and nominations processes remain transparent and generally attuned to the needs of the courts and judiciary. For example in the Netherlands, the legislation prescribes a nomination procedure by which a Committee of Recommendations, which comprises a number of judicial members and is presided over by a judge, recommends candidates from a list of up to 6 nominees that had been initially proposed by the Minister of Justice and agreed to by the Judicial Council.<sup>47</sup>

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<sup>42</sup> See Rosseland A, Presentation of the National Courts Administration and the Norwegian Court Reforms of 2002, (Stockholm Institute for Scandinavian Law, 2010), 608 at 612. The current Chairperson is a Supreme Court judge. See <http://www.domstol.no/en/Domstoladministrasjonenno/About-the-National-Courts-Administration-The-Board/>

<sup>43</sup> See s 11 of the Courts Service Act 1998 (Irl). The principles of public accountability are clearly reflected in the broad stakeholder composition of the board of the Irish Courts Service, which represented a major departure from the South Australian model on which it was originally based

<sup>44</sup> Notably, however, the Dutch Board is supported in its function by a statutory “Board of Delegates,” whose membership includes representatives of the courts. Sweden has recently introduced a similar governance structure, which includes a “Supervisory Council” with eight members, including two heads of court. See Operational Plan 2010-2012 (SNCA, 2009), below at 56. The Supervisory Council reviews the operations of the SNCA and advises the Director-General, who is now solely responsible for its operations. In Denmark, there is a “Board of Governors” with 11 members, eight of whom are representatives of the courts. See *The Danish Courts - An Organization in Development*, (Stockholm Institute for Scandinavian Law, 2010), 581. In England and Wales, where the court administration is managed by a semi-autonomous government agency, there is a board of 10-11 members, which includes three judges. See Her Majesty’s Courts and Tribunals Service Framework Document (April, 2011), at <http://www.official-documents.gov.uk/document/cm80/8043/8043.pdf>

<sup>45</sup> Lord Chief Justice Philips of Worth Matravers, *The Lord Chief Justice’s Review of the Operation of the Courts*, (2008) at pp 7 and pp 16.

<sup>46</sup> CEPEJ (2003), above n 2, at pp 110; See the Uhrig Report, above n 14, at pp 100.

<sup>47</sup> See s 85 of the Judiciary (Organization) Act (Nld)

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## Ministerial Responsibility, Public Accountability and Organizational Transparency

One of the most striking characteristics of the Northern European model is that public control over judicial agencies is no longer primarily or exclusively achieved by means of direct Ministerial responsibility.<sup>48</sup> In most cases, the operational responsibility for the agency rests solely with the board of the agency, or, alternatively, its chief executive officer.

One of the reasons for the removal of direct ministerial responsibility is the expectation that judicial agencies should operate at arm's length from the minister and independently from any government interference. As we have seen, this principle has its roots in the Swedish constitutional tradition, according to which ministers are not responsible for the activities of independent agencies if those activities fall beyond their power of intervention.<sup>49</sup>

The principle of diminished ministerial responsibility also applies in Denmark, Ireland and the Netherlands, although the minister's responsibility for certain broad, particularly budgetary, matters affecting the operations of the agency, has not been removed in its entirety.

For example, in clearly defined exceptional circumstances, the minister may be entitled to dismiss the board of an agency where it has made decisions that are manifestly contrary to the law,<sup>50</sup> or where the Auditor-General advises the minister that there are significant financial irregularities in the management of the agency's budget.<sup>51</sup> However, other than in most exceptional circumstances, ministerial responsibility for court administration may be exercised only indirectly, through the general budgetary cycle and a robust exchange of information about the operations of the courts with the public and parliament. The minister has no other input into the internal operational matters of the agency.

New forms of public accountability and institutional transparency have been developed in order to compensate for the loss of direct ministerial responsibility. The traditional, vertical forms of accountability between the ministry and the public service have been replaced by a series of horizontal mechanisms of openness and transparency that permeate through the relationship between the agency and the government (or parliament) on the one side, and the agency and the public on the other.<sup>52</sup>

One of the key mechanisms of public accountability is the publication of detailed annual reports and strategic operational plans. In the Nordic countries, the principle of official publicity has been taken to an even higher level. For example, in Sweden, the freedom of information laws give members of the public (and the media) far-reaching rights of access to information in relation to practically all aspects of independent authorities' internal operations and decision-making processes. Once an official decision is made by an authority, the decision itself, together with all the materials and correspondence that are associated with the decision, automatically become publicly available.<sup>53</sup>

In addition, there is the protection available through the institution of the Parliamentary Ombudsman, who is responsible for monitoring the work of public agencies and investigating complaints (and in some cases, initiating prosecutions) from members of the public if they believe that they have been mistreated by a public authority.

As we have seen above, diverse composition of the board of an independent authority (which typically includes members of parliament and key stakeholder representatives), also serves as an important accountability mechanism in most jurisdictions.<sup>54</sup>

Finally, there are independent financial audits performed by the Auditor-General, as well as the government's general instructions that accompany the budget bills. Both the financial audits and the operational directives are publicly available

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<sup>48</sup> See CEPEJ (2003) above n 2, at pp 111-112. This is primarily the case of Sweden and Norway, as well as Ireland.

<sup>49</sup> See CEPEJ (2003), above n 2, at pp 20.

<sup>50</sup> s 106 of the Judiciary (Organization) Act (Nld). In the Netherlands, the minister makes a recommendation, but the decision is made by Royal Decree.

<sup>51</sup> See Jesper Wittrup, Poul Sorensen, "Quality of Justice in Denmark" in Marco Fabri et al (eds), *The Administration of Justice in Europe: Towards the Development of Quality Standards* (2003), 119, at pp 125. In Denmark, the minister of justice may, if the agency has received such a negative assessment from the Auditor-General, instruct the agency to take measures that the minister and the Auditor-General have agreed upon, failing which the minister may be entitled to dismiss the board of the agency; CEPEJ (2003), above n 2, pp 43.

<sup>52</sup> See e.g. Langbroek P, "Quality Management and Autonomy for Court-Organizations; or Creating public trust by developing quality standards for court services", EGPA Paper Study Group on Management and Delivery of Justice, 2001, at pp 6. OECD (2007), above n 33, at pp 14.

<sup>53</sup> Levin, above n 40.

<sup>54</sup> See CEPEJ (2003), above n 2, at p 21.

documents, providing important information to the public about the operational results and expected achievements of their agencies.<sup>55</sup>

For example, the Swedish government included the following basic operational directives to the SNCA in the appropriations directions for 2010:

With respect for the respective roles of the courts, the SNCA and other relevant public authorities, the SNCA shall create conditions for the Courts of Sweden to achieve its operational targets by:

- ensuring an appropriate allocation of resources
- providing administrative support and service
- acting as a driving and supporting force in developmental and quality- enhancement measures
- striving to improve access and provide information about the work of the Courts of Sweden
- working to promoting greater co-operation within the Courts of Sweden
- working to improve co-operation between the courts and other concerned authorities.<sup>56</sup>

### **Broadly Defined Functions and Tasks**

As can be discerned from the general appropriations directions for the SNCA, the principal task of the Judicial Agency is to allocate the budget and to provide administrative support and service to the courts, while also acting as a driving force for their developmental activities.

One of the striking features of the Swedish system is that the Agency does not have a major say in the internal operations of the courts. It is only responsible for creating the optimal operational conditions for the courts “from a distance”.<sup>57</sup> To achieve these aims, the agency is required to maintain a very clear delineation between its own activities and those of the courts that it serves.

Nevertheless, the Judicial Agency’s principal role is to familiarise itself with the conditions in which the courts operate, coordinate activities between the courts and other authorities where appropriate, as well as provide and maintain a number of common systems that are used by all of the courts.<sup>58</sup> In this regard, the agency is primarily responsible for the provision and maintenance of common administrative systems, such as IT, security, financial administration and staff administration systems, as well as various ancillary tasks such as recruitment, archiving and procurement.

Where additional operational support is required by the courts, the agency can provide the necessary expertise to the presidents of the courts to assist them develop appropriate structures, tools or systems based on the best-practice models developed in consultation with the courts. In that sense, the SNCA can be described as a central service organization for the courts, because it can provide significant professional expertise in areas such as organizational competence design, court design, staff training, technology, and informational platforms.<sup>59</sup>

In addition to providing operational and administrative support, the agency is also responsible for performing certain legal and policy functions, such as evaluating proposed legislative amendments and drawing up proposals for legislative reform, in close consultation with the courts and other relevant stakeholders.<sup>60</sup>

In the Netherlands, the Council for the Judiciary has an even more ambitious agenda. In addition to the tasks performed by the Swedish SNCA, the Council for the Judiciary has a broad mandate to systematically promote the legal quality in the courts by conducting research, analyses and programs that are designed to improve the quality of legal outcomes and achieve more uniform application of the law.<sup>61</sup> It also has responsibility for maintaining a quality organizational framework

<sup>55</sup> See Torbjörn Larsson, in OECD (2002), above n 32, at pp 181ff.

<sup>56</sup> Domstolsverket (SNCA), Operational Plan 2010-2012, (2009) at pp 8, referring to the Swedish Government’s Appropriation directions for the 2011 budget year in respect of the Courts of Sweden, at pp 3, available at [http://www.domstol.se/Publikationer/Informationsmaterial/appropriationdirections\\_2011.pdf](http://www.domstol.se/Publikationer/Informationsmaterial/appropriationdirections_2011.pdf) . See also s 13 of the Courts Service Act 1998 (IrI). The board of the Irish Courts Service is required by law to take into account any “policy or objective of the Government or a Minister of the Government insofar as it may affect or relate to the functions of the Service.”

<sup>57</sup> CEPEJ (2003)

<sup>58</sup> SNCA, above n 56, at pp 12.

<sup>59</sup> SNCA, above n 56.

<sup>60</sup> SNCA, above n 56.

<sup>61</sup> Bunjevac, above n 1, at pp 220. See Judiciary (Organization) Act (Nld), s 94. See also Council for the Judiciary, Quality in the Judicial System in the Netherlands (2008), p 4. available at:

<http://www.rechtspraak.nl/Gerechten/RvdR/Publicaties/Research+Memoranda.htm> (viewed 9 March 2011). For example in 2009 and 2010 the Council completed or commissioned research on decisions involving adjustment problems with children, updated international

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that aims to promote organizational improvements in the courts in the financial area, work processes area, the learning area and the customer area.<sup>62</sup> In that sense, therefore, the Agency acts as a powerful research and development engine for the courts and the judiciary.

### **Conclusion**

There are significant internal and external challenges impacting on the courts' operations and they are growing in scope, intensity and complexity. This trend is unlikely to be reversed.

The executive model of court governance makes it difficult for courts to strategically plan their operations, due to the identified structural problems that are inherent in its organizational design.

As a result, more integrated and vertical administrative arrangements are required to give the courts more internal possibilities, particularly in financial and personnel matters (integrated management).

An independent judicial agency inspired by the Northern European model can provide the necessary support to the courts by promoting their self-responsibility, independence, quality and efficiency. Ideally, an independent judicial agency should be managed by a professional board consisting of fixed-term appointees, but with significant (majority) judicial participation.

To compensate for the reduction in ministerial responsibility, additional new forms of public accountability should be offered.



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research on minimum sentences, assessed the practices of single and multiple judge decisions, the issues involved in court sequestration, the quality of specialized commercial courts, the complexity of (statistical) information in judicial decisions, the financing and turnaround in mediation as well as a pilot study on the enforcement of civil judgments. See generally also, Council for the Judiciary (Netherlands), Agenda for the Judiciary 2008-2011: Independent and Committed (2007), p 3. The Council develops programs in consultation with the courts to improve the reasoning of judgments, encourage second-reading of judgments, devote more time to preliminary inquiries, encourage continuous education, procedural improvements, peer review, consultations between courts of appeal and district courts, self-assessment procedures, case differentiation, as well as a customer appreciation survey in combination with a mentoring system.

<sup>62</sup> See Albers, "Performance Indicators and Evaluation for Judges and Courts" at: [http://www.coe.int/t/dghl/cooperation/cepej/events/onenparle/MoscowPA250507\\_en.pdf](http://www.coe.int/t/dghl/cooperation/cepej/events/onenparle/MoscowPA250507_en.pdf) at pp 11. The Dutch Rechtspraak organizational quality system was partly based on the European Foundation for Quality Management.