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Judicial Independence and/or(?) Efficient Judicial Administration

1. When did we start to think about judicial independence? Why should we care?

We are today so used to the rhetoric of judicial independence that we rarely think about the origins of the concept of judicial independence and whether and how we benefit from it. Although the idea of separation of powers has been discussed already from Aristotle and Polybius to Marsilius of Padua, John Fortescue, and Gasparo Contarini¹, judicial independence is a comparatively modern invention.

There were for centuries and centuries only bodies having judicial functions without almost any independence. For example, in the times of the Norman monarchy, the king with his Curia Regis was in charge of judicial power in the Kingdom of England. Subsequently, however, more courts were formed and a judicial vocation developed. In the fifteenth century, the king's role in exercise of judicial power diminished substantially. Even so, kings could still influence courts and dismiss judges. The House of Stuart exercised this power recurrently in order to override Parliament.²

The formerly unlimited royal privilege of instituting courts was curtailed when Parliament eliminated the courts of the Star Chamber and High Commission in 1641 and when by adopting the English Bill of Rights³ it declared illegal the establishment of ecclesiastical courts by James II.⁴ After the Stuarts were eradicated with the Revolution of 1688, the attitude toward the power of the king to overrule Parliament by dismissing disobedient judges and nominating new judges became more and more one of detestation. King William III at the end of the day approved the Act of Settlement 1701⁵, which instituted tenure for judges except where

¹ S. D. Gerber. The Court, the Constitution, and the History of Ideas. – Vanderbilt Law Review 2008 (61), pp. 1088 –1105.

² R. J. McWhirter. Going Courting. Where We Got Courts and the Rule of Law. – Arizona Attorney, October 2008 (45), pp. 12–22.

³ English Bill of Rights. Available at <http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&Year=1688&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=1518621&ActiveTextDocId=1518621&filesize=29720> (20.12.2009).

⁴ R. J. Reinstein. The Limits of Executive Power. – American University Law Review, December, 2009 (59), p. 282.

⁵ Act of Settlement. Available at <http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&PageNumber=0&NavFrom=0&activeTextDocId=1565208&parentActiveTextDocId=0&showAllAttributes=0&showProsp=0&suppressWarning=0&hideCommentary=0> (20.12.2009).

Parliament relieves them of their duties.*⁶ In the main, this resulted in a significant degree of independence from executive control for British judges in the eighteenth century and thereafter.*⁷

Since the time of Aristotle, the main rationale for advocating for judicial independence has been the objective to protect the people from tyranny.*⁸ It has been asserted that judicial independence is most important in those cases where courts are called upon to resolve disputes between individuals and the state or between different branches of government. Judicial independence, at its base, means that judges are free to rule against the government, should the law so dictate, without fear of reprisal.*⁹

Later, judicial independence has been considered in a much broader context, including that of undue influences from all possible agents in society.

Although there is tension between independence and accountability, independence will be weak if corrupt behaviour is prevalent.*¹⁰ The threat to judicial independence is not always governmental. The judiciary needs to be concerned about independence not only from the other branches of government but also from illegitimate sources of power. Judicial independence from other branches of government is crucial, but it is meaningless if judges are instead subjected to other improper influences. Consequently, governments seeking to establish an independent, autonomous judiciary having the respect and trust of the people must take steps to secure the independence of the judiciary from the influence of powerful non-government groups that have an incentive to influence the outcome of adjudications.*¹¹ In this sense, judicial independence has utilitarian reasons. Judges conceivably influenced by agents of undue pressure would render judgements not based exclusively on the law and facts of the case but may take into account the interests of the above-mentioned agents. Therefore, judgements rendered under undue influence would lead the society away from the models of behaviour upon which that society has decided through legislation*¹² to be those best serving the interests of the society.

Judicial independence signifies much more than a judge's freedom from political influence. Independence has a number of definitions and dimensions, including structural, organisational, and administrative aspects of a judicial system, which all play a role in judicial independence.

The International Association of Judges has declared that "[j]udicial independence is independence from any external influence on a judge's decisions in judicial matters, ensuring [for] the citizens impartial trial according to law. This means that the judge must be protected against the possibility of pressure and other influence by the executive and legislative powers of [the] state as well as by the media, business enterprises, passing popular opinion etc. But it also implies guarantees against influence from within the judiciary itself"*¹³.

There are several, different types of independence:

- 1) substantive independence, which is functional (*sachliche Unabhängigkeit*) or decisional independence, in German and American law, respectively (making judicial decisions and exercising official duties subject to no other authority but the law);
- 2) personal independence (adequately secured judicial terms of office and tenure);
- 3) collective (institutional) independence (judicial participation in the central administration of courts); and
- 4) internal independence (independence from judicial superiors and colleagues).^{*14}

In the discussion on the influence of the hunt for efficient court management, all of these types of independence should be kept in mind.

⁶ No judge in England has been removed from a high court since 1830. See M. Dakolias, K. Thachuk. Attacking Corruption in the Judiciary: a Critical Process in Judicial Reform. – Wisconsin International Law Journal, Spring, 2000 (18), p. 402. Nevertheless there have been very few lapses in propriety. One judge died in Nottingham, on 17 July 1884, in a house which was neither so sedate, nor so orderly, as the judge's lodgings. But so far as independence is concerned any examples of subservience to either executive or to the legislature in the last century in England are difficult, if not possible, to find. See Lord Lane. Judicial Independence and the Increasing Executive Role in Judicial Administration. – Judicial independence: the contemporary debate. S. Shetreet, J. Deschênes (eds.). Dordrecht: Kluwer Law International 1985, p. 525.

⁷ S. Jay. Servants of Monarchs and Lords: the Advisory Role of Early English Judges. – American Journal of Legal History 1994 (38), p. 151.

⁸ S. D. Gerber (Note 1), p. 1090.

⁹ J. C. Wallace. An Essay on Independence of the Judiciary: Independence from what and why. – New York University Annual Survey of American Law 2001 (58), p. 242.

¹⁰ M. Dakolias, K. Thachuk (Note 6), p. 354.

¹¹ J. C. Wallace (Note 9), pp. 245–246.

¹² Here we do not enter the discussion whether any society is able to find the best models of behaviour through legislation and just assume that we have not been able to find out any better sources.

¹³ International Association of Judges. Meeting in Recife, 17–21 September 2000, Final Report. The Independence of the Individual Judge within his Own Organization. Available at: http://www.iaj-uim.org/site/modules/mastop_publish/?tac=41 (17.06.2010).

¹⁴ See S. Shetreet. The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: the Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges. – Chicago Journal of International Law, Summer, 2009 (10), p. 281; M. Dakolias, K. Thachuk (Note 6), pp. 361–362.

Raul Narits and Uno Lõhmus have asserted in the commentaries to the Estonian Constitution that the constitutional provision for judicial independence should protect courts primarily from the executive power^{*15} and that European countries have been at an increasing rate acknowledging judicial self-administration, denoting that judges should have substantial contribution in administration of courts.^{*16}

The one caveat, sometimes offered, is that judicial independence should not come at undue cost in terms of judicial accountability. If, for example, a judge is afforded life tenure in an effort to insulate her from outside influences and then she demonstrates an invidious bias in her performance, the independence inherent in the life tenure makes it difficult, if not impossible, to hold her accountable for her unacceptable bias. Conversely, judicial accountability can undermine independence. For example, if a robust system of judicial discipline and removal is put in place to hold judges accountable for their biases, the judges' independence is inevitably infringed, as the disciplinary regime can always be used to intimidate judges from rendering unpopular decisions. This illustrates the problem as one of balancing two competing interests.^{*17}

Judicial independence is often treated as if it were an unalloyed good, to be furthered insofar as practically possible. In the traditional telling, an independent judiciary is regarded as if it were the font of justice, the rule of law and individual rights, if not the font of all good things. Such worship of judicial independence is not sustainable, theoretically or empirically. Indeed, the concept of judicial independence potentially flies in the face of our fundamental constitutional concept of checks and balances. While there is no doubt that a measure of judicial independence is a good thing, such independence must be kept in balance with judicial accountability. Increased judicial independence is not always better.^{*18}

Although the concept of judicial independence is at least in part based on the Aristotelian desire to keep away from the threat of tyranny, unlimited judicial independence, if not counterpoised by accountability as well as checks and balances between powers, could lead to tyranny itself: judicial tyranny.

2. Courts need administration, don't they?

The courts cannot function without administration. As Peter Ferdinand Drucker has already phrased it, "[w]ithout institution there is no management. But without management there is no institution".^{*19}

Courts are highly complex institutions, which are difficult to manage on a number of levels and for a number of reasons.^{*20} For decades, if not longer, legislators and many in the executive branch saw the judicial branch as unmanaged and the source of many fiscal and budgeting nightmares. They also often viewed judges and their managers as incapable of effective management.^{*21}

The scant administrative capabilities demonstrated by courts for decades flowed in part from the prevailing view that courts were simple organisations that would work well as long as judges addressed their caseloads diligently. The modern concepts of case and caseload management—the idea that courts are responsible for the timely progress of cases and for the active management of judicial resources—had not yet been embraced. Rudimentary court and caseload management was supplied by clerks of the court in the form of handling court files and scheduling cases. Over time, however, growing communities yielded larger workloads, and growth became foremost among the several factors driving the necessity for rational court management. Additional compounding factors were increasing social and legal complexities of issues that come before the courts. Even as court systems simplified their jurisdictional structures through unification reforms, the communities they served became more complex and interdependent. As complexity and interdependence grew in social relationships and economic transactions, the laws that govern those relationships mirrored their complexities and interdependencies.^{*22}

However, the controls necessary for judicial administration make judicial independence vulnerable to risk. There are five models of judicial administration. These are:

- 1) the exclusive executive model;
- 2) the joint executive–judicial and multi-branch responsibility model (e.g., judicial councils);

¹⁵ Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition). Tallinn: Juura 2002, p. 611 (in Estonian).

¹⁶ Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne. 2., täiendatud trükk (The Constitution of the Republic of Estonia. Commented edition. Second, amended edition). Tallinn: Juura 2008, pp. 678 and 683 (in Estonian).

¹⁷ D. Pimentel. Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity. – *Cleveland State Law Review* 2009 (57), p. 5.

¹⁸ F. B. Cross. Thoughts on Goldilocks and Judicial Independence. – *Ohio State Law Journal* 2003 (64), p. 195.

¹⁹ P. F. Drucker. *Management: Tasks, Responsibilities, Practices*. New York: Harper & Row 1973, p. 6.

²⁰ A. B. Aikman. *The Art and Practice of Court Administration*. Boca Raton, Florida: CRC Press 2007, p. 5.

²¹ *Ibid.*, p. 7.

²² S. Henley, J. H. Suhr. The Role of Court Administration in the Management, Independence, and Accountability of the Courts. – *Florida Bar Journal*, March, 2004 (8), p. 29.

- 3) the exclusive judicial model;
- 4) the shared responsibility model; and
- 5) the model of separate independent organ of judicial administration.*²³

The exclusive judicial model may be classified into two sub-models:

- a) the individual model, vesting the responsibility in one individual judge, as in New York, and
- b) the collective model, vesting the responsibility in a collegial judicial body, as in the federal judiciary of the United States, or as in Italy and Portugal.*²⁴

The shared executive–judicial model too can be classified into sub-models:

- a) vertical division of responsibility (i.e., certain matters are the responsibility of one branch throughout the whole court system while other matters are placed in the responsibility of another) and
- b) horizontal division of responsibility—normally, the administration of the higher court will be the responsibility of the judiciary and the executive will be entrusted with the administration of the lower courts (as in Australia, Germany*²⁵, and Canada).^{*26}

One model of shared judicial–executive responsibility is for the responsibility indeed to rest with the executive for the court system, in whole or in part, while the executive is under a duty to consult the judiciary in exercising its responsibility over the court system. A variation of the shared responsibility model may go beyond consultation with the judiciary and may provide for joint responsibility of the judiciary and the executive for court administration.*²⁷

In conclusion, it can be asserted that the more involvement of executive and legislative powers in judicial administration the more potential threats exist to judicial independence.

3. Efficiency of judicial administration v. judicial independence—the case of Estonian judicial reforms

Since regaining independence in 1991, Estonia has tried out two different systems of judicial administration and is currently debating introduction of a third.

Right after recovery of independence in 1991, even before adoption of the Constitution, Estonia instituted the new court system. The Legal Status of Judges Act was adopted on 23 October 1991 and entered into force on 1 January 1992*²⁸, and the Courts Act had the same adoption date and entered into force a year later, on 1 January 1993.*²⁹ These acts created a system of courts having three links and three instances, special administrative courts were formed, and the judges were to be appointed for life.*³⁰

Estonia adopted a shared responsibility model of judicial administration quite close to the German version. The responsibility was divided horizontally (leaving the Supreme Court outside the administration by the executive power) and vertically (leaving the majority of issues to be administered by the executive and only a few by the judicial power). The courts of first instance (the county court, or *maakohus*; city court, or *linnakohus*; and administrative court, or *halduskohus*) and courts of second instance (circuit court, *ringkonnakohus*) were administered by the Ministry of Justice. The Minister of Justice approved the budgets of courts of first instance and courts of appeal; determined the territorial jurisdiction and location of, and the number of, judges in these courts; appointed the chief judge of a county or city court; and approved the rules of these courts and the land registries and registration departments in the composition thereof. The initial selection of judges of courts of first instance and circuit courts was within the realm of judicial power—they were (and are) appointed to office by the President of the Republic, on the proposal of the Supreme Court.*³¹

²³ S. Shetreet. *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*. – *Judicial independence: the contemporary debate*. S. Shetreet, J. Deschênes (eds.). Dordrecht: Kluwer Law International 1985, p. 644.

²⁴ *Ibid.*

²⁵ Constitutional Court (*Bundesverfassungsgericht*) has in Germany the benefit of a much wider administrative independence than other courts. The budget estimates of the Constitutional Court are prepared by the court and are presented to the Ministry of Finance directly as a separate plan, like the budget plan of a Federal Ministry.

²⁶ S. Shetreet (Note 23), p. 644.

²⁷ *Ibid.*, p. 645.

²⁸ Eesti Vabariigi kohtuniku staatuse seadus, 1991. – RT 1991, 38, 473 (in Estonian).

²⁹ Kohtute seadus, 1991. – RT 1991, 38, 472 (in Estonian).

³⁰ The pros and contras regarding judicial independence guaranteed by the 1991 Acts were discussed in a paper: J. Ginter. *Guarantees of Judicial Independence*. – *Juridica International* 1996 (I), pp. 75–84.

³¹ Eesti Vabariigi põhiseadus, § 150. – RT 1992, 26, 349; RT I 2007, 43, 311 (in Estonian). Translation into English available at <http://www.president.ee/en/estonia/constitution.php> (23.03.2010).

The Supreme Court (*Riigikohus*) was (and still is) administered by itself and financed directly from the state budget. The different model of administration for the Supreme Court was for the most part rationalised by the fact that in Estonia the Supreme Court has the authority of a constitutional court as well. According to the Constitution of the Republic of Estonia, the Chief Justice of the Supreme Court is appointed to office by the *Riigikogu*, Parliament, on the proposal of the President of the Republic. Justices of the Supreme Court are appointed to office by the *Riigikogu*, on the proposal of the Chief Justice of the Supreme Court.^{*32}

For a decade, the Supreme Court and the Ministry of Justice were engaged in discussion as to whether the model of judicial administration guaranteed enough independence for the judiciary.

Then Chief Justice of the Supreme Court, Rait Maruste, proclaimed that it is necessary to bring the Courts Act, adopted before the Constitution, into accordance with the Constitution and generally recognised principles of democratic jurisprudence, and that in its essence and substance the Estonian judicial system is similar to the Anglo-American system and therefore the system of judicial administration should follow the American model in such a manner that all administrative matters would be decided by the Supreme Court and the Chief Justice.^{*33}

Another proponent of greater involvement of the judiciary in judicial administration, Heinrich Schneider, suggested that the separation of the judicial power from the executive and the legislative power presupposes the organisational unity and integrity of the judicial power. Moreover, the judicial system should be independent in judicial administration, vesting the responsibility for judicial administration in a judicial body.^{*34} The idea of more autonomy in administration was defended in a number of other papers. Chief Justice of the Supreme Court at the time, Uno Lõhmus asserted that the existing procedures for formation of court budgets created a risk that the judgements of the Supreme Court might find reflection in the next year's budget of the Supreme Court.^{*35} First-instance-court judge Aase Sammelseg came to the conclusion that involvement of executive power in the judicial administration causes conflicts of interest between the administrator (executive power) and the judiciary.^{*36}

Rait Maruste asserted in 1997 that in substance the Ministry of Justice was proposing a system of judicial administration that treats courts as adjudicative institutions of executive power that have the same autonomy in delivery of justice but that is subject to the control and supervision of the Minister of Justice in all its other activities.^{*37}

The idea of greater judicial responsibility for judicial administration was countered by the Ministry of Justice. Then Minister of Justice Märt Rask asserted that the system of judicial administration should not be removed from the authority of the Ministry of Justice and that none of the many mandates of executive power in judicial administration hinder judicial independence.^{*38}

The Ministry of Justice proposed a draft Courts Act that would leave courts of first and second instance under the administration of the Ministry of Justice. Notwithstanding that the Estonian Constitution, in § 146, declares that “[t]he courts shall be independent in their activities and shall administer justice in accordance with the Constitution and the laws”^{*39}, the stance of the ministry was that judicial independence should be guaranteed exclusively at the level of individual judges and it would mean only that no-one should be allowed to interfere in the matters of a concrete court case; i.e., for the most part, barely substantive (functional) independence of the judiciary was supposed to be appropriate. The only other aspect of independence deemed worthy of mention in the explanatory note to the draft was internal independence (independence from judicial superiors and colleagues).^{*40}

At the first reading of the draft in the *Riigikogu*, then Minister of Justice Märt Rask insisted that no change in judicial administration is reasonable.^{*41} Only on the second reading did the Ministry of Justice agree to the idea of creating a new institution of judicial administration—the Council for Administration of Courts.^{*42}

³² The Estonian Constitution, § 150.

³³ R. Maruste. Eesti kohtusteemi juhtimise korrastamise kava (Project for Regulating the Management of the Court System). – *Juridica* 1995/5, pp. 199–203 (in Estonian).

³⁴ H. Schneider. Kohus lahusvõimude süsteemis (Courts in the System of Separation of Powers). – *Juridica* 1999/9, p. 419 (in Estonian).

³⁵ U. Lõhmus. Kohtuvõimu sõltumatus ja kohtuhaldus (Independence of Judiciary and Judicial Administration). – *Riigikogu Toimetised* 2001 (3). Available at <http://www.riigikogu.ee/rito/index.php?id=11686&op=archive2> (17.01.2010) (in Estonian).

³⁶ A. Sammelseg. Kohtukorralduse korraldamatus pärsib kohtusteemi arengut (Problems in Judicial Administration Hampers Development of the Judicial System). – *Riigikogu Toimetised* 2001 (3). Available at <http://www.riigikogu.ee/rito/index.php?id=11686&op=archive2> (17.01.2010) (in Estonian).

³⁷ R. Maruste. Kuidas korraldada kohtukorraldus? (How to Organise the Administration of Courts?) – *Juridica* 1997/10, pp. 501 (in Estonian).

³⁸ M. Rask. Võimude tasakaalustatus kui põhiseadulik väärtus (Balance of Government Powers as a Constitutional Value). – *Riigikogu Toimetised* 2001 (3). Available at <http://www.riigikogu.ee/rito/index.php?id=11686&op=archive2> (17.01.2010) (in Estonian).

³⁹ The Estonian Constitution, § 146.

⁴⁰ Kohtute seaduse eelnõu seletuskiri (Explanatory Memorandum to the Draft Courts Act), 2000. Available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=003674649&login=proov&password=&system=ems&server=ragne11> (24.01.2010) (in Estonian).

⁴¹ The speech of then Minister of Justice, Märt Rask, at the first reading of the Courts Act in *Riigikogu* on 14 February 2001. Available at <http://web.riigikogu.ee/ems/stenograms/2001/02/t01021405-15.html> (25.01.2010) (in Estonian).

⁴² *Ibid.*

The new Courts Act was adopted on 19 February 2002 and entered into force on 29 July 2002. This act created the Council for Administration of Courts, and the system of judicial administration of courts of first and second instance shifted a little further from the executive responsibility model. From this point onward, the majority of the decisions of the Minister of Justice in judicial administration needed the consent of this council. The council's approval became necessary for:

- 1) determination of the territorial jurisdiction of courts;
- 2) determination of the structure of courts;
- 3) decision on the exact location of courts and courthouses;
- 4) the determination of the number of judges in the courts and judges in permanent service at a courthouse;
- 5) the appointment to office and any premature release of chairmen of courts;
- 6) determination of the number of lay judges;
- 7) determination of the internal rules of courts;
- 8) determination of the number of candidates for judicial office;
- 9) the appointment of candidates for judicial office;
- 10) decisions on any additional remuneration for a manager of a courthouse;
- 11) the establishment of the composition of register data for the courts' information system and the procedure concerning submission thereof; and
- 12) the conscription of judges into active service in the defence forces.

The council's approval is not necessary for budgetary decisions, but the council provides a preliminary opinion on the principles for the formation and amendment of annual budgets of courts.^{*43}

Still the executive remained heavily involved in the administration of the first- and second-instance courts. And the judicial power continued to be unsatisfied with the situation.

The next momentous factor to be considered in the development of Estonia's courts is that the judges worked out the principles for development of the court system. The discussion about the development of the court system's self-organisation, its financing, and administration culminated in February 2007, when the *en banc* meeting comprising all Estonian judges approved certain principles for development of the court system. The document concerning these principles according to which the court system would be developed as an independent branch of power, for the first time in the history of the Republic of Estonia, set out the directions and objectives for that development.

The most important principles for the development of the court system were declared as being the following:

1. Estonia's court system is a Constitutional institution that, on the basis of the principle of separate and balanced powers, is independent in its activities.
2. The court system operates as an independent power, responsible for the functioning of the administration of justice on the basis, and pursuant to the procedure, established by laws.^{*44}
3. To ensure development of the court system in observation of fundamental values and its functioning pursuant to established requirements, it is important to regulate the duties and structure of the court system, to develop the financing and administration of the court system, to deepen the self-managerial elements thereof, and to promote the personnel policy of the court system and training.
- ...
7. For further development in line with the principle of separation of powers, the administration of courts should be separated from the executive power. To guarantee the appropriate administration and development of courts, an independent administrative authority was to be established, to be part of the single court system in legal and organisational senses and subject to the management model of the court system as a whole.
8. The court system shall be managed on the basis of the principle of self-management, with that management exercised through the activities of the Court *en banc*, the Council for Administration of Courts, the Chief Justice of the Supreme Court, chairmen of courts, the full court, and the director general of the administrative authority of courts and directors of courts.
- ...
15. The budget of the court system, separated from the budget of the Ministry of Justice, must become a stable all-inclusive budget of the system of administration of justice, the development priorities of which are established for at least three years at a time^{*45 *46}.

⁴³ Kohtute seadus (The Courts Act), § 41. – RT I 2002, 64, 390; 2009, 68, 463 (in Estonian).

⁴⁴ This principle involved other elements also.

⁴⁵ This principle involved other elements also.

⁴⁶ The principles of development of the court system. Resolution of the Court *en banc* of 9 February 2007. Available at <http://www.nc.ee/?id=188> (26.03.2010).

In March 2008, the Minister of Justice established a working group to prepare the amendments to the legislation regulating judicial administration and organisation. Then, in 2009, a new draft Courts Act was submitted by the working group headed by Märt Rask, who was Minister of Justice at the time the Courts Act was adopted in 2002 and is now Chief Justice of the Supreme Court.^{*47} The new draft suggests a complete change in the judicial administration; the administration of the first- and second-instance courts will be in the same system as the Supreme Court. The Ministry of Justice will have almost no functions in judicial administration. Judicial administration will be the mandate of the Council for Courts' Administration of Courts and the Centre for Courts' Administration.

At first glance, the draft appears to have the potential to be popular with the judiciary. However, in reality the overwhelming majority of the Supreme Court Justices and judges of the courts of first and second instance have opposed the draft.^{*48}

The opposition to the draft has several, very different sets of roots.^{*49} Nonetheless, almost all who oppose the 2009 draft are unsatisfied with the fact that it proposes to introduce to judicial administration many features that have long been employed exclusively in the sphere of administration of civil service.

The draft proposes that the Chief Justice of the Supreme Court may be, upon the proposal of the President, removed from office by the *Riigikogu* without the requirement of any reason being offered for this removal.^{*50} This innovation has been explained as a means to guarantee more efficient management of the court system by the Chief Justice. Yet, while such measures are not unfamiliar in the administration of executive power, the introduction of such measures in judicial administration creates unnecessary potential opportunities for executive and legislative power to put pressure on the Chief Justice—the head of the Supreme Court. Such opportunities are extremely dangerous in Estonia, because the Estonian Supreme Court exercises the judicial review and has to check the constitutionality of the legal acts of the executive and legislative power.

The greatest challenge to judicial independence is the close relationship between the executive branch and the judiciary, resulting in a lack of sufficient judicial independence. This challenge can be seen in the pressures exerted on judges both by the executive branch and by higher-ranking judges.^{*51}

The second most common criticism of the draft of 2009 is that it constructs excessively hierarchical relationships among the Chief Justice, the chairmen of the courts, the chairmen of the courts' chambers, and the justices and judges. The draft allows:

- 1) release of a chairman of a chamber of the Supreme Court due to failure of co-operation between the Chief Justice and the chairman of that chamber^{*52}; and
- 2) release of a chairman of a court, a chairman of a chamber of a circuit, or a manager of a courthouse due to failure of co-operation with the chairman of the higher court or with the chairman of the court.^{*53}

This concept is again not unfamiliar in relations between managers within the executive power. And, of course, rigid hierarchy makes management more efficient. But within the judicial power such grounds for release create unnecessary potential opportunities for higher-ranking judges to exert pressure on judges, which has been criticised by many analysts.^{*54} Internal judicial independence requires that the judge be independent from directives or pressure from his fellow judges with regard to his adjudicative functions.^{*55}

The 2009 draft introduces an opportunity for a judge to be transferred from one courthouse of a court to another by the chairman of the court without the consent of that judge.^{*56} This would make it easier for judicial administration to equalise caseloads across the various courts, but it would create an additional opportunity for a higher-ranking judge to exert pressure on judges as well.

⁴⁷ Text of the Draft Courts Act (2009). Available at [http://www.riigikogu.ee/?page=pub_file&op=emsplain&content_type=application/msword&file_id=868762&file_name=Kohtute%20seadus%20\(652\).doc&file_size=384000&mnsent=649+SE&fd=26.03.2010](http://www.riigikogu.ee/?page=pub_file&op=emsplain&content_type=application/msword&file_id=868762&file_name=Kohtute%20seadus%20(652).doc&file_size=384000&mnsent=649+SE&fd=26.03.2010) (26.03.2010) (in Estonian); Explanatory memorandum to the Draft Courts Act (2009) (Note 40).

⁴⁸ J. Filippov. Reformierakond valmistub kohtuid politiseerima (Reform Party Prepares to Politicise the Courts). – Eesti Ekspress, 10.12.2009. Available at <http://www.ekspress.ee/news/paevauudised/eestiudised/reformierakond-valmistub-kohtuid-politiseerima.d?id=27693755> (12.01.2010) (in Estonian).

⁴⁹ U. Lõhmus. Kohtuhaldus kohtute seaduse eelnõu järgi (Administration of the Judiciary under the Courts Act Bill). – *Juridica* 2010/2, pp. 75–85 (in Estonian); P. Simson. Debatt: Kas kohtuid kummitab politiseerumisoht? (Debate: Is there a Threat of Politicisation of the Courts?). – Eesti Päevaleht, 3.02.2010. Available at <http://www.epl.ee/artikkel/487310> (23.03.2010) (in Estonian).

⁵⁰ Section 27 of the Draft Courts Act (2009).

⁵¹ S. Shetreet (Note 14), p. 296.

⁵² The Draft (2009), § 26.

⁵³ The Draft (2009), § 19.

⁵⁴ See, e.g., S. Shetreet (Note 14).

⁵⁵ S. Shetreet (Note 23), p. 637.

⁵⁶ The Draft (2009), § 52.

If the power of transfer were to be in the hands of the executive, it would constitute a very powerful deterrent and sanction against a judge who does not conform to what the authorities may desire. But even if such a power is in the hands of the judiciary, it should be vested in a collegial body—at any rate, in the hands of more than one person.^{*57}

The issue of the scope of administrative supervision over a judge by his fellow judges is becoming increasingly present as a subject of debate. For example, unrestricted collective judicial control of the assignment of cases might lead to the undermining of a nonconformist judge's independence. This might have a chilling effect on judicial independence. On the other hand, absence of any control for fear of an adverse effect on judicial independence might militate against the efficiency of the justice system. Also, it might adversely affect public confidence in the courts. The legitimacy and validity of judicial interference with the administrative assignment of a judge was also subject to adjudication in Germany (in the case of Judge Dr V. H. de Somoskeoy).^{*58}

Another problematic issue is that the 2009 draft authorises the Chief Justice of the Supreme Court to distribute by himself the budget allocated for courts among the various courts.^{*59} No doubt, the most functional scheme for distribution of the money is to offer the mandate to a single person. But this power would increase the dominance of the Chief Justice in the hierarchy of the judiciary. It is difficult to understand why the budget cannot be in the hands of the Council for Courts' Administration.^{*60}

The draft introduces a novelty for the Estonian judicial system, substitute judges. According to the draft, the substitute judges should have the qualifications necessary for a person becoming a judge and would be appointed through the same procedure as the other judges. However, they would receive a salary only for the time for which they are appointed to serve as a substitute judge.

The use of substitute and part-time judges has been criticised widely. It is cost-effective, as it does not require long-term commitment of judges, accommodations, and support staff; these advantages, however, must be considered against the flaws of such a system. It has led to criticism that second-rate justice is disposed thereby. It has been asserted that use of predominantly part-time judges is incompatible with an orderly sequence of court sittings within an area and may impair the consistency of sentencing. It is conceivable that those part-time judges who fail to please the government may have their service terminated or may not be offered the opportunity to accept a full-time appointment. In the public perception, is that not a factor that could affect impartiality? In spite of these powerful objections to the institution of part-time judges, it is found in a number of countries. The 1983 Montreal Declaration did not state that the practice of employing part-time judges is inconsistent with judicial independence (§ 2.20 and explanatory note).^{*61} However, the declaration stated, the practice should not be resorted to, because the public perception concerning independence might cast doubt on the impartiality and independence of the judge.^{*62}

For the Estonian judicial system, there is a further argument against introduction of substitute judges. The Estonian Constitution's § 147 states rigidly that 'judges shall be appointed for life'^{*63}. And it is extremely questionable whether the substitute judge receiving a salary only for the brief period(s) for which she serves as a substitute judge can be regarded as a judge appointed for life. In any sense, the guarantees of independence would be substantially less for substitute judges than for 'full' judges appointed for life.

In conclusion, one may assert that the history of the development of the schemes for administration of the Estonian judicial system indicates that judicial administration may hinder judicial independence no matter what concrete model of judicial administration is employed.

⁵⁷ S. Shetreet (Note 23), p. 630.

⁵⁸ *Ibid.*, pp. 638–639.

⁵⁹ The Draft (2009), § 92.

⁶⁰ The First Study Commission of the International Association of Judges has concluded in their (2003) study on "The Role and Function of the High Council of Justice or Analogous Bodies in the Organisation and Management of the National Judicial System" that "[t]he independence of the judiciary is also dependent on adequate budgetary allocations for the administration of justice and the proper use of those resources. This can be best achieved by an independent body which has responsibility for the allocation of those resources". Available at http://www.iaj-uim.org/site/modules/mastop_publish/?tac=43 (21.06.2010).

⁶¹ Universal Declaration on the Independence of Justice. – Judicial Independence. S. Shetreet, J. Deschênes (eds.). Dodrecht, Boston, Lancaster: Martinus Nijhoff Publishers 1985, p. 447.

⁶² S. Shetreet (Note 23), p. 626.

⁶³ The Estonian Constitution, § 147.