THEORETICAL QUESTIONS AND MODELS OF COURT ADMINISTRATION

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Abstract

The separation of public administration and the administration of justice took place in Hungary more than one and a half centuries ago in line with Act IV of 1869. Yet, we may still identify numerous necessary or expedient points of contact in the legal system between the two organizational forms. In public law thinking the administration of justice and public administration have been linked in multiple ways for centuries. There are substantial differences in terms of why and especially how the two branches of law examine the administration of courts, while European scholars of public law also think differently about the issue. In this paper, I aim to introduce exactly these segments: namely what the opinion of Hungarian scholars of public law has been about the separation and the interconnections between the two areas, moreover, the factors based on which they tried to separate the law application activities carried out by jurisdiction and public administration, as well as the theoretical questions that may arise in view of this in connection with the administration of courts.

Keywords: *separation of powers, administration of justice, judicial independence, quasi jurisdiction, efficiency.*

Introduction

The separation of public administration and the administration of justice took place in Hungary more than one and a half centuries ago in line with Act IV of 1869. Yet, we may still identify numerous necessary or expedient points of contact in the legal system between the two organizational forms. One of these involves administrative jurisdiction but we may also mention the quasi-judicial activity of public administration that is discussed in scholarly publications as a special aspect of public administration which at the same time also represents the exception from the principle of the monopoly of jurisdiction by judges. The administration of courts is also one of the related areas with a 1991 resolution of the constitutional court[1] arguing that it represented a special, "relatively independent" field of public administration. At the same time, publications in the area of constitutional law also scrutinize this topic in a necessary and justified way, while the regularities of court administration are among the classic questions of public administration, including the differentiation between external and internal administration. When discussing the topic from the perspective of public administration, the question of the independence of judges also makes up a necessary starting point, such research,

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[1] Rationale of Constitutional Court resolution no. 53/1991. (X. 31.) II. 2., Magyar Közlöny 1991. p. 120.

however, focuses primarily on studying the tools of administration and management.

It is already clear form the above that there are substantial differences in terms of why and especially how the two branches of law examine the administration of courts, while European scholars of public law also think differently about the issue. In this respect, the starting point itself is not specified enough in connection with the organizations belonging to jurisdiction[2] but in public law thinking the administration of justice and public administration have been linked in multiple ways for centuries. In this paper, I aim to introduce exactly these segments: namely what the opinion of Hungarian scholars of public law has been about the separation and the interconnections between the two areas, moreover, the factors based on which they tried to separate the law application activities carried out by jurisdiction and public administration, as well as the theoretical questions that may arise in view of this in connection with the administration of courts.

1. The Comparison of Jurisdiction and Public Administration In View of the Principle of Separation of Powers

It is a distinct preliminary question related to the topic what the attitude of works on public law has been towards the confluence of the branches of power in different eras. Although separation of powers represents one of the cornerstones of the rule of law, from the era of Dualism (1867-1918) all the way to today all studies have mentioned it as a fact in connection with courts that judicial activities are also performed by other, especially public administration bodies and there may also be other overlaps between public administration and justice.

The principle of separation of powers has been adapted in Hungarian works on public law in two ways. The classic trichotomy is associated with the name of Montesquieu in theoretical works in French and Latin states as well as in Hungary. The problems related to the practical implementation of the separation, however, appeared early on, what is more, they were already present in the original work[3], thus especially in German publications a dual system also appeared based on the differentiation of public will and action[4] which distinguished only between the legislative and the executive branches, whereby the latter also included administration and justice.[5]

An early description of the separation of powers in Hungarian publications on public law was written by Győző Concha in *Politica* in which he argued that the judicial power had already been separated but compared to the legislative and executive power its separation was only relative.[6] Concha also acknowledged the significance of judicial independence, however, he did not address the relationship between public

[2] Berthier, Laurent – Pauliat, Hélène: Administration and management of judicial systems in Europe, Study by the Observatoire des Mutations Institutionnelles et Juridiques (Observatory of Institutional and Legal Change–OMIJ, EA 3177) University of Limoges, Euroepan Commission for the Efficiency of Justice (CEPEJ), this document is available online at https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-administration/168078829f (last access 02.12. 2020.) p. 2.

[3] C.f. Montesquieu, Charles, A törvények szelleméről [The Spirit of the Laws], Osiris, Budapest, 2000, p. 253.

[4] For example, Lorenz von Stein.

[5] In more detail: Ernő Nagy, Magyarország közjoga: államjog [Public Law in Hungary: Constitutional Law], Budapest, Eggenberger, 1897, p. 196.

[6] Győző Concha, Politica vol. 1. Budapest, 1905, p. 291.

administration and the courts in detail and thus he did not specifically deal with jurisdiction by particular bodies of public administration and its perception in constitutional law. Later, this was explained by Gábor Máthé in a way that the separation would have involved the transformation of public administration, the implementation of which was unlikely in practice due to the municipia.[7] József Eötvös, also based on the theory of Montesquieu, differentiated between legislative, governing, judicial, royal, and public administrative powers from which he considered the first two to be decisive and which he referred to as state will and action based on the analogy of human nature.[8]

During the era, the name of Károly Csemegi was also closely associated with Act IV of 1869. Csemegi not only considered separation to be necessary but also realized that only the establishment of the guarantees of judicial independence may provide a constitutional guarantee.[9] János Martonyi integrated administrative jurisdiction into the theory of the separation of powers by, besides the classic triad, also considering the power of the head of state to be remarkable[10] Martonyi also acknowledged the opinion deriving from Locke according to which the activities of the executive and judicial branches greatly resemble each other in terms of their regulation by legislation and the nature of the activity itself. Due to the different character of the objective of the function, according to which public administration pursues public interest, while the courts only guarantee the rule of law, he also considered organizational differentiation to be necessary. [11] Although by this time several European states had stated *expressis verbis* the need for the separation of public administration and justice[12], Martonyi also highlighted that in practice separation only took place partially. As examples of *quasi iurisdictio*, he mentioned the court established for the disciplinary matters of administrative officials, the bodies acting in connection with compulsory retirement, as well as those cases when public administration makes a decision on a preliminary question, and last but not least, criminal justice by the police as well as municipal justice. Based on all these, he concluded that the organizational differentiation of the two branches of power were imperfect and thus separation might take place based on the nature and objective of the activities.[13]Martonyi also introduced the other types of links between branches of power besides quasi jurisdiction.[14]

Compared to others before him, István Bibó provided a novel interpretation of the theory of separation of powers. He pointed out that the theory was simultaneously descriptive and normative as it was created partly because the authors wished to

[7] Gábor Máthé, A magyar burzsoá igazságszolgáltatási szervezet kialakulása 1867-1875 [The Emergence of the Hungarian Bourgeois Judicial Organistaion 1867-1875], Akadémiai Kiadó, Budapest, 1982, p. 17–26.

[8] József Eötvös, A XIX. század uralkodó eszméinek befolyása az államra II. [The influence of the dominant ideas of the 19th century on the state II.], Magyar Helikon, Budapest, 1981, p. 145-147.

[9] Gábor Máthé, A bírói hatalom gyakorlásáról szóló 1869: IV. tc. létrejötte és jelentősége a dualizmus jogrendszerében [The creation and significance of Act IV of 1869 on the Exercise of Judicial Power in the legal system of dualism]. Gazdaság és Jogtudomány 3. (1969. 1-2.) p. 137.

[10] János Martonyi, A közigazgatás jogszerűsége a mai államban [The legality of public administration in the modern state], Budapest, 1939, p. 14.

[11] Martonyi: op. cit., 11.

[12] See the history of French law referred to by Martonyi, Martonyi, op. cit., p. 12.

[13] Martonyi, op. cit., p. 19 and 21.

[14] For details see Martonyi, op. cit., p. 14-21.

systematize the different segments of state powers and partly to create a model. Bibó referred to the teachings of Aristotle as well as the English constitution whereby the separation of public administration and jurisdiction barely took place. Bibó, however, did not see a contradiction in this respect but the confirmation of the idea that the essence of Montesquieu's triad did not involve the complete and overall separation of the branches of power but its goal was to avoid the concentration of power by establishing adequate guarantees.[15] Bibó partly also touched upon the substantive differentiation of public administration and executive actions in connection with the critique of the division of power. Its so to say idealist critique primarily criticized the functional division which was based on the realization that the application of law represented a decisive activity for both powers. According to Bibó, such a realization could not be considered as new as Locke had already argued that jurisdiction was a part of the executive power, which was, however, surpassed by Montesquieu.[16]

2. The Assessment of Common Points in Studies of Public Law[17]

The practical impossibility of the strict separation of branches of power appeared relatively early and in an obvious manner based on the above. Therefore in Hungary the general opinion was that due to the unity of state power, the theory of separation of powers cannot be interpreted in a rigid way.[18] During the debates of the act stipulating the separation of public administration and jurisdiction[19] in 1869 several people argued that the judicial powers of administrative bodies should be maintained. István Tisza also proposed that the legislation should stipulate that the county competence was to be preserved at the lowest level[20], which, however, did not yet happen at that time. Therefore the impossibility of complete and consistent separation already presented itself at this time on the level of legislation and jurisprudence. According to the scholars of public law at the time, it was not simply about the insufficiency of the regulation and a kind of solution that was to be maintained for the time being, but in certain areas it had become some kind of a requirement that quasi jurisdiction should also survive.

Besides Ernő Nagy[21], Károly Kmetty also referred to considerations of

[15] István Bibó, Válogatott tanulmányok. Vol. II. 1945-1949. [Selected Studies. Vol. II. 1945-1949.], Magvető, Budapest, 1986, p. 369-392.

[16] Bibó: op.cit., 388.

[17] In connection with this chapter, see: Zsuzsanna Árva, A quasi bíráskodás megközelítési lehetőségei [Approaches to quasi jurisdiction], Pro Futuro, 2013. 3. p. 120-135.

[18] Nagy Ernő, op.cit., 195.

[19] On the relationship between public administration and executive actions see András Varga Zs., "Közigazgatás és jogalkotás" [Public Administration and Legislation] in Csehi Zoltán – Koltay András – Landi Balázs – Pogácsás Anett (eds.), (L)Ex cathedra et praxis, Ünnepi kötet Lábady Tamás 70. születésnapja alkalmából [(L)Ex cathedra et praxis, Festive Volume on the Occasion of the 70th Birthday of Tamás Lábady], Budapest, Pázmány Press, 2014, p. 546. or György Gajduschek, "A közigazgatás szervezeti jellemzői – összehasonlító aspektusból" [Organisational characteristics of public administration - a comparative perspective] in Szamel Katalin – Balázs István – Gajduschek György – Koi Gyula (eds.), Az Európai Unió tagállamainak közigazgatása [Public administration in the Member States of the European Union], Budapest, CompLex, 2011, p. 39.

[20] Máthé, op. cit., 146.

[21] Nagy E., op.cit., 195.

expediency when explaining jurisdiction by administrative bodies with regard to misdemeanors, police, disciplinary or other cases that was maintained at that time by several European states.[22] Even though the most important scholars of public law in Hungary, Móric Tomcsányi and István Csekey[23], recognized the significance of separating the branches of state power, also due to reasons related to expediency[24], they did not consider it to be necessary by all means.[25] Thus separation was expressly implemented only at the level of law. The judicial activity of administrative bodies was maintained, among others, in the case of misdemeanors[26], in civil lawsuits with a lower litigation value[27], in affairs of craftsmen[28] and servants[29], as well as in disciplinary matters[30], but municipal jurisdiction was also a recognized exception[31], along with the procedures of guardianship and orphans authorities[32] discussed in works on public administration. While in the case of courts not only the law application activities of a public administration type represented an exception but the administration of the courts also.

3. Theoretical Questions Related to Court Administration

The topic of the administration of courts typically appears in more recent public law publications despite the fact that its connection with the separation of executive action as well as public administration and justice is beyond doubt. In terms of the theoretical issues related to court administration, the paper focuses primarily on those elements which should also be considered as part of an international comparison and which have dogmatic significance. Due to the limitations in terms of its length, however, it does not wish to provide an evaluation of current administration systems either in Hungary or abroad.

[22] Károly Kmetty, A magyar közigazgatási jog kézikönyve [Handbook of Hungarian Administrative Law], Politzer-féle Könyvkiadóváll. kiadása, Budapest, 1905, p. VI.

[23] István Csekey, Magyarország alkotmánya [Constitution of Hungary], Renaissance, Budapest, 1943. p. 191–192.

[24] "The practically identical nature of public administration and jurisdiction also manifested itself in the complete merger of these two activities over the centuries. In most cases the same bodies were responsible for all acts of the executive power, including both public administration and jurisdiction. However, exactly the circumstance that jurisdiction is always bound by law and is an activity that is intolerant of external instructions, made the organizational separation of jurisdiction justified from public administration that is partly driven by considerations of a political nature and expediency." Translation mine. István Egyed quoted in: Gyula [Tusnádi] Élthes, A rendőri és jövedéki büntetőjog. Az ezeréves magyar kihágási jog története és a mai állapota. [Police and excise criminal law. The history and present state of the thousand-year-old Hungarian law of misdemeanour] Fővárosi Nyomda, Budapest, 1935, p. 578.

[25] Móric Tomcsányi, Magyarország közjoga [Public Law of Hungary], Királyi Magyar Egyetemi Nyomda, Budapest, 1940, p. 15.

[26] Nagy E., op. cit., p. 292., Csekey, op. cit, p. 191., Kmety op. cit., p. VI. and 723., István Egyed, Közjogi alapismeretek [Basics of Public Law], Budapest, Grill Kiadó, 1937, p. 159., Martonyi, op. cit. p. 19.

[27] Nagy E., op. cit., p. 292., Csekey, op.cit., p. 191., Kmety, 1905, op. cit. p. VI.

[28] István Stipta, A magyar bírósági rendszer története [History of the Hungarian Court System], DUP, Debrecen, 1997, p. 156. or Kmety, op. cit., p. 722-723.

[29] Nagy E., op. cit.., p. 292., Egyed, op.cit., p. 159.

[30] Csekey, op. cit., p. 191., Kmety, op.cit., p. VI. and p. 723., Martonyi, op.cit., p. 19.

[31] Kmety op. cit., p. 722-723.

[32] Kmety, op. cit., p. 499-503.

3.1. Preliminary Questions

When studying the administration of courts, it is an essential preliminary question whether one can establish a uniform international standard for the administration of jurisdiction. International studies examining this question call attention to several problems. One of these involves the issue of differences deriving from the use of legal language and terminology closely related to the legal system of each country. Thus the member states define the scope of bodies belonging to the organizational system of justice as a branch of power differently, and what is more, research considers the administration of courts to be closely associated with the standard of jurisdiction, which, however, is difficult to measure based on empirical and/or exact research.[33] Similarly to the measurement of the external efficiency of public administration, we face the same problems in the case of the administration of justice as well.[34] In each country there is one such an organizational system which may be identified as jurisdiction and thus the comparison may only take place on a different chronological basis or from an international perspective. In the former case differing historical circumstances need to be taken into consideration, while in the latter the features of the given country's legal system may act as influential forces. As a result, it is difficult to find such points of reference that may serve as the basis of truly exact comparisons and would thus be suitable for the assessment of the regularities of administration. Exactly because of those above, just as in the case of the assessment of the external efficiency of public administration, in the case of the standard of the operation of jurisdiction the opinion of the general public on the operation of the courts has a significant role. The assessment of this may be facilitated by the annual reports and the evaluation of other indices that may provide a solution in connection with factors like the acceleration of procedures or the improvement of certain sub-processes, however, when talking about the operation of the system as a whole, the results need to be examined with adequate care and great caution exactly because of the independence of the courts.

The administration of courts, however, is associated in all rule of law countries with the principle of the independence of courts and its guarantees may not be infringed by the rules related to administration either. The principle is declared by numerous international and national documents, including the national constitutions.[35] This is exactly why it is important to specify what qualifies as administration and what those elements are that are related more to the procedural rules of the courts and the compliance with them. The borderline between management and administrative functions is especially important also because both tasks typically belong to the same bodies and heads of courts. At the same time, it is administration itself that links justice with the two other branches of power, the executive and legislative ones, the most. In the case of the latter, the connection is provided not only by the definition of the legal framework but also the acceptance of the budget closely related to court administration.

[33] Berthier – Pauliat op. cit. p. 5-6.

[34] Lajos Lőrincz, A közigazgatás alapintézményei [The basic institutions of public administration], HVGOrac, Budapest, 2007. p. 59-69.

[35] László Trócsányi – Attila Badó, Nemzeti alkotmányok az Európai Unióban [National constitutions in the European Union], Complex, Budapest, 2005.

Based on the above, it is clear that there are essential points of contact between courts and public administration also on a theoretical level. And even though it might seem easy to differentiate between the two institutional systems, this is not always straightforward because of the related functions.[36] Similarly to Hungarian publications, international legal studies also attempt to separate the two systems based on functions, however, it is not difficult to notice that both organizational systems carry out the application of law. This is exactly the reason why certain factors have appeared in legal studies based on which the two types of law application may be differentiated. These may be the following:

3.2. Delimitation Criteria for the Application of Law by Courts and Public Administration

Although some of the delimitation criteria of the application of law by public administration and courts are also discussed by textbooks in public administration law[37], it is worth discussing some of the differences that are significant from a dogmatic perspective here as well. One of these differentiating segments (although mentioned less frequently today) is based on the distinction of classic public law and private law as well as public interest and private interest. According to this, public administration represents the public interest due to its nature, while the court represents private interest. Such distinction, however, is immediately upset by the classification of criminal law as opinions differ about its public or private law nature.[38] In Hungarian studies Lajos Szamel emphasized that the private interest of the customer may come to the foreground also in the classic application of law by a public administration authority as certain individual rights may not be revoked by the authority and the principle of rights acquired and exercised in good faith often appears.

The discretionary power of public administration is another often mentioned criterion as opposed to the courts that are strictly bound by law. In this respect, however, Lajos Szamel pointed out that both bodies applying the law have a certain degree of discretionary power necessary for such application of law. It is not the prohibition of deliberation by the court that derives from the fact that judicial activity is bound by law but the constitutional guarantee of judicial independence. At the same time, the principle of being bound by law also prevails in connection with the activities of public administration[39]. János Martonyi, when studying discretionary power, concluded that one of the key differences between the law application activities of courts and administrative bodies is that the application of law by courts covers two areas. One of them involves establishing the facts of the case, while the other is the legal qualification of a specific historical fact pattern. As opposed to this, public administration besides these also takes into consideration factors of

[36] Berthier – Pauliat op. cit. p. 5-7.

[37] See István Balázs (ed.), Közigazgatási eljárások [Administrative procedures], DE ÁJK, Debrecen, 2019, p. 15-22.

[38] Lajos Szamel, Törvényhozás – bíráskodás – közigazgatás – kísérlet a bíráskodás fogalmának megközelítésére a törvényhozástól, illetve a közigazgatástól való elhatárolással [Legislation - judiciary - administration - an attempt to approach the concept of judiciary by distinguishing it from legislation and administration], Állam és Igazgatás, 38 (1988. 8.), p. 704.

[39] Lajos Lőrincz, A közigazgatás alapintézményei [The basic institutions of public administration], HVGOrac, Budapest, 2005, p. 64-65. and at this point he makes a distinction between deliberation within the scope of task-setting norms as well as official law application norms. Szamel: op. cit., p. 705.

expediency, which is not typical of the courts.[40]

It is already visible based on the above that a key feature involves the position of the authority in relation to the parties, and in the case of courts, judicial independence. Based on the principle of independence, the position of the court should always be neutral, while such a uniform organizing principle is not typical in administrative cases. In certain cases that may involve legal disputes (as for example in the case of the application of law for offenses) we may consider the body to be neutral, however, this is not entirely straightforward either. This is especially true because among acting authorities there are also administrative bodies the majority of which operate within a hierarchical system whereby the superior body may influence decision-making while adhering to the principle of the prohibition of the withdrawal of powers.[41]

In view of the decisions of the Constitutional Court, we may also identify a significant difference between the question of judicial independence and the fact that the position of the administrative procedure is not always neutral towards the parties. Of course, this in reality represents the merger of several factors that are addressed well by studies in constitutional law through the separation of different segments of independence, including the personal independence of the acting judge and the independence of the organization itself. From the perspective of the topic at hand this is truly significant as it is beyond doubt that the independence of the judicial organization itself is declared by the constitution, while this is not true for public administration as a whole.

Although judicial independence according to the general view applies exclusively to courts, in publications from the era of dualism and the beginning of the 20th century such opinions were also voiced that argued that in the process of criminal justice by the police the legislator created an institution that resembles judicial independence[42]. This was deduced from two factors: one of them was the principle of the free deliberation of evidence and the other involved the provision among the rules of police conduct according to which the police criminal judge exercises judgment independently. This opinion, however, was not accepted at that time either as, for example, another specialist of criminal justice studying misdemeanors, József Tóth, criticized the system of misdemeanor jurisdiction because it necessarily breaches the principle of judicial independence due to the procedure of administrative bodies.[43]

3.3. Basic Types of Court Administration Internationally

International publications fundamentally attempt to separate the judicial branch from the executive one through the use of both the organizational and functional approach, with judicial independence playing a central role in this respect as well. Exactly because of this independence, two main opinions have emerged in international studies in terms of whether the administration of courts is part

[40] János Martonyi, A diszkrecionális mérlegelés kérdései [Issues of discretionary assessment]. Acta Jur. et Pol., Szeged, Tom. XIV, Fasc. 5, 1967, p. 8.

[41] Szamel: op.cit., p. 706.

[42] Gyula Élthes clearly interprets legislation in a way that they also provide judicial independence for the administrative authorities applying misdemeanor law. Élthes: op. cit., p. 523–525.

[43] József Tóth, A rendészeti ténykedés alakjai [Shapes of Law Enforcement Actions], Szent János Nyomda, Eger, 1939, 186–187. See also Árpád Szakolczai, A közigazgatási hatóságok mint bíróságok [Administrative Authorities as Courts], Jogtudományi Közlöny, 1894. 15. p. 113.

of the organizational system or not. According to one of these, the main task of judges and courts involves the administration of justice in view of which administration cannot be a part of the organizational system. Such an approach is represented by Finland or Bulgaria. Based on the other approach, administration should also be in the hands of the heads of courts or placed within the organizational system as the exercising of certain administrative powers (with special regard to financial ones) may threaten the independence of the courts. Such an opinion is visible in Belgium and the Netherlands. In France, we can see an in-between model where the head of the court relies on administrative bodies in connection with certain activities.

It is already clear from this that the different member states of the EU use completely different systems, however, it is a shared feature of all that they do so for the purposes of preserving judicial independence, which is also guaranteed on the level of the constitution[44] and they also consider the separation of administrative work from the administration of justice to be necessary. At the same time, the constitutional solutions also differ in terms of how the protection of independence is defined. Based on these differences, the judicial councils also have different roles in the various systems, based on which we may distinguish between the following models:

According to the unitary model, administration may only belong to the ministry of justice and it also includes management and the distribution of budgetary resources. In such a system the judicial councils have no role as the division of power is based on functional separation whereby jurisdiction is also a kind of a state function that is a part of execution. This at the same time is reminiscent of the dual theory of the separation of powers.

There is an intermediate decentralized model in which the branches of power somewhat compete with each other and the minister of justice and the judicial bodies both play a role in administration. Such a model is followed by the great majority of European countries and although the distribution of management powers varies, it is generally true that the more significant part of competences is centered in the hands of the minister of justice. These include functions related to the advancement of judges, disciplinary matters or vocational training, as well as budgetary and other management powers. Due to the competing powers, however, it is typical that in the above issues the judicial courts formulate recommendations or express their opinion on the ideas of the ministry. A temporary rearrangement of the particular powers is also typical, while in certain cases there may be a lack of clarity in terms of certain competences which means that the given power may be exercised by the ministry as the legal regulations usually define the tasks and competences of the judicial bodies in an exhaustive manner.

The third model is represented by the autonomy-oriented or management model in which the administrative rights almost exclusively belong to the judicial bodies. This is typical of Denmark, the Netherlands, and Sweden. In the case of the latter, a body operating as a public administration authority is responsible for the administration of the courts. There may be several types of these bodies as well but it is common in all of them that they operate within jurisdiction as a general regulatory authority.

Based on efficiency, however, two other models may also be outlined. One of

[44] See Trócsányi – Badó, op. cit.

the south European solutions considers the personal independence of the judge to be the guarantee of efficiency, while in the northern model the independence of the judicial organization is considered to be cardinal. The opinion of the Council of European Judges published in 2007 recommended the implementation of the autonomy model[45]. The Consultative Council, in line with Article VI of the European Convention on Human Rights, argued that a judicial council would benefit both the justice system and the protection of the independence of the judges themselves, which together would promote the efficiency and quality of justice and also reinforce public confidence in the justice system. Therefore, the task of the body is to participate in the evaluation of the quality of the administration of justice and the implementation of techniques aimed at the improvement of the efficiency of judges' work and therefore should also have certain budgetary powers.[46]

4. Theoretical Questions Related to Court Administration in Decisions of the Hungarian Constitutional Court

After the change of regime in Hungary, questions related to the administration of courts arose more sharply in the period preceding the reform of 1997. Several decisions touched upon the issue of court administration, based on which the following dogmatic elements may be outlined. In connection with the 1972 Act on Court Organization that gave the task of court administration to the minister of justice, the Constitutional Court in its decision no. 53/1991. (X. 31.) pointed out that the essence of judicial activities involves the administration of justice and the guarantees of judicial independence are also related to this. At the same time, the body also called attention to the fact that continental rights consistently wish to separate the administrative activities of courts from the administration of justice. These include, according to the court, the provision of the personal and material conditions of the activity or the monitoring of the order of administration, which at the same time also ensure operation. In this respect, however, the Government may also have certain powers as the protection of the constitutional order as specified by Article 35, Section (1), points a) and b) of the then effective Constitution or the execution of laws are closely related to the operation of the courts. In terms of the latter, they argued that these activities do not represent a subordination of the judicial organization to the executive power. The decision also called attention to the fact that the separation of powers does not mean that the branches of power could not be limited by each other. In the case of the judicial power, the only limitation to this is exactly judicial independence.

Overall, the decision considered the administration of courts to represent a special branch of public administration, which is relatively independent, however, it also argued that not only the administrative duties related to courts belonged here but also the provision of the execution of court decisions as well as the tasks related to notaries and lawyers. At the same time, the Constitutional Court also called attention to the fact that the legislator had relative freedom in terms of the organization of

[45] Opinion No. 10 (2007) of the Consultative Council of European Judges for the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society. This document is available online at https://rm.coe.int/168074779b (last access: 10.10. 2021).

[46] Berthier – Pauliat op. cit. p. 11-13.

administration as part of which it might also consider factors of expediency within a constitutional framework. Constitutional Court Justices Antal Ádám and Imre Vörös also pointed out that in connection with the administration of courts we may distinguish between internal and external administration typical of public administration. They believe that the former includes the control of the court proceedings and administration, while the latter involves the provision of the conditions needed for operation and the control of leaders.

The Constitutional Court in its resolution no. 13/2013. (VI. 17.) also with reference to Constitutional Court resolution no. 97/2009. (X. 16.) stated it in its decision related to the legitimacy of the National Judicial Office that there were no international standards concerning the administration model of justice. This statement was considered to be governing by the Constitutional Court also after the Fundamental Law took effect (13/2013. (VI. 17.), Constitutional Court resolution, rationale [61]]. It was also at this point that the body referred to the fact that prevalence of separation of powers and judicial independence were not defined by the relationship between the judicial organization and the two other branches of power as well as other organizations (including the non-governmental, political, and social players), and the legislator continues to have extensive freedom in the establishment of the details of the court administration system.[47]

The Constitutional Court in its resolution no. 22/2019. (VII. 5.) briefly addressed the introduction of international administration models. In harmony with those mentioned above, it differentiated the models based on administration by the minister, judicial councils, and the mixed models, claiming that several subtypes of these may be distinguished. In connection with the ministerial model, it highlighted that the administration tasks related to the courts were performed by an external body, typically the minister of justice. According to the decision, this also prevailed in Austria and before 1997 Hungary had also used this model. In the case of administration by elected judicial courts different solutions are possible in terms of the composition of the councils, thus in certain cases the councils work only with judges as members, while in other cases there are also members who are not judges. In the mixed model, the tasks related to administration are divided between the minister of justice and the elected judicial court. They also highlighted it that the selection of the administration model might always be based on the specific features of the country, in connection with which the most important factor is that the independence of the court, the judicial organization should not be substantially influenced by the given model. This is a governing requirement for both the external and the judicial administration. The court also mentioned it as an additional requirement that transparency and efficiency should be improved and social control should be ensured.

The decision also noted that after the change of regime in Hungary the legislator experimented with several models of administration. They also mentioned and quoted from the resolution of the Venice Commission made at its plenary meeting on March 15–16, 2019 [CDLAD(2019)004], from which they highlighted it that although the commission was "supportive of independent judicial councils with decisive influence over decisions on the appointment and career of judges, it has not ruled out systems with a decision-making process

[47] 13/2013. (VI. 17.) Constitutional Court resolution, rationale [61]].

within the sphere of a minister for justice accountable to Parliament, provided that effective guarantees are in place to avoid such systems negatively affecting judicial independence." The Venice Commission at the same time stressed the role of judicial councils in providing effective checks and balances but also pointed out that as opposed to the heads of courts, it is the minister of justice who is responsible to Parliament.[48]

5. Conclusion

Thus based on those mentioned above it can be stated clearly that the ideas of a given state on the separation of powers are closely related to the selection to the specific model of court administration. Similarly to international studies, the Constitutional Court mentioned the same models and in line with the opinion of the Venice Commission it stated that there was no single solution for court administration in case the guarantee of judicial independence was implemented. In this respect we should mention it again that in the process of establishing the administration model all countries make their decisions in consideration of their social, historical, economic, and legal environment, as a result of which the different solutions cannot be adapted as such in other countries and their different sub-elements may also be used only in consideration of how they may fit into the system as a whole.

Although the recommendations of the European judicial councils prefer the use of judicial councils it can still be stated that there are no uniform international standards in the establishment of the administration systems of courts. It is an important factor, however, in all cases that the precise content and sub-elements of administration should be made clear and the administrative powers specified, which together may contribute to the improving efficiency of courts. In connection with the latter, however, the elements of public administration get a significant role, which may permeate the entire administration and management system.

At the same time, innovative elements also appear in the administration of jurisdiction, not only in terms of the system as a whole but also in connection with specific powers. As the Constitutional Court also pointed out, since the change of regime Hungary has experimented with several administrative models. These modernization attempts may at any given time serve the purposes of the renewal of jurisdiction and the catalysis of innovative practices.

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[48] 22/2019 (VII. 5.) Constitutional Court resolution, rationale [76] - [107].

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