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Judicial Independence and the Budget: A Taxonomy of Judicial Budgeting Mechanisms

ALEX ROSSELLI*

ABSTRACT

This Paper addresses three aspects of judicial budgeting. First, it will identify the four broad families of constitutional provisions that consider the judicial budget. While the majority of procedures and requirements that govern judicial budgeting are found in statutes, many nations' constitutions explicitly address judicial salaries. Other constitutions only broadly address judicial budgeting. Second, we will analyze different approaches to judicial councils. Third, this Paper will address several different approaches to the judicial budgeting process. This includes how the judiciary's budget is proposed, as well as how it is allocated and managed. Finally, this Paper will touch upon the tension inherent in judicial budgeting in democratic societies. While judicial independence is prioritized by most nations, there is a competing priority of ensuring efficient use of public funds. This tension can create problems as nations work to keep government spending in check, while continuing to honor judicial independence.

I. CONSTITUTIONAL PROVISIONS PERTAINING TO JUDICIAL BUDGETING

Of the more than seventy nations whose constitutions include some provision relating to the judicial budget, four general families emerge to describe the different approaches to judicial budgeting.

A. Model 1: Protection of Judicial Salaries

The constitutions that fall under this model only provide explicit protection for judicial salaries. Article III, Section I of the United States Constitution offers a good example of this first family of constitutional provisions:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.¹

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¹ U.S. CONST. art. III, § 1.

B. Model 2: Independent Judicial Budget

The second family of constitutional provisions require the judiciary shall have an independent budget, and in some instances provide that they shall be able to administer these budgets independently. Bolivia offers a good example of this type of provision: “The guarantees of judicial independence are . . . [t]he budgetary autonomy of the judicial bodies.”²

C. Model 3: Salaries Set by Statute

The third family of provisions include those that state simply that judicial salaries shall be set by statute. Greece provides a good example: “The remuneration of magistrates shall be commensurate with their office. Matters concerning their rank, remuneration and their general status shall be regulated by special statutes.”³

D. Model 4: Judicial Budget as Percentage of GDP

The final family includes only two nations: Nicaragua and Honduras. These two constitutions require that the judiciary receive a set percentage of the national budget. Nicaragua’s constitution requires that “The Judicial Power shall receive no less than four percent of the General Budget of the Republic”⁴ Honduras’s constitution states that not only does the judiciary enjoy administrative and financial independence, but it also includes the following provision: “In the General Budget of Revenues and Expenditures of the Republic it shall have an annual allocation of no less than three percent of the current revenues.”⁵

² BOLIVIA CONST. tit. III, ch. 1, art. 178.

³ 1975 SYNTAGMA [SYN.] [CONSTITUTION] 88 (Greece).

⁴ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] tit. VIII, ch. V, art. 159., LA GACETA, DIARIO OFICIAL [L.G.] 9 January 1987, as amended 2014.

⁵ HONDURAS CONST. tit. V, ch. 12, art. 318.

II. JUDICIAL COUNCILS

Judicial councils seem to be the most common approach to judicial budgeting. They serve as intermediaries between the judiciary and the government, helping to preserve the judiciary's independence.⁶ The judicial council plays a critical role in the budget process in several northern European nations, as well as the United States.

While judicial councils have different responsibilities in each country, Wim Voermans suggests that there are two models of European judicial councils. The Southern European model is “mostly constitutionally rooted and fulfil[s] some primary functions in the safeguarding of judicial independence. These functions typically include advice as regards the appointment or promotion of members of the judiciary, or the exercise of the power of appointment or promotion by the Council itself, the training and the exercise of disciplinary powers with regard to members of the judiciary.”⁷

In contrast, the Northern European model includes councils that are primarily involved with court administration, court management, and the budgeting of courts.⁸ This includes setting the budget, distribution and allocation, and the supervision and control of the expenditures.⁹ The United States falls into this category. Most of these councils are very similar, although there are some notable differences.

One of the main factors that influences how effective a judicial council is in terms of ensuring judicial independence is the council's composition. There are numerous approaches to designing a judicial council. These councils can be as small as only four members, in the case of

⁶ Wim Voermans, *Councils for the Judiciary in Europe: Trends and Models*, in *THE SPANISH CONSTITUTION IN THE EUROPEAN CONSTITUTIONAL CONTEXT* 2133 (Francisco Fernandez Segado ed., 2003).

⁷ *Id.* at 2.

⁸ *Id.* at 2–3.

⁹ *Id.* at 3.

the Netherlands, to as many as forty-four, in the case of Belgium.¹⁰ Analyzing council membership models can be split into two stages: how members join the council, and who the members are.

A. How Members are Selected

Regarding the process for selecting members of the council, members join the council either through appointment, election, or a combination.

1. Only Elected by Their Peers

In this approach, judges vote or otherwise select individuals from among their profession to serve on the council. In Hungary, the fourteen member judges are selected according to a majority vote among judges.¹¹

2. Elected by Peers and Selected by Executive or Legislative Branches

The second model of judicial councils is made up of judges and individuals selected by one of the other two branches of government. Slovenia and Italy include lawyers and law professors elected by the Parliament.¹² In France, the President of the Republic, the National Assembly, and the Senate each appoints two citizens who are not members of either the Parliament or the judiciary.¹³ In Romania, the Senate elects two representatives from civil society.¹⁴

Lebanon also falls into this category. Prior to 2001, all ten members of the Higher Judiciary Council were appointed by the Executive.¹⁵ Reform No. 389 of 21 December 2001 introduced the idea of electing members to the Council by the judiciary body, although there are only two elected

¹⁰ Primož Rataj & Gerga Strban, *Supreme Courts as Guarantees for Effectiveness of Judicial Systems in the European Union*, in BEST PRACTICE GUIDE FOR MANAGING SUPREME COURTS 102 (2017).

¹¹ *Id.* at 103 n.275.

¹² *Id.* at 103.

¹³ *Id.* at 108 n.337.

¹⁴ *Id.* at 108 n.335.

¹⁵ INT'L FEDERATION FOR HUMAN RIGHTS, JUDICIAL COUNCILS REFORMS FOR AN INDEPENDENT JUDICIARY: EXAMPLES FROM EGYPT, JORDAN, LEBANON, MOROCCO, AND PALESTINE 13 (2009).

members.¹⁶ The three established members of the Council include the President of the Court of Cassation who is the President of the Council, the Attorney General to the Court of Cassation, and the President of the Judicial Inspection Committee, all of whom are appointed by a decree of the Council of Ministers. The remaining members are judges appointed by decree, upon proposals from the minister of justice.¹⁷

3. Elected by Peers and Selected by a Non-Governmental Body

The third model includes judges and non-judge members, but the non-judge members are selected by a non-governmental body. In Bulgaria, prosecutors elect four members of the Council.¹⁸ In Estonia, the bar association appoints a member to the Council.¹⁹

B. Qualifications for Membership

Regarding *whom* may serve on the Judicial Council, there are four models.

1. Judges-Only

The first model includes only judges on the judicial council. Among EU member states that have a judicial council (twenty-one in total), only four include only judges: Hungary, Lithuania, Northern Ireland, and Scotland. The United States falls into this category. The Chief Justice of the United States Supreme Court presides over the conference, and the rest of the membership is comprised of the chief judge of each judicial circuit, the Chief Judge of the Court of International Trade, as well as a district judge from each regional judicial circuit.²⁰

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Rataj & Strban, *supra* note 10, at 104.

¹⁹ *Id.* at 109.

²⁰ Julia S. Gibbons, *How the Judiciary Gets its Funding*, FED. LAW., Oct. 2009, at 31.

Hungary provides a unique twist on the judges-only model. While the Council is comprised of only judges, there are several non-judges who can attend Council meetings and are given consultation rights. The list of individuals who may attend includes: the President of the National Office for the Judiciary, the Minister of Justice, the Prosecutor General, the President of the Hungarian Bar Association, the President of the Hungarian Chamber of Notaries Public and any ad-hoc experts and the representatives of any civil society organizations and other interest groups invited.²¹

2. Judges and Other Individuals Appointed by Another Branch of Government

The second model of judicial councils is made up of a mixed membership, including judges and individuals selected by one of the other two branches of government. Slovenia and Italy include lawyers and law professors elected by the Parliament.²²

3. Judges and Other Individuals Appointed by Non-Governmental Groups

The third model is also a mixed membership, but the non-judge members are individuals who represent non-governmental interests or groups. These non-judge members can include legal professionals, an individual appointed by the bar association, and representatives of users of the courts. In Bulgaria, for example, prosecutors elect four members of the Council.²³

4. Judges, Other Individuals, and Members of the Other Branches

The fourth model includes judges, other individuals, as well as members of the executive or legislative branches. In Jordan, the Judicial Council is composed of a president, who is appointed by the King, the president of the Supreme Administrative Court, chief prosecutor at the

²¹ Rataj & Strban, *supra* note 10, at 103 n.75.

²² *Id.* at 103.

²³ *Id.* at 104.

Court of Cassation, a judge from the Court of Cassation, presidents of the courts of appeal, secretary general of the Ministry of Justice, president of the Amman-based Court of First Instance and two heads of courts of first instance from governorates other than the capital.²⁴

In Estonia, for example, the judicial council includes the following individuals: members of the Parliament, a sworn advocate appointed by the Board of the Bar Association, the Chief Public Prosecutor or a prosecutor appointed by the Chief Public Prosecutor, and the Chancellor of Justice or a representative appointed by the Chancellor, while the minister of justice is a participant with the right to speak.²⁵

In these mixed councils, a balance is struck between ensuring the judiciary has a voice in any relevant discussions, but also ensuring that the judiciary is not able to completely control their own governance. Of course, this can be a double-edged sword; if the non-judge members are merely tools of the executive or legislative branches, then the autonomy of the body is threatened.²⁶ There is extreme diversity in the different positions and individuals represented in mixed councils. Mixed councils include members of parliament (Estonia),²⁷ the minister of justice (Poland),²⁸ and the attorney general (Palestine).²⁹

III. METHODS OF JUDICIAL BUDGETING

This section will walk through the process by which the judiciary proposes and receives funds, as well as how the funds are managed. In order to see where the pressure points may emerge, the process can be broken down into five stages, and various approaches to each stage will be

²⁴ *Senate Approves Changes to Judiciary Independence Law*, JORDAN TIMES (Last updated July 31, 2017), <http://www.jordantimes.com/news/local/senate-approves-changes-judiciary-independence-law>.

²⁵ Rataj & Strban, *supra* note 10, at 104.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, JUDICIAL COUNCILS REFORMS FOR AN INDEPENDENT JUDICIARY: EXAMPLES FROM EGYPT, JORDAN, LEBANON, MOROCCO, AND PALESTINE 17 (2009).

addressed in turn. First, we will look at the where the funds for the judiciary come from. Second, we will consider the budget proposal process, including who negotiates the budget and how. Third, we will look at how the funds are allocated, including whether the funds are earmarked for particular expenses or if it comes in a lump sum. Fourth, we will identify who actually doles out the funds. Fifth, we will look at how the judiciary handles accounting and auditing processes. Finally, we will consider how the judiciary may be held accountable for its use of funds. By breaking down the process into these stages, we can see where along the process independence may break down or be protected.

A. Source of Funds

Judicial funds derive from two buckets of money: state funds and state funds plus other sources.

1. Exclusively State Funds

In this model, the judiciary's budget is derived exclusively from state funds. In Denmark, for example, the state central budget finances the judiciary entirely, and any fees that are generated are sent to the Ministry of Justice; these fees do not impact the judiciary's budget.³⁰

2. State Funds Plus Other Sources

In this model, the state's central budget is supplemented by any revenue from other sources. In Egypt, the budget is made up of court fees, fines paid in civil and criminal cases, any goods confiscated by the courts, as well as resources allocated by the state in the public budget.³¹ The

³⁰ EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY (ENCJ), FUNDING THE JUDICIARY: PREPARATORY WORK, QUESTIONNAIRE AND REPLIES 86 ANNEX II TO THE ENCJ REPORT (2015–2016).

³¹ Mahmud al-Khudayri, *The Law on Judicial Authority and Judicial Independence*, in JUDGES AND POLITICAL REFORM IN EGYPT 45, 55 (Nathalie Bernard-Maugiron ed., 2008).

UK Supreme Court adds another category of funds. That court is funded by general state funds, court fees, contributions from the Northern Ireland Court Service and the Scottish government, and a small line item derived from the gift shop and renting the venue out.³²

IV. BUDGET REQUEST AND NEGOTIATION

A. *Pre-Budget Negotiation: Budget Framework Established*

This is not the process for every country, but before budget negotiations and planning begins in some nations, the Ministry of Finance or appropriate ministry will establish budget frameworks for every ministry. These frameworks include guidelines applicable to each ministry for them to follow when they draw up their respective budget proposals, and usually reflect policy priorities or overall budgetary realities. Based on these guidelines, each court or council will draft their budgets and submit it to the appropriate body.

In Albania, for example, once the Ministry of Finance issues the overall guidelines, the Office for the Administration of the Judicial Budget (ZABGJ), which oversees the administration of the courts' budgets, directs the individual courts to propose their budgets in accordance with the guidelines.³³

Once the framework has been established, the first stage of the budget process is the initial request for funding, which is often accompanied by an ongoing negotiation between various entities. There is some degree of variety in which entities are involved in making the initial proposal, as well as who has a seat at the negotiating table once the proposal is made. At the most basic level, the first question is how the authority to draw up the budget is split between the Executive and the Courts.

³² GRAHAM GEE ET AL., *THE POLITICS OF JUDICIAL INDEPENDENCE IN THE UK'S CHANGING CONSTITUTION* 205–06 (2015).

³³ EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY, *supra* note 30, at 38.

B. Complete Executive Control

Under the Executive model, the authority to draw up the budget lies with either the minister of justice or the minister of finance; the judiciary is shut out of the process entirely. In Belgium, for example, the minister of justice, in accordance with the budgetary framework established by the Government, draws up the budget and submits it to the Council of Ministers and the minister of finance.³⁴

C. Court Proposes the Budget and Negotiates with the Executive Before Budget is Submitted to the Legislature

This is the more common approach for proposing the budget. In accordance with overall budget guidelines established for each ministry, the Court develops a budget to then propose to the Executive, usually the Ministry of Justice or the Ministry of Finance. Often the MOJ will send the budgetary guidelines to the courts, who then propose their individual budget requests to the MOJ.

Denmark presents an interesting example of this process, even though they do not have to follow it. The Court Administration receives the budget guidelines from the Ministry of Justice.³⁵ It then negotiates a budget with the Ministries of Finance and Justice; once that budget is approved, the Ministry of Finance submits it to the Parliament as a part of the overall Finance Bill. However, because the Court Administration is an independent institution, it has the legal authority to present its own budget directly to Parliament, but the Administration has never actually used this authority.³⁶

³⁴ *Id.* at 44.

³⁵ *Id.* at 38.

³⁶ *Id.*

D. Court Proposes the Budget to the Executive, but Retains Right to Negotiate with the Legislature

In one model, the judiciary submits a budget request to a member of the Government, usually the minister of justice, who then submits that proposal to Parliament. Once the budget is proposed, the Executive negotiates with Parliament on each line item. However, the judiciary retains the authority to negotiate or submit commentary according to how the negotiations proceed.

The United Kingdom's Supreme Court provides one example of what this process looks like. The President of the Supreme Court and the Chief Executive of the Court determine the request for funding, and they present the request to the Lord Chancellor. The Lord Chancellor includes that request as a separate line item on the MOJ's budgetary request to the Treasury. In this process, the Lord Chancellor is simply a conduit for the Court's budgetary request; no changes to the Court's request are to be made.³⁷ Ultimately, the Lord Chancellor is responsible for working directly with the Treasury to secure funds for the Court. This can pose a problem for ensuring the judiciary's funding is truly protected. To address this clear deficiency in the judiciary's ability to negotiate its own budget, a concordat was reached in 2013 between the MOJ and Supreme Court. This agreement laid out that the Lord Chancellor will submit to the Treasury without amendment whatever request for funding is received from the Court. However, the Lord Chancellor retains the right to include any additional comments as to the merits of the bid. Additionally, while the Lord Chancellor works directly with the Treasury to secure the Court's funds, the Court is not prevented from also negotiating with the Treasury.³⁸ Next, the Chief Executive of the Supreme Court submits

³⁷ GEE ET AL., *supra* note 32, at 206.

³⁸ Concordat Between the Ministry of Justice and the Supreme Court of the United Kingdom, Sec. 5 (Oct. 2013).

an estimate to the Treasury to then be presented to the Parliament as a part of the overall estimates.³⁹

In the United States, the funds for the judicial branch are included annually in the Financial Services and General Government (FSGG) Appropriations bill.⁴⁰ The Supreme Court's budget is split into two accounts: (1) Salaries and Expenses; and (2) Care of the Buildings and Grounds.⁴¹ The judiciary's budget is proposed by the Judicial Conference of the United States, which is the national policy-making body for the federal courts.⁴² The budgeting process begins a year and a half before the start of the next fiscal year when the chair of the Conference's Budget Committee sends a budget guidance letter to the chairs of the nine Judicial Conference committees with financial responsibilities.⁴³ Each committee is then responsible for developing the budget request for its area of responsibility, and these requests are then presented to the Budget Committee.⁴⁴ The Budget Committee then considers each request and presents a budget recommendation to the Judicial Conference, which then approves the full budget request.⁴⁵ By statute, the budget is then presented to the Office of Management and Budget (OMB), and the President presents the judiciary's budget with the full budget request to Congress.⁴⁶ Following the official submission of the budget to the

³⁹ Constitutional Reform Act of 2005, (Eng.), Staff and Resources ¶ 184, <http://www.legislation.gov.uk/ukpga/2005/4/notes/division/6/6/8>.

⁴⁰ Matthew E. Glassman, *Judiciary Appropriations FY 2017*, CONG. RES. SERV., May 15, 2017, Summary, <https://fas.org/sgp/crs/misc/R44526.pdf>

⁴¹ Voermans, *supra* note 6, at 7

⁴² Gibbons, *supra* note 20, at 31.

⁴³ *Id.* at 30.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 31 U.S.C. § 1105(b) – Budget Contents and Submission to Congress: “Estimated expenditures and proposed appropriations for the legislative branch and the judicial branch to be included in each budget under subsection (a)(5) of this section shall be submitted to the President before October 16 of each year and included in the budget by the President without change.” It should be noted that the President is authorized to submit deficiency and supplemental appropriations if necessary because of laws enacted after the submission of the budget. The President is required to include reasons for the submissions, as well as justification for why the supplemental request was not made in the original budget. Both the legislative and judicial branches also have the authority to propose deficiency and supplemental appropriations, which the President must promptly transmit to Congress without change. *See* 31 U.S.C. § 1107.

OMB, members of the Judicial Conference’s Administrative Office present a more detailed budget to Congress, and Administrative Office staff members work with members of the Financial Services and General Government Appropriations Subcommittee to highlight budget requests.⁴⁷

Sweden’s budgeting cycle lasts three years. During the first year, the Council presents a proposed budget to the Government on March 1.⁴⁸ The Government includes that proposal in its overall budget proposal to Parliament on September 20.⁴⁹ Between March 1 and September 20, the Government and the Council negotiate policy objectives and other measurements which are then included in the instructions from the Government to the Council once the budget is finally approved.⁵⁰ After the Government submits the budget to Parliament, both bodies will refer to past annual reports prepared by the Council for guidance on funding decisions.⁵¹

Denmark has a similar request process to Sweden. The Domstolsstyrelsen submits the budget proposal to the minister of justice, who then submits the proposal to Parliament. Even though the Domstolsstyrelsen makes budget proposals to the minister of justice, it retains the authority to address Parliament directly if it considers the allocated funds to be insufficient.⁵²

E. Council Offers an Opinion About the Budget

In countries where the council or judiciary lacks a formal seat at the budgeting drafting or negotiating table, those bodies can still submit an opinion about the budget request. In the Netherlands, the Council provides an opinion on the formal budget proposal drafted by the Ministry of Security and Justice, who proposes the bill the Parliament.⁵³

⁴⁷ Gibbons, *supra* note 20, at 30.

⁴⁸ WIM VOERMANS & PIM ALBERS, COUNCILS FOR THE JUDICIARY IN EU COUNTRIES 24.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Voermans, *supra* note 6, at 5.

⁵³ BEST PRACTICE GUIDE FOR MANAGING SUPREME COURTS, *supra* note 10, at 119 n.464.

V. BUDGET ALLOCATION

Once the budget is approved, the next step in the process is the allocation of funds. There are two ways budgets are allocated: earmarked allocation and lump sum allocation. In either instance, when funds are allocated to individual courts, the funds tend to be allocated according to a variety of factors, including court performance.

A. *Legislative Earmarks*

Under this approach, the budget allocated by Parliament is earmarked for specific expenditures. In Denmark, a certain percentage of the funds are allocated to the courts directly, while the remaining allocation is sent to the Court Administration for expenses including training, specific projects, technology, and buildings.⁵⁴

When funds are allocated to individual courts, a variety of factors are considered, including: caseload (England and Wales),⁵⁵ the previous year's budget (France),⁵⁶ and even just contact between the head of the individual courts who can draw attention to the needs of their court (Italy).⁵⁷

Performance budgeting, the process of tying budget allocation to performance, is a controversial approach to ensuring democratic accountability over the judiciary. Estonia, the Netherlands, and France are some of the countries who are currently using some performance budgeting approaches.⁵⁸ The criteria used to determine budget allocation is set by different bodies

⁵⁴ EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY, *supra* note 30, at 97.

⁵⁵ *Id.* at 102.

⁵⁶ *Id.*

⁵⁷ *Id.* at 103.

⁵⁸ *Id.* at 99–102.

in different countries, these include: the Ministry of Finance (Croatia),⁵⁹ the Parliament (Spain),⁶⁰ the Judicial Council (Lithuania),⁶¹ as well as set forth in the law.⁶²

B. Lump Sum, No Earmarks

In this model, funds are allocated to the judiciary without any direction from the legislature. It is up to the judiciary to spend the funds according to its own discretion. In Sweden, once the judicial budget is approved by Parliament, the Council receives a lump sum without any earmarks.⁶³ The Council then determines each court's budget and distribution based on four criteria: (1) type of court; (2) size of court; (3) case load; and (4) special circumstances that may require supplemental funds.⁶⁴ When Parliament passes the budget, it includes general instructions that relate to how budget targets should be achieved.⁶⁵

In the United States, once Congress approves the judiciary's budget, the Executive Committee of the Judicial Conference establishes a spending plan for the entire judiciary, and the Administrative Office allocates funding to each court based on this spending plan.⁶⁶

VI. BUDGET ADMINISTRATION

Budget administration involves determining how the budget should be handled within the amount allocated. The different approaches to budget administration can be categorized into three categories: administrative authority vested in the Executive, authority vested in the Council or courts, and authority that is divided between the two. Judicial budget administration exemplifies

⁵⁹ *Id.* at 107.

⁶⁰ *Id.* at 109.

⁶¹ *Id.* at 108.

⁶² *Id.*

⁶³ VOERMANS & ALBERS, *supra* note 48, at 25.

⁶⁴ *Id.* at 24.

⁶⁵ *Id.* at 21.

⁶⁶ Gibbons, *supra* note 20, at 31.

the tension inherent in the judicial budgeting process. There is a constant balance to be struck between judicial independence on the one hand, and democratic accountability on the other.

A. Administrative Authority in the Executive

Under this approach, the budget for the judiciary is administered by one of the ministries in the executive branch. Generally, this authority falls to the minister of justice. In France the minister of justice has the authority to administer funds, and the ministry of justice determines how much each individual court receives from the total amount allocated.⁶⁷ Similarly, in Australia the High Court of Australia Act of 1979 granted the High Court the legal recognition to administer its own affairs.⁶⁸ The act further set out that the High Court would receive funds based on an appropriation from parliament.⁶⁹ However, the minister of justice “may give directions as to the amounts in which, and the times at which, moneys [appropriated by parliament] are to be paid to the court.”⁷⁰ The court may not spend money in a way not in accordance with what the Minister approved.

B. Administrative Authority in the Council or Courts

Under this approach, the authority to administer the funds for the judiciary devolves to the individual courts, or more often, the council. This seems to be the far more common approach. Indeed, most European nations utilize this approach. In Poland the First President of the Supreme Court is authorized to administer the budget for the Court.⁷¹

⁶⁷ EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY, *supra* note 30, at 92.

⁶⁸ High Court of Australia Act of 1979, (Cth) pt. III, § 17.

⁶⁹ High Court of Australia Act of 1979, (Cth) pt. V, § 35, div. 1.

⁷⁰ High Court of Australia Act of 1979, (Cth) pt. V, § 35, div. 2.

⁷¹ EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY, *supra* note 30, at 94.

In the United States the judiciary is unique among federal government agencies in that funding is distributed and managed by the courts in decentralized manner.⁷² Once the funds are dispersed to the lower courts, the chief judge of that court and the court unit's executives are free to use those funds as they see fit.⁷³ There are several advantages to this flexible approach to judicial expenditures. Resource allocation and staffing needs can be taken care of at the local level, which can help ensure a more responsive and efficient use of funds.⁷⁴ Additionally court units within a judicial district can move funds among different units, which can help local courts address needs more efficiently than if they were to rely on the Administrative Office.⁷⁵

C. Divided Administrative Authority

There are only a few examples of this approach, and the division of authority seems to fall according to use of funds. In Croatia, for example, the court president decides on the administration within the funds allocated to that court. The MOJ decides how to administer capital investments funds.⁷⁶ In England and Wales, the authority initially lies with the Board of HM Courts and Tribunals Service. The Board only acts unanimously, so if the members are unable to resolve a dispute regarding, among other things, how to administer funds, the Lord Chancellor and the Lord Chief Justice jointly work to resolve the matter. This contingency has never occurred.⁷⁷

VII. ACCOUNTING AND AUDITING PROCESS

The primary approach to accounting and auditing is to vest this authority with the courts or Council. A second approach gives the Executive the authority to audit the judiciary.

⁷² Gibbons, *supra* note 20, at 31.

⁷³ *Id.*

⁷⁴ *Id.* at 31.

⁷⁵ *Id.*

⁷⁶ EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY, *supra* note 30, at 91.

⁷⁷ *Id.*

A. *Authority in the Council or Judiciary*

In this model, the responsibility of tracking expenditures falls to the judiciary. For example, the U.K. Supreme Court's Chief Executive is responsible for keeping track of the courts accounting.⁷⁸ Sweden's Domstolsverket maintains a system of financial accountability over the lower courts, although there are no real sanctions for exceeding a budget allocation.⁷⁹

B. *Executive Authority*

There are some countries where the Executive supervises the judiciary through direct inquiries of the judiciary. In France, every three months, the appeals courts provide the Ministry of Justice with a budget overview, and once a year they provide an annual report justifying the expenditures.⁸⁰

VIII. POLITICAL ACCOUNTABILITY

Political accountability in this context involves the ability of a body outside the judiciary to hold the judiciary accountable based on the judiciary's use of funds. There are three approaches to balancing judicial independence against the political accountability for the use of public funds: accountability that runs only to the court, weak accountability to the Executive,⁷⁹ and a stronger accountability to the Executive.

A. *Accountability to the Court Only*

The Explanatory Note to the United Kingdom's Constitution Reform Act of 2005 lays out the budgetary process for the Supreme Court, including tracing the contours of political

⁷⁸ GEE ET AL., *supra* note 32, at 203.

⁷⁹ VOERMANS & ALBERS, *supra* note 48, at 26.

⁸⁰ *Id.* at 55.

accountability. The staff of the Supreme Court will be accountable to the Chief Executive, not the Lord Chancellor. The Lord Chancellor leads the MOJ, so the decision to vest managerial control over the Supreme Court's staff in the Chief Executive can be seen as a small, but important move to protect the judiciary's staff from outside influence. Similarly, the Chief Executive is answerable to the President of the Supreme Court, not the Lord Chancellor.⁸¹

B. Weak Accountability to the Executive

In a few countries, the Council or courts are only weakly accountable to the executive. In Scotland, the Scottish Court Service (SCS), a fully independent board led by judges without any ministerial direction, this has created an issue of accountability. The Judiciary and Courts Act of 2008 provides that ministers may take over the SCS only in the event of a serious failure to perform its functions.⁸² The Chief Executive of the SCS is ultimately responsible for presenting the SCS's accounts to Parliament, and also appears before the Public Audit Committee to give an update on the SCS's work. The Scotland Act of 1998 explicitly prohibits the Scottish Parliament from summoning judges, although there was debate during the passage of the Judiciary and Courts Act about the propriety for allowing Parliament to summon judicial members of the SCS board; Parliament settled for the power to invite judges.⁸³

C. Strong Accountability to the Executive

In other nations, the Council and the courts are more firmly accountable to the executive. In the Netherlands, the Council is fully accountable to the minister of justice regarding how funds

⁸¹ GEE ET AL., *supra* note 32, at 202.

⁸² Judiciary and Courts Act of 2008, (ASP 6) pt. 4, Sec. 70 (Scot.).

⁸³ GEE ET AL., *supra* note 32, at 234.

are spent.⁸⁴ Sweden's approach to ministerial accountability and control has largely dictated the nation's approach to controlling the Domstolsverket. In Sweden ministers are generally only able to act, and be held liable, collectively as the Government, rather than independently.⁸⁵ Moreover, ministers are traditionally not responsible for the activities of independent administrative bodies, if the activity lies beyond the minister's power of intervention.⁸⁶ Control of these bodies lies in other mechanisms, including the specific directives and instructions accompanying the budget from Parliament.⁸⁷ Given the lack of ministerial accountability and control over independent administrative bodies, Sweden opted to create the Domstolsverket as an intermediary between the Government and the judiciary. When the Government wishes to hold the judiciary accountable or otherwise question the courts, the Government calls upon the Council.⁸⁸

CONCLUSION

Each of the above sections can be understood as a decision point. At each point, legislators determine which individual or governmental body has the authority to request, approve, or set the judiciary's budget. As such, each decision point can represent further protection of judicial independence, or an erosion of the independence of the judiciary. The more control the judiciary has over each stage of the budget process, the more independent the judiciary is likely to be. On the flip side, if the executive or legislative branches each of the decisions regarding the budget, the judiciary can't be expected to function entirely independently.

⁸⁴ Rataj & Strban, *supra* note 10, at 119 n.460.

⁸⁵ VOERMANS & ALBERS, *supra* note 48, at 20.

⁸⁶ *Id.* at 21.

⁸⁷ *Id.*

⁸⁸ *Id.*