A Case for Court Governance Principles

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Introduction

Hard times can inspire new ways of thinking about old problems. State courts today have ample reasons for questioning the continued viability of traditional approaches to organizing their work and to providing leadership. This paper proposes a set of principles for governing state court systems that is intended to provoke a debate about how court governance can best be enhanced to meet current and future challenges. Governance is defined as "the means by which an activity or ensemble of activities is controlled or directed, such that it delivers an acceptable range of outcomes according to some established standard" (Hirst, 2000).

The principles outlined in this paper were developed by examining what courts, as institutions, need to do internally to meet their responsibilities. This is in contrast to much of the current writing about the future of court governance, which tends to focus on ways in which the state courts can improve their relationship with the other branches of government.

The next section sets the stage by describing the ways in which state court systems currently are organized. Four basic models are identified. The problems and opportunities presented by each model are described, as are some problems in governance that appear to be more or less generic in state courts today. The next section discusses the distinctive cultural problems associated with governing courts as opposed to other parts of state government. Existing discussions of court governance are not sufficiently attentive to this cultural dimension. Ten principles of court governance are then outlined, with explanatory comment which can respond to the challenges presented by court culture.

Court Organization: Contemporary Models

The state court systems of today emerged in the 1970s and 1980s as the long-standing ambitions of court reformers began to be realized at a rapid pace. Reformers had decried the degree to which trial courts were enmeshed in local politics, subject to overlapping jurisdiction, and governed by widely divergent court rules and administrative procedures within a state.

To varying degrees in recent decades, all states have changed the organization of their courts. The principle of court unification was the main engine driving that change, which had four key components. First, the number of trial courts was to be reduced as the courts of each county were consolidated into one trial court or a simple two-level structure of a single general jurisdiction and a single limited jurisdiction court. A side benefit would be the gradual elimination of non-law trained judges.

Second, responsibility for trial court funding would be taken from county and city

governments and placed instead in the state budget process. Judicial salaries would no longer be paid out of fees and fines. The court budget could be used to distribute resources across the state courts in an equitable and efficient manner, and budget priorities could be established for the entire state court system.

Third, court administration would be centralized in a state-level administrative office of the courts that prepared the state court budget. This would standardize court policies across the state and take local politics out of the hiring and supervision of court personnel. At the same time, centralization would promote professionalization of the state court workforce.

Finally, the administrative rules for a state's courts would be set not by the legislature, but by the state supreme court, consistent with the principle of the judiciary as an independent branch of state government.

A progress report in 2010 shows the court unification agenda was only party realized (See Appendix A). Today, 10 states have a single trial court and another seven have a simplified two-level system. Thus, roughly one-third of the states completed the logic of consolidation. Five states retain a significant number of non-law trained limited jurisdiction court judges.

State funding was more fully realized. Forty-two states now fund 100 percent of salaries for their general jurisdiction court judges. However, only 17 (out of 44) states with limited jurisdiction courts provide full funding for their judges. Even where judges' salaries are fully funded, however, responsibility for other court funding is still fragmented in some states.

Important steps toward centralization were taken in most states. All states have an administrative office of the courts and in the majority of states the office has sole responsibility for budget preparation, human resources, judicial education, and legislative liaison.

Most state judicial branches have taken over rule making responsibilities. In 32 states, the court of last resort has exclusive rulemaking authority (and in 21, there is no legislative veto). Legislatures retain primary rulemaking responsibility in eight states. In others, the authority is shared or held by a judicial council.

The pace of changes to state court structures slowed considerably in the 1990s. While some states continued to consolidate trial courts and shift responsibilities to the state level, in most states the model for court organization seems fixed for at least the medium term.

One reason for the slower pace is that the fundamental logic of the unification model is being questioned. There is no longer a consensus that full unification is the desired end state for all court systems to reach. Even during the heyday of the unification movement, it was speculated that "it is the individual elements of court unification—and not the overall level of court unification—which affect court performance" (Tarr, 1981:365).

The state courts today can still be classified into one of four basic models of organization

first identified in 1984.

Constellation: *"The state judiciary is a loose association of courts which form a system only in the most general of terms . . . numerous trial courts of varying jurisdictions . . . which operate with local rules and procedures at least as important as any statewide prescriptions . . . Formal lines of authority among the courts are primarily a function of legal processes such as appeals . . ."* (Henderson et al.1984:35)

Few, if any, states today have court systems in which the supreme court is the only source of policy or administrative coherence. State court administrative offices have been granted or have assumed authority to set basic standards for how local courts are organized. The quality and consistency of information reported to state administrative offices has improved, providing a mechanism through which trial courts can be compared to one another statewide.

> **Confederation:** *"A relatively consolidated court structure and a central authority which exercises limited power. Extensive local discretion . . . There are clearly defined managerial units at the local level administering the basics of judicial activity"* (Henderson et al.1984:38).

The state supreme court and the administrative office of the courts in this model can lead primarily through the use of persuasion and the provision of technical assistance services in areas such as management information systems. Over time, use of those services will promote standardization in basic trial court operations.

> **Federation:** *"The trial court structure is relatively complex, but local units are bound together at the state level by a strong, central authority"* (Henderson et al. 1984:41).

Coherence in court administration can be achieved in such systems when the state supreme court and administrative office have the authority to appoint trial court presiding judges and control over categories of funding needed by local trial courts, or when the presiding judges of general jurisdiction courts have administrative responsibilities for the limited jurisdiction courts in their area.

> **Union:** *"A fully consolidated, highly centralized system of courts with a single, coherent source of authority. No subordinate court or administrative subunit has independent powers or discretion"* (Henderson et al.1984:46).

Court systems organized in this way tend to give a prominent role in the policy-making process to judicial councils that include representatives of all levels of the court hierarchy and also administrators at the trial court level. Regional administrative units are sometimes created to reduce the distance between local courts and the central court administration.

While each model for court organization presents its own distinctive challenges to effective governance, some challenges are more or less generic to all four organizational models. First, trial judges have a considerable amount of discretion over how they organize their courtrooms. As a result, it is difficult to standardize all aspects of court administration within in a particular trial court, let alone across a state. In most states, all judges are elected by the public, giving them a claim to independence rarely found in other parts of state government, where at most only the head of an office or agency is an elected official. One consequence of this fact is that it is difficult for any individual judge to represent authoritatively a trial court's views to the state supreme court or court administrative office.

Second, centralized court decision-making needs to demonstrate that it hears and respects the views of trial court level officials when making policy decisions. Representative forums have not developed that bring together on a regular basis state-level leaders and managers with their counterparts at the trial court level. Early in the court reform movement judicial councils were established to provide such a forum, but these did not take hold except in California and Utah, although several states (e.g., Minnesota) have recently re-established their councils.

There are some developments that will, in time, strengthen the hand of central court administration in all four models of court organization. There has been a dramatic improvement in the quantity and quality of the case level information that flows from trial courts to the state level. This provides the raw material for planning and policy-development. At the same time, sophisticated performance measurement systems and workload assessment methodologies have been developed that can provide a standard of management information never before available to court managers.

The court unification agenda focused on structural aspects of how trial courts should be organized. The next section looks at another dimension of challenges to court governance, those associated with the very distinctive organizational culture that characterizes courts.

The Culture of Court Systems

> "*In our country, judicial independence means not just freedom from control by other branches, but freedom from control of other judges"* (Provine, 1990).

In these few words, Doris Marie Provine captures the challenge facing any effort at court governance. Accepting the above as a truism, how are decisions to be made on behalf of independent actors who see themselves first, as autonomous adjudicators and, second, if at all, as part of a system? Stated another way, how do you balance self-interest with institutional interests, while attempting to respect both?

Self-Interest Orientation

Understanding the cultural challenges to effective governance is critical if improved

governance models are to be advanced. The manner, in which judges are selected, not by their future colleagues, but by third parties--governors, legislators, or the electorate--contributes to this sense of independence from the outset of a judicial career (Lefever, 2005). As a consequence, judges' "mandates" do not all derive from the judicial institution itself, resulting in a decreased sense of organizational identity for many new judges. This sense of individual independence poses a significant obstacle to creating a system identity and, in turn, fidelity to the decisions of a governing authority.

At the trial court level, this manifests itself in judges resisting the notion that they should be concerned about anything other than handling "my cases." Presiding judges will frequently be heard describing themselves as "firsts among equals," who experience great difficulty in confronting the self-interested perspective that many judges bring to issues of court administration and operations. In an environment where the first instinct is to assess any proposal from the perspective of "how will it impact me", it is difficult to initiate change, or even make decisions.

Appreciating this self-interest orientation and working to, if not overcome it, then understand and work with it, will be critical to any form of governance. Soliciting input, providing an opportunity to be heard, providing a forum for debate, explaining why an issue is important and why a decision was made the way it was, and ensuring effective lines of communication are important in any organization. The culture of courts makes such activities imperative.

Organizational Implications

Any organization (including courts) operates the way it does because the people in that organization want it that way (Ostrom and Hanson, 2010). The people who create this organizational culture in courts are judges, who used to be attorneys. Attorneys operate in a professional culture where goals tend to be abstract, authority diffuse, and there is low interdependence with others. It has been said that "the conflict in professional organizations results from a clash of cultures: the organizational culture which captures the commitment of managers, and the professional culture, which motivates professionals (Raelin, 1985). Professional court administration, whether in the form of court administrators, chief judges, or judicial councils, must operate in the world of concrete goals, more formal authority, and task interdependence if the needs of the organization are to be met.

As noted above, some judges are called upon to take on administrative roles. The culture of judges being equals and a presiding judge being only a first among equals, frequently results in a lack of appreciation for the qualities needed in a leader. This can result in the practice of choosing administrative leaders based on seniority rather than administrative competence, or of selecting judges who are least likely to challenge judicial autonomy. At the state level, the practice of rotating chief justices is a manifestation of this culture, and frequently results in tenures too short to permit effective engagement or accomplishment. The desire for a personal legacy can result in a personal agenda at the expense of system needs.

The culture of courts also directly affects non-judicial, professional administrators who are responsible for ensuring effective and efficient court operation, but who, in most instances, lack the authority of chief operating officer positions found in other business or governmental environments. Court executives and presiding judges, and state court administrators and chief justices, ideally function as a management team. The extent to which this ideal relationship actually exists can vary widely, again because of court culture. Something as simple as whether a court executive has a seat at the table during bench meetings, or whether they are relegated to the back row, speaks volumes about the role of the executive in the operation of the court and the existence of a true management team.

Additional cultural challenges result from the competing interests of different court levels and state versus local orientations. The culture of a supreme court could not be more different from the culture of a trial court, yet in many jurisdictions it is the supreme court or the chief justice who sets policy for the entire system. It is not surprising that as state supreme courts have taken on more administrative oversight, budget, and policy setting, that trial courts have frequently resisted many forms of coordination and centralization. Trial courts often seek autonomy and flexibility, whereas state goals tend to be more in line with coherence and consistency.

In the policy-setting arena, how do the voices of trial judges get heard? Are there forums for expressing needs and concerns, and if so, are they viewed as effective and credible? Do judges have to speak collectively through "associations" to be heard and, if so, how will these various voices speak for the system? If multiple voices result in conflicted messages, aren't other branches going to be free to selectively hear, interpret, and ignore? Providing an effective means for judges to contribute, communication that is effective, and decisions that are clear, are all critical to bridging the various interests of court levels and facilitating effective system governance.

It has been suggested that striking the balance between self-interest and institutional interests, while binding separate units of an organization together, requires strategies that embrace three elements: a common vision of a preferred future, helpful and productive support services that advance the capabilities of the organization's component parts, and a shared understanding of the threat and opportunities facing the system (Griller, 2010). The governance principles set out in section III are intended to explore these elements.

While court culture must be understood and considered when addressing governance, it cannot be allowed to serve as an excuse for failing to provide a court system with an effective means of self-governance.

Principles of Court Governance

It is clear that there are multiple structural models in place for governing and managing

state and local courts. Thus, it is likely that any prescriptive efforts aimed at re-alignment must be consistent with the history, culture and goals of any individual court "system," however defined. This paper therefore attempts to posit unifying principles that can serve as a starting point for critiquing existing models, while understanding that they must be adapted to a variety of political, legal and constitutional settings. We suggest that effective court governance requires:

1. A well-defined governance structure for policy formulation and administration for the entire court system. Ideally, in our view, this principle should apply to a state court system as a whole, but in many states this will have to be a long-term and perhaps incremental goal. The principle, applied at any level, however, suggests that structure should be explicit, and the authority for policy-making and implementation well defined. The absence of such clarity can significantly undermine the ability to make decisions.

2. Meaningful input from all court levels into the decision-making process. This is a fairly obvious principle drawn from basic knowledge about system management. In the absence of any means of contributing to the process of making decisions, constituents who have to live with the decisions generally lack any sense of buy-in or ownership. This can result in, at best, indifference to the success of the enterprise or, at worst, resistance and sabotage. Perhaps more important, however, is the fact that the quality of the decision-making process is vitally enhanced by the knowledge and insights of all parts of the system.

3. A system that speaks with a single voice. A court system that cannot govern itself and cannot guarantee a unified position when dealing with legislative and executive branch entities is not in fact a co-equal branch of government. Competing voices purporting to speak for the judiciary undermine the institutional independence of the courts and leave other parts of government (and the public) free to choose the messages they prefer in relation to court policy and administration. This is potentially very damaging both to the actual welfare of court systems and ultimately to the level of respect and attention afforded them.

4. Selection of judicial leadership based on competency, not seniority or rotation. The complexity of modern court administration demands a set of skills not part of traditional judicial selection and training. Selection methods for judicial leadership should explicitly identify and acknowledge those skills, and judicial education should include their development. This is no easy task in the context of court cultures around the nation, but a more thoughtful conversation should begin and courts should seek ways to identify standards and practices that are better than many of those now in place.

5. Commitment to transparency and accountability. The right to institutional independence and self-governance necessarily entails the obligation to be open and accountable for the use of public resources. This includes not just finances but also, and more importantly,

the effectiveness with which resources are used. We in the courts should know exactly how productive we are, how well we are serving public need, and what parts of our systems and services need attention and improvement. And we should make that knowledge a matter of public record.

6. Authority to allocate resources and spend appropriated funds independent of the legislative and executive branches. If someone outside the judiciary has the power to direct the use of dollars, that entity has the power to direct policy and priorities for the third branch. Obviously, there is always negotiation over funding priorities, but budget practices like line item funding shift the policy-making from the judicial branch to the legislative, and have the effect of pitting different parts of a court system against each other. Courts with the authority to manage their own funds can ensure that priorities are dictated by agreed-upon policy and planning and not by the "project du jour."

7. A focus on policy level issues; delegation with clarity to administrative staff; and a commitment to evaluation. Decisions about policy belong with the structural "head" of a judicial system, but implementation and day-to-day operations belong to administrative staff. An avoidance of micro-management by the policy-maker and clear authority for implementation in the managers are both important for the credibility and effectiveness of court governance, and can minimize the opportunities for undermining policy at the operational level. Finally, without a commitment to evidence-based evaluation of policies, practices and new initiatives, courts cannot claim to be well-managed institutions.

8. Open communication on decisions and how they are reached. Judicial culture generally fosters a strong sense of autonomy and self-determination amongst judges - a necessary corollary of decisional independence. In the administrative context, that same culture can make system management tricky. No one wants to tell judges how to decide cases, but we may need to tell them how to manage case records, report court performance, move to electronic filings and discovery, and handle assignments and schedules. To the extent judges, and staff, feel that decisions emerge from a "black box," without their input and prior knowledge, the potential for discomfort and dissatisfaction, not to mention general mischief, is magnified. A good system of governance does everything it can to keep information flowing.

9. Positive institutional relationships that foster trust among other branches and constituencies. Given the natural constitutional and political tensions that are inherent in our system of government generally, the judiciary must work constantly to explain itself to the other branches. Care and strategic attention must be afforded to building personal and professional relationships that will ensure an adequate level of credibility when the judiciary is in conversation with the other parts of state government. This is particularly essential on the budget and finance side, and on the question of openness and

accountability. Legislative and gubernatorial staffers as well as their bosses need to know they can take information and numbers "to the bank" in terms of accuracy and transparency when they come from the courts. It also helps if courts are pro-active on the "quality" side of the equation, demonstrating commitment to things like judicial education and performance evaluation for judges and courts.

10. Clearly established relationships among the governing entity, presiding judges, court administrators, boards of judges, and court committees. Nothing undermines good governance faster than muddled understanding of who is responsible for what. Judges in general have a penchant for assuming that plenary jurisdiction and authority on the decisional side should translate into equally broad individual authority on the administrative front. Thus it is particularly important in court management for the assignments and authority of leaders and mangers to be clear, explicit, and included in the general orientation of new judges and staff, as well as in the training of new and potential judicial leadership.

Conclusion

American courts are not alone in re-examining the governance of our systems. In Australia, the dependence of the courts on the Ministry of Justice for the administration of the courts has given rise to a call for self-governance. A recent report entitled *Governance of Australia's Courts - A Managerial Perspective* contained this observation:

> "Even as the current arrangements seem to "work," in the sense that they have not given rise to major catastrophes or dysfunctions, there is no reason why they could not be made to work even better. Good people can make bad structures work. But, good people can work even better within good structure."
> (Alford et al.2004).

Many of us in the American state courts are in the same boat. Good people are doing good work in court systems hampered by a lack of good structure. We hope that this discussion will support a much broader consideration of what good court governance requires and how those principles might be brought to bear in the effort to do better work in better structures.

In conclusion, if you assume for the moment that the principles set forth are viable and appropriate, would the state-level governance of your court system stand up to these principles? What about the governance within your individual judicial districts or courts? How would you know, whose opinion would count, and how would you initiate meaningful improvements? It is our belief that these are questions well worth considering. If we ignore the question of how we make decisions and how we can make better decisions, or in other words, how we can most effectively govern our courts, then aren't we relegating the judiciary to something less than a co-equal branch of government?

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State	Chief Justice			Administrative Offices of the Courts		Budgeting			Other Courts	
	Method of Appointment	Term (Years)	Selects Presiding Judge of General Jurisdiction Courts?	Year Created	Staffing	Budget Submitted To	Can executive branch amend the budget?	Some locally funded courts?	# General Jurisdiction Judges	Intermediate Appellate Court?
Alabama	Election	6	No	1971	76	Executive	Yes	Yes	142	Yes
Alaska	Supreme Court	3	Yes	1959	83	Legislature		No	44	Yes
Arizona	Supreme Court	5	With Supreme Court	1960	434	Both		Yes	170	Yes
Arkansas	Election	8	No	1965	79	Legislature		Yes	115	Yes
California	Governor	12	No	1960	491	Both	Yes	No	1917	Yes
Colorado	Supreme Court	Indefinitely	Yes	1971	98	Legislature		Yes	144	Yes
Connecticut	Governor	8	No	1965	150	Executive	Yes	Yes	180	Yes
Delaware	Governor	12	No	1971		Executive	Yes	Yes	24	No
District of Columbia	Nominating Commission	4	Yes	1971		Both	Yes	No	59	No
Florida	Supreme Court	2	No	1972	496	Legislature		No	527	Yes
Georgia	Supreme Court	2	No	1973	91	Legislature		Yes	193	Yes
Hawaii	Governor	10	Yes	1959	214	Legislature		No	45	Yes
Idaho	Supreme Court	4	No	1967	37	Legislature		No	39	Yes
Illinois	Supreme Court	3	No	1959	136	Legislature		No	868	Yes
Indiana	Nominating Commission	5	No	1968	55	Executive	Yes	Yes	296	Yes
Iowa	Supreme Court	8	Yes	1971	60	Legislature		No	344	Yes
Kansas	Seniority	Indefinitely	With Supreme Court	1965	46	Both		Yes	238	Yes
Kentucky	Supreme Court	4	No	1976	745	Legislature		No	130	Yes
Louisiana	Seniority	Indefinitely	No	1954	77	Legislature		Yes	222	Yes
Maine	Governor	7	Yes	1975		Executive	Yes	Yes	16	No
Maryland	Governor	Indefinitely	No	1955	398	Legislature		Yes	146	Yes
Massachusetts	Governor	To Age 70	With Supreme Court	1956	154	Executive	Yes	No	82	Yes
Michigan	Supreme Court	2	With Supreme Court	1952	113	Legislature		Yes	217	Yes
Minnesota	Governor	6	No	1963	187	Executive		No	281	Yes
Mississippi	Seniority	Indefinitely	No	1974	14	Legislature		Yes	49	Yes
Missouri	Supreme Court	2	No	1970	233	Both	Yes	Yes	357	Yes
Montana	Election	8	Yes	1975	31	Executive	Yes	Yes	49	No
Nebraska	Governor	Indefinitely	No	1972	23	Executive	Yes	No	55	Yes
Nevada	Rotation	2	No	1977	29	Legislature		Yes	60	No
New Hampshire	Seniority	5	Yes	1980	44	Executive		No	42	No
New Jersey	Governor	Indefinitely	Yes	1948	619	Executive	Yes	Yes	428	Yes
New Mexico	Supreme Court	2	No	1959	68	Both		Yes	84	Yes
New York	Governor	14	No	1978	223	Both		Yes	536	Yes
North Carolina	Election	8	No	1965	271	Both		No	209	Yes
North Dakota	Supreme Court	5	No	1971	22	Legislature		No	42	Yes
Ohio	Election	6	No	1955		Executive		Yes	387	Yes
Oklahoma	Supreme Court	Indefinitely	No	1967	42	Legislature		Yes	221	Yes
Oregon	Supreme Court	6	Yes	1971	186	Executive	Yes	Yes	175	Yes
Pennsylvania	Seniority	Indefinitely	No	1968	308	Both	Yes	No	421	Yes
Rhode Island	Governor	Life	No	1969	145	Executive		Yes	27	No
South Carolina	Legislature	10	Yes	1973	21	Both		Yes	68	Yes
South Dakota	Supreme Court	4	Yes	1974	32	Executive		No	38	No
Tennessee	Supreme Court	4	No	1963	72	Executive	Yes	Yes	154	Yes
Texas	Election	6	No	1977	58	Legislature	Yes	Yes	425	Yes
Utah	Supreme Court	4	No	1973	99	Both		Yes	79	Yes
Vermont	Governor	6	With Supreme Court	1967	29	Legislature		No	37	No
Virginia	Supreme Court	4	No	1952	135	Executive	Yes	No	156	Yes
Washington	Supreme Court	4	No	1957	164	Executive		Yes	195	Yes
West Virginia	Seniority	1	No	1945	40	Legislature		Yes	65	No
Wisconsin	Seniority	Until Declined	With Supreme Court	1962	123	Both	Yes	Yes	246	Yes
Wyoming	Supreme Court	4	No	1974	9	Legislature		Yes	20	No