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Edited by
KUNO SCHEDLER



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18 Courts and Public Management

Introduction

Courts are the centerpiece of the modern state and express the pervasiveness of law in limiting what government can do or enabling a framework for public policy. Courts have presumed legitimacy and are expected to work independently in democratic societies. Their ultimate purpose is to resolve conflicts and promote social peace through judicial decisions that are supposed to take into account the rule of law. According to Raz (1980), courts are authoritative institutions that apply legal reasons recognized and enforced in a legal system.

In addition, courts take part in an autonomous legal system, which is based on strictly legal considerations. However, the very existence of a court, its nature, and its identity depend on features of the political system of which it is part (Raz, 1980). Courts are created and funded by political authorities, and are entities in a political system, with consequential effects on the prerogatives and policies of the state (Kagan, 2009). As the courts directly influence public policies and public services, the management of these organizations is a topic of great interest in public administration. In this chapter, we discuss the management of courts, reviewing the relationship between courts and public policy and the place of these organizations in the institutional structure of the state. We also discuss the idiosyncrasies of their operating logic and the challenges regarding court management.

Courts and public policy

The independence of the Judiciary and its autonomy from political issues in democratic societies allows the courts to place themselves above particular interests and to preserve the interests of the different stakeholders. Even considering that most of the work of judges concerns issues that are not politically controversial and that court decisions are based on the law, courts, especially appeal courts, are not merely legal institutions.

The influence of courts in public management involves legitimacy, judicial intervention, capacity, competence, the public policy agenda, the authority of public managers, and management of resources (O'Leary and Straussman, 1993). Osorio and O'Leary (2016, p. 3) present some evidence of the impact of the courts on public management through judicial decisions: (a) judges have been aggressive and active in their oversight of administrative agencies; (b) judges often refuse to defer to administrators' expertise; (c) judges may become invested in the outcome of litigation involving public institutions and, as a result, lose their "cloak of neutrality"; and (d) judicial decisions concerning public agencies often include detailed judicial supervision of organizations (including ongoing, affirmative decrees), with frequent judicial interaction with agency staff.

The role of courts as policymaker has been extensively addressed in the literature (Baum, 2003; Banks and O'Brien, 2016). In many situations, judges' decisions involve issues with political consequences, in areas such as health, education, and work, among others. These situations arise more often in countries where the Judiciary influences other branches of government more strongly. Dahl (1957, p. 294) suggests that "the main task of the court is to confer legitimacy on the fundamental policies of the successful coalition", an approach known as the ruling-regime thesis, in which courts are considered part of the political system.

The political dimension of courts is often reduced to judicial decision-making, with scholars trying to predict or prescribe the individual behavior or votes of justices considering their partisan, political or ideological bias (Clayton, 1999). Others consider how judges could affect public policy by making rational choices to overcome institutional constraints that stand in the way of their policy preferences or goals (Clayton, 1999). Historical and new institutionalist scholars criticize the excess of politics of these attitudinal-based approaches and their decontextualized predictability of ideological decisions by courts. They argue for a more robust conception of the forces behind judicial behavior, considering the patterns of institutional relationships within the political regime (Clayton, 1999) and the broad array of interested actors participating in the dialogue with courts over legal politics (Staszak, 2016).

As political institutions, courts are dependent on the political environment. As argued by

federalist approaches, their authoritative interpretation of the constitution may affect the role of courts in adjudicating constitutional disputes (Scalia, 2020; Koopmans, 2003). The emergence of the judicialization of politics is related to “the expansion of the province of courts and judges in determining public policy outcomes, mainly through administrative review, judicial redrawing of bureaucratic boundaries between state organs, and ‘ordinary’ rights jurisprudence” (Hirschl, 2008, p. 255). Courts are not merely supposed to apply and enforce existing laws, “they have also been granted law-making power and the capacity to formulate and implement policies, sometimes supplementing, at other times replacing, and even opposing the policies of executive agencies and legislative bodies” (Fix-Fierro, 2003, p. 13).

Like the judicialization of politics, judicial activism has consequences for public management. Judicial activism influences public policies through the responses of the courts to substantive social patterns and values in the social contexts in which the courts are embedded. From the perspective of judicial activism, courts are critical in governance, and potentially more effective than other government institutions in producing social reform (Horowitz, 1977). The retreat from policymaking would threaten their judicial legitimacy, a controversial conclusion, as pointed out by Baum (1983). Those concerned about the ideological direction of courts or who are partisans of the constrained court view deny the courts the power to engage in policymaking (Rosenberg, 1993; Nachev, 2019).

Understanding courts as part of the institutional structure of the state means, in practical terms, understanding the interests, values, ideologies, and political preferences which permeate court activities and influence how they undertake their institutional functions, all of which have consequences for the government.

Court management

In addition to being considered legal and political institutions, courts can also be studied, from the perspective of organizational theory, as professional bureaucracies, according to Mintzberg’s (1979) taxonomy. Judges constitute their operating core, making judicial decisions to resolve conflicts, according to rules and methods provided by law (Fix-Fierro, 2003). The function and structure of the courts

presuppose that appellate court judges have the power, preferably in a collegial manner, to overturn decisions of lower court judges. However, one judge is not hierarchically subordinate to another.

Courts are organizations in which decision-makers (judges) have responsibilities, being “active administrators, public policy implementers and managers of government institutions” (Staszak, 2016, p. 325). Those who research courts, according to Shapiro (1986, p. 1), have generally employed a prototype with some remarkably idiosyncratic characteristics that influence the operating logic of the courts: “(1) an independent judge applying (2) preexisting legal norms after (3) adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong.”

The way judges are appointed directly influences the behavior of these professionals and the management of courts. Guarneri (2001) offers a typology that helps to understand the different models of selection of judges in democratic political regimes, which includes three main alternatives: (a) appointment by the Legislative, Executive or both; (b) direct election by citizens; and (c) public tender, sometimes accompanied by a period of initial practical experience. The prevalence of one or other model, according to the author, depends mainly on the legal tradition of each country and its process of formation of state bodies.

Court management involves at least two sets of tasks: (a) management of the court itself, comprising the planning, organizing, monitoring, and control of the resources that make up the court structure, such as human resources, budget, logistics, and information technology; and (b) management of judicial proceedings, which involves analysis of judicial cases between parties in dispute, the testimony of witnesses, and so on, which usually culminates in judges making decisions.

Several studies have analyzed the organizational nature of the courts and their management based on organizational culture (Ostrom et al., 2007), administrative practices (Aikman, 2006; Posner, 1996), and reputation (Garoupa and Ginsburg, 2015). The management of the courts has also been addressed from the perspective of the administration of justice, with studies divided into four major themes: governance, legitimacy, innovation, and performance (Guimaraes et al., 2018). Research in these cross-cutting themes

covers a variety of questions about how courts are governed (governance) and taken for granted as institutions (legitimacy), how courts use the best alternatives to achieve results (innovation), and what are the relationships between the efficient use of resources and the results obtained (performance).

Table 18.1 records the operating logic of the courts, developing some specific dimensions, characteristics, and key phenomena for the management of these organizations. Some of these characteristics may vary from country to country, but they portray a universal model.

Implementing performance-based management models in courts faces obstacles as the social function and expected results of these organizations involve subjective issues that are hard to assess. Questions such as how management can contribute to the efficiency and effectiveness of courts and shorten the time of judicial proceedings remain open. Answering questions like these goes to broader institutional and cultural dimensions of each country and is therefore far beyond the management of the courts. However, many countries have sought to apply best management practices

to increase the efficiency and effectiveness of courts under the umbrella of the New Public Management (NPM) approach.

NPM emerged in the 1980s as an attempt by governments in different countries to respond to two public administration challenges: (a) the need to mitigate problems of inefficiency in the state apparatus, especially in the face of crises of a budgetary and fiscal nature; and (b) the need to improve the level of democratic accountability and high-level government control. NPM involves a set of principles that aim to make the state more efficient at a lower cost, closer to the citizen, and with the capacity to offer better quality services. Structural and managerial reforms summarize the core logic of NPM when considering dimensions of public sector performance: cost efficiency, service quality, policy coherence and coordination, and equal access to services (Hammerschmid et al., 2019). A review of the NPM can be found in Schedler (Chapter 4) in this Encyclopedia.

However, most NPM reforms can only be applied to court management with difficulty, due to the operating logic of these organizations (Table 18.1) and the monopoly of the

Table 18.1 Operating logic of the courts

Dimensions	Characteristics of the courts	Key phenomena in court management
Institutional ethos	Legal institution	Duality between legal and political structures
Organizational structure	Professional bureaucracy	Coordination between the strategic apex and the operating core
Stakeholders	Society as a whole	Attendance of conflicting and diffuse interests
Operating core	Judges	Efficiency and effectiveness
Control	Self-control	Independence versus control dichotomy
Accountability and transparency	Low level of both practices	Social pressure on both aspects
Nature of work	Decision-making	Evaluation of judicial work
Core activity	Social dispute resolution	Paradox between court access and congestion
Decision-making process	Independence and impartiality	Limits of judicial independence
Technology	Human-based	Automation and robotization
Production volume	Demand-driven	Balance between caseload and quality of judicial decision/production
Output	Judicial decision with the force of law	Effectiveness of judicial decisions
Outcomes	Conflict resolution and social peace	Impact of the judicial activity on society

Source: Prepared by the authors.

courts in enforcing justice. This is the case of (a) agencification, in which the service provided by the courts would be transferred to quasi-autonomous agencies; (b) contracting out, in which justice services would be provided in a competitive manner; and (c) flexible employment practices, in which judges would not maintain an effective and stable link with the state. Other reforms could have limited effects on court management. Downsizing reforms, for example, reducing redundancies, closures, or terminations, and customer orientated reforms, aiming to increase communication between courts and citizens, would undoubtedly affect the courts' support services, while not necessarily changing the core activity, namely, judicial proceedings.

Courts face the same social and political pressures as other public bodies to greater austerity, efficiency, effectiveness, transparency, and accountability. These pressures have been more intense since the 1980s, concurrent with the rise of the NPM movement. Since the 2000s, some initiatives to improve court management have emerged, as different countries and groups of people have tried to increase the efficiency and effectiveness of courts. These include the creation of the European Commission for the Efficiency of Justice (CEPEJ) in 2002, the International Association for Court Administration (IACA) in 2004, and the International Consortium for Court Excellence (ICCE) in 2008.

Total Quality Management (TQM) and Performance Management (PM) are examples of management models based on NPM applied to courts. TQM in courts has been discussed primarily in the USA, the Netherlands, and Finland. This model has been introduced into courts with various degrees of success (Langbroek et al., 2017). One of the prominent examples of the use of TQM in courts is the International Consortium for Court Excellence model (www.courtexcellence.com), which aims to empower court management by measuring performance and using the measurement outcomes as information for organizing change for quality improvement. The most important values in the TQM model applied in courts are "equality (before the law), fairness, impartiality, independence of decision making, competence, integrity, transparency, accessibility, timeliness, and certainty" (Langbroek et al., 2017, p. 10).

Performance Management involves measuring products and results that can be considered court performance indicators, usually focusing

on improving services to the public. PM generates the information necessary to measure the courts' production and quality (Langbroek et al., 2017). As examples of PM models for courts, Langbroek et al. (2017) point to the management models used by the European Commission for the Efficiency of Justice, the International Framework for Court Excellence, the Finnish Rovaniemi Court of Appeal, and the European Commission of Justice Scoreboard.

Challenges of court management

Challenges of court management at the institutional level are significant. First, judicialization of politics, judicial activism, or ideologization of the judiciary may increase the institutional imbalance between government branches and present risks for the implementation of public policies. Second, courts could act in association with authoritarian governments, where the judiciary becomes subordinate to the executive branch, imposing repressive measures and driven by administrative convenience. Third, media frames, influenced by social media, fake news, or political use of information, may affect the support of the public for courts, bringing a new perspective to judicialization of politics and dispute resolution involving government or partisan interests.

Another critical challenge in court management is the so-called "responsive judge" phenomenon often associated with judicial activism. In this situation, the judge resolves conflicts oriented towards the future, in contrast to the judge who makes decisions in legal relations based on past events (Kettiger et al., 2019, p. 314). The main issue concerns how to organize specific judicial procedures and preserve judicial independence when the court becomes a participant in the problem-solving process and connect this to legislation and a fair trial (Kettiger et al., 2019).

At the organizational level, one of the main challenges of court management is the balance between independence and control. Those two features are seen as being in opposition, that is, control would supposedly reduce the independence of judges and courts. Another challenge is about the reputation and legitimacy of the courts. The conditions of presumed legitimacy can lead courts to a process of accommodation in which values such as efficiency and effectiveness are not priorities. The paradox regarding

efficiency and quality in justice is also an important challenge. How these two demands can be reconciled in the work carried out by judges remains an open question.

Last but not least, there is the challenge of the use of information and communication technologies by courts. These technologies could be a key factor for the efficiency of the courts, but several projects around the world have failed, and “there is still a lack of detailed information on the success or otherwise of these projects, and on the projects that have clearly brought some added value to the functioning of the justice system” (Kettiger et al., 2019, p. 314).

Other subjects, for instance, the influence of international courts on the independence and management of national courts, are also important challenges for the functioning of these institutions. However, exploring other issues is beyond the scope of this chapter. The functioning of courts involves social, political and managerial problems that are hard to solve. Some of these are best described as wicked problems, as they depend on the paradoxical situation between two contradictory needs: on the one hand, the universal need to increase access to justice, and, on the other, the constant battle of the courts to reduce caseloads and congestion.

Court management is a complex and multifaceted theme. It constitutes a long road to be followed by politicians, policymakers and researchers interested in answers to the challenges of the administration of justice and court management, particularly considering the consequences for public policy and public services. This chapter represents a modest contribution in this regard.

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See also

Prisons and Public Management, Corporate Governance and Hybridity of State-owned Enterprises, Corruption in Public Management

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