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The Judiciary between Management and the Rule of Law

**Results of the Research Project «Basic Research
into Court Management in Switzerland»**

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Foreword

The judiciary is facing a range of new challenges. The most obvious is a growing volume of business and increasingly complex cases at a time when financial resources are dwindling. The work that the courts do is also coming in for more criticism, not only from litigants but also from supervisory authorities, not to mention the media. In addition, courts face increasing competition from alternative dispute resolution mechanisms. The courts must therefore be well organised if they are to guarantee sustainable adjudication for the future.

In Switzerland, however, hardly any research has been conducted until now into court administration, i.e. the management of the judiciary. As part of a larger research project, it was therefore planned to investigate various aspects of court management from the standpoint of a variety of disciplines. The Swiss National Science Foundation (SNSF) confirmed the need for research and provided the basic funding for twelve dissertation projects and two additional studies. As the Sinergia Project on “Basic Research into Court Management in Switzerland”, the basic research was carried out by six universities, Bern, Lausanne, Lucerne, St. Gallen, Utrecht (Netherlands) and Zurich, and successfully completed in four years.

This was made possible thanks to the commitment shown by a wide range of participants, whom we would like to take this opportunity to thank: first of all, the young academics who addressed the joint research question and conducted careful research under the close supervision of their sub-project managers. Thanks is also due to the judges and court staff themselves: on the basis of the numerous surveys and interviews that made up the research activities, it was possible to devise empirical principles, but this would not have been possible without the cooperation shown by the members of the judiciary. In addition, our active and practical exchanges with the scientific advisory board chaired by Prof. Dr. Arnold Marti were of enormous importance. The managers of this research project would also like to thank Daniela Winkler for her professional support, who also assisted in networking the project at an international level, in particular through the European Group for Public Administration (EGPA). She in turn was assisted by Fabiane Reber and Rico Torri, who also made

a valuable contribution to the work of finalising this publication. Stämpfli Publishers showed an immediate interest in publishing the research results – thanks for this go to Stephan Grieb and Christa Escher. And thanks also to Kenneth MacKenzie for translating this publication into English.

Bern, February 2016 The editors and overall project managers

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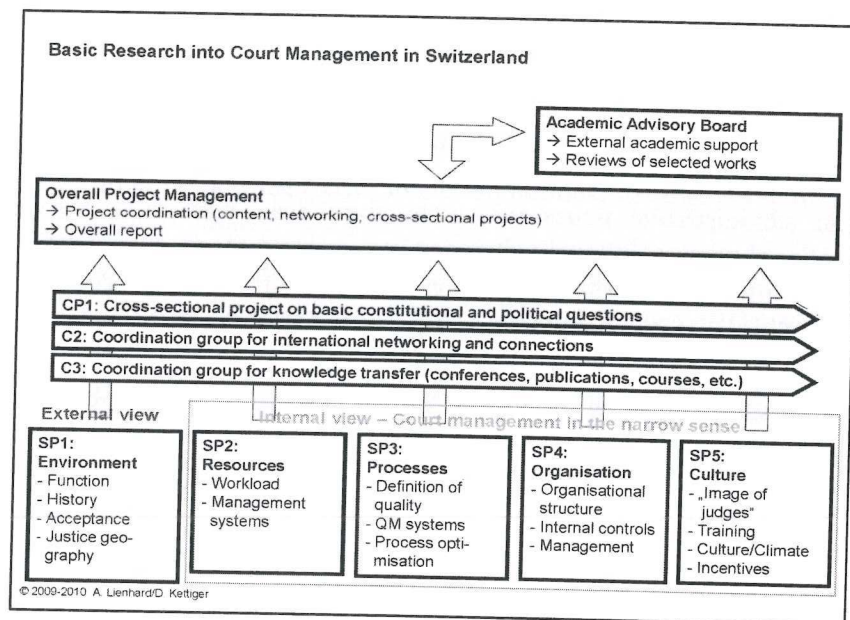


Figure 1: Research and project structure

22 The overall project management committee was supported by a *Academic Advisory Board*, made up of recognised experts from Switzerland and abroad.⁵² It had the task of advising the overall project management committee. In addition, it also expressed its opinion on the results of the research in a number of reviews. During the project, numerous members of the Academic Advisory Board took active part in workshops and coordination meetings of all the researchers involved in the project.

⁵² See the list of participants in Annex 3.

2 Basic constitutional and political issues (cross-sectional project)

2.1 Introduction

Giovanni Biaggini, Regina Kiener

23 Business management models for court management affect the judiciary as the third branch of the state and thus concern a core sector of state activity. The management of the courts is therefore subject to numerous legal requirements and obligations. Court management must take equal account of the special social functions of the judiciary (protecting the rights of the individual, preserving legal stability, realising the decisions of principle made by the [constitutional] legislature), the special working methods associated with the task of adjudication, and the resultant professional characteristics of its members. In a democratic state governed by the rule of law, court management is therefore integrated into a *tight normative structure*: this constitutional and political framework is determined by the Federal Constitution (and in political entities such as Switzerland, which is organised federally, by the constitutions of the individual cantons). International law imposes minimum standards, in particular the right of the litigants to a fair hearing before an independent tribunal established by law (Art. 6 Sec. 1 ECHR, Art. 14 Sec. 1 UN Pact II). These requirements are differentiated by procedural legislation, which in some cases also regulates the basics of court organisation. At cantonal level, there are corresponding regulations in administrative procedural law and in the legislation on the organisation of the judiciary. Lastly, based on their delegated legislative powers, the higher courts in the Confederation and cantons have issued certain selective rules in relation to the organisation of the judiciary that are binding as far as court management is concerned.

24 The basic constitutional and international law questions related to the issues of organisation of the judiciary that are key to court management have so far only been investigated in relation to the Swiss judiciary to a limited extent. For fundamental issues in relation to judicial function and the methods of adjudication, reference can be

made to international research; the same applies to the analysis of the international legal framework on the guarantee of judicial independence. However, this applies only to a limited extent when devising the principles for the organisation of the Swiss judiciary that are key to the field of court management. The aspired research findings are directly connected with the specifically Swiss characteristics of the principle of democracy; this results in numerous particularities in the organisation of the judiciary, which in some cases are unique by international comparison. So far, even in Swiss research, these have not yet been scientifically considered in a comprehensive manner and only sporadically with regard to court management. Examples include the influence of the political parties in the selection and appointment of judges; the negligible formal eligibility requirements for being appointed to judicial office; the appointment of judges for a limited term of office with the requirement of re-election; the significant role of the federal and cantonal parliaments in the appointment of judges and their removal from office and in the oversight of the judiciary; or the special place that law clerks have in the Swiss judicial system. In addition, however, court management also brings new problems that have so far seldom been the subject of academic research. This is especially the case with regard to the protection of court management data. When it relates to the performance of individual judges or law clerks, this data is of considerable relevance to personal privacy, and it may only be processed – for example for purposes of controlling – if constitutional guarantees are respected.

25 The principles developed in the cross-sectional project on “basic constitutional and political questions” should help to fill in these gaps. *The aim is* to determine the legal framework for court management measures based on specific questions and from this basis to define a “best practice” for court management. In the research project, *four studies* are conducted into fundamental constitutional and international law issues related to the organisation of the judiciary that are closely related to court management. There is considerable need for further research in the following areas: organisational structures within courts (2.2.1); selection and qualifications of judges (2.2.2); processing of personal data on judges (2.2.3); and supervision of the judiciary (2.2.4).

From a *methodological point of view*, the object of the *studies* is to analyse those provisions of constitutional and international law that form the framework for court management measures, including the court judgments and decisions issued on the matter (Federal Supreme Court, ECHR, UN Human Rights Committee) and the relevant literature. The regulatory provisions and the relevant practices are analysed and considered in relation to the research questions underlying the individual studies. Depending on the research question, the studies also seek to compare legal systems. For example, organisation models, such as the judicial councils used in the countries of Southern, Central and Eastern Europe will be investigated with regard to their legitimacy and suitability for “good practice”.

The *synthesis* investigates whether and to what extent the introduction or more widespread use of court management models impedes the fulfilment of constitutional and international law requirements or can contribute to making them easier to fulfil. Here the findings from the *studies* are analysed from the standpoint of the actors involved in court management (legislature; parliament; government/administration; judiciary). The results on the one hand allow propositions to be made on modernisation opportunities within the existing normative framework (results *de lege lata*). On the other hand, proposals for modernisation strategies are brought forth (*de lege ferenda*). These have their basis in guarantees of procedural fairness – namely judicial independence – which the legislator and other actors involved in court management are constitutionally obligated to respect and fulfil (Art. 35 Federal Constitution). Then however, the Constitution and international law also impose limits on an expansion of management strategies within the judiciary.