
Supervisory Control and Court Management

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Court management is an essential precondition for guaranteeing the adjudication of cases. At the same time, court administration is the key focus of supervisory control. Management instruments and structures, caseload management and other elements of quality assurance including the certification of judicial authorities must therefore be accorded considerable constitutional importance.

Introduction

[1] The laconic political demand that the Swiss Federal Supreme Court ought to achieve savings of 20%¹ marks the beginning of a new era in Switzerland. While previously scarcely anyone dared ask whether courts were in fact deploying their resources with proper efficiency, this topic, hitherto shielded from debate by notions of judicial independence, has suddenly moved into the spotlight.

[2] Federal Supreme Court Judge *Hans Wiprächtiger* recognised the issue as a sign of the times early on, and spoke of it as follows:²

“Members of the judiciary find themselves facing the fact that they are no longer working as they did previously in a ‘sheltered realm of public respect’. Courts are increasingly being regarded as part of the service sector, no longer surrounded by an aura of infallibility, but subject to the same scrutiny as other state bodies.”

[3] These developments have had some repercussions: The Swiss Federal Supreme Court, for instance, has further improved its reporting procedures and has set up a system of court controlling. And in the cantons as well, reforms have been strengthened in various respects, leading to lively discussion about judicial councils, performance-oriented courts, client surveys, caseload management and even new public management in the judiciary.

[4] To a certain extent these reforms range between the two poles of supervising the administration of justice and of managing it.

Parliamentary Supervisory Control over the Judiciary

Constitutional Basis

[5] At *federal level*, the Federal Constitution³ in Art. 169 para. 1 specifies that the Federal Assembly exercises *supervisory control* over the federal courts, and thus over the Federal Supreme Court as well as over the Federal Administrative Court and the Federal Criminal Court. The lower courts are subject to the supervision of the Federal Supreme Court, and are thus also indirectly under the supervisory control of Parliament.⁴ This *two-tier* system of supervisory control is also the structure in some cantons (e.g. the Cantonal Supreme Court of the Canton of Zug⁵, the Cantonal Supreme Court and Administrative Court of the Canton of Bern⁶).

[6] In connection with the competence for supervisory control, we must also consider the competence for appointment or re-appointment of judges in accordance with Art. 168 para. 1 of the Federal Constitution. In a system of appointment

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¹ The *Neue Zürcher Zeitung* (NZZ) am Sonntag 26 June 2005 with the headline, “Blocher demands massive savings proposals from Assembly – At a meeting in Lausanne Federal Councillor Blocher demanded that the Supreme Court present a budget with cutbacks of 20%.”

² *Hans Wiprächtiger*, *Recht und Richter*, in: Pierre Tercier et al. (ed.), *Festschrift für Peter Gauch*, Zürich 2004, p. 327.

³ Swiss Federal Constitution of 18 April 1999 (Federal Constitution, SR 101; www.admin.ch/ch/e/rs/1/101.en.pdf).

⁴ For the supervision of the upper and lower courts at the federal level, see *Heinrich Koller*, in: Marcel Alexander Niggli/Peter Uebersax/Hans Wiprächtiger (eds.), *Basler Kommentar zum Bundesgerichtsgesetz*, Basel 2008, rev. 62 ff. on Art. 1 BGG.

⁵ § 12, 55 of the Act on the Organisation of Court Authorities of 3 October 1940 (BGS 161.1); § 2 of the Standing Orders of the Supreme Court of 26 September 1997 (BGS 161.112); on the current reforms in the judiciary of the Canton of Zug, see *Daniel Kettiger*, *Die vorzeitige Einführung des Staatsanwaltschaftsmodells im Kanton Zug*, *Die Schweizer Richterzeitung* (Justice – Justiz – Giustizia) 2008/2.

⁶ Art. 13 para. 2 of the draft of 17 December 2008 of the Act on the Organisation of Judicial Authorities and the Office of the Cantonal Prosecutor (E-GSOG) regulates the supervision of the Supreme Court. In accordance with Art. 13 para. 3 E-GSOG a new departure is supposed to be that the administrative court (and no longer the Department of Justice, Communal and Ecclesiastical Affairs) will oversee administrative judicial authorities that are independent from administration.

for a set term of office, effective supervisory control constitutes an essential requirement for decisions on re-appointments.⁷

[7] The fundamental constitutional limit here, both for supervisory control in general as well as for the preparations for appointments, is *judicial independence* as it is laid down in Art. 191c of the Federal Constitution institutionally and in Art. 30 para. 1 of the Federal Constitution as basic procedural law.⁸

The Object of Supervisory Control of the Administration of Justice

[8] Parliamentary supervisory control (organised as the cross-authority or inter-authority supervision of an authority) is by its nature a limited supervision in comparison to a body's own internal supervision.⁹ This comes out in respect of the *central administration*, in which supervision essentially concentrates on an overall view and is marked by a certain *distance*: Parliament thus in principle carries out a form of monitoring of trends or an examination of reasonableness. Moreover, supervisory control is basically a type of retrospective supervision, even though activities of the supervised bodies may and should be closely followed. Supervisory control serves ultimately as a means of spelling out *responsibilities* and creating *trust*.¹⁰

[9] In relation to *supervisory control over the courts*, further restrictions arise as a result of judicial independence: It must be assumed that the basic principle is that supervision is primarily concerned with *administration*¹¹, – including the management of budget allocations¹² – (external administrative practices, proper formal procedures), whereas adjudication (legal judgments and precedents, material accuracy) is largely outside the scope of supervision. Supervisory control thus constitutes in principle a kind of *retrospective control*, as it does in central administration.¹³

[10] On the basis of expert opinion and practice relating to the *parliamentary supervision of courts*, however, three main directions can be outlined:¹⁴

- A *narrow definition* restricts supervisory control to aspects of formal adherence to proper administrative procedures including budget management (under no circumstances may the content of court decisions be considered).¹⁵
- A *medium position* goes a step further and includes an examination of trends in adjudication as well as the appraisal of legislative success and effectiveness (with a view to amending the law) as well as inquiries in the case of gross infringements of the law or violations of procedures (e.g. delays).¹⁶
- A broad definition of the concept would *in addition* involve enhanced rights to information (in particular the obligation to provide information about court judgments and rulings, [subsequent] inspection of court files¹⁷) and would not in principle exclude the material study of court judgments¹⁸.

⁷ For the procedure (esp. on the investigation of legally pertinent material), see *Regina Kiener*, Verfahren der Erneuerungswahl von Richterinnen und Richtern des Bundes, Gutachten im Auftrag der Gerichtskommission der Vereinigten Bundesversammlung, Verwaltungspraxis der Bundesbehörden (VPB) 3/2008 350 ff., esp. p. 371 ff.

⁸ The basic text is *Regina Kiener*, Richterliche Unabhängigkeit, Verfassungsrechtliche Anforderungen an Richter und Gerichte, Bern 2001, esp. p. 294 ff., which rightly indicates that supervisory control also has the duty to protect independence (thus to uncover examples of inadmissible interference); see also *Gerold Steinmann*, in: Bernhard Ehrenzeller/Philippe Mastronardi/Rainer J. Schweizer/Klaus A. Vallender, Die Schweizerische Bundesverfassung, Kommentar, 2nd ed. Zürich/St. Gallen 2008, rev. 10 on Art. 191c BV.

⁹ On these distinctions, see *Regina Kiener*, Note 8, p. 297.

¹⁰ On this whole matter, see *Ulrich Zimmerli*, Le contrôle parlementaire, in: François Bellanger/Thierry Tanquerel, Surveillance et contrôles de l'administration, Zürich 2008, p. 111 ff.

¹¹ Cf. for federal level Art. 26 para. 1 of the Federal Act of 13 December 2002 on the Federal Assembly; ParlA, SR 171.10).

¹² Cf. for the federal level Art. 26 para. 2 ParlA.

¹³ For an overview, see *Heinrich Koller*, in: Marcel Alexander Niggli/Peter Uebersax/Hans Wiprächtiger (eds.), Basler Kommentar zum Bundesgerichtsgesetz, Basel 2008, rev. 12 ff. on Art. 3 of the Federal Act of 17 June on the Federal Supreme Court (Federal Supreme Court Act; FSCA, SR 173.110).

¹⁴ Parliamentary supervisory control over the Swiss courts, Bericht vom 28. Juni 2002 der Geschäftsprüfungskommission des Ständerates, BBl 2002 7625 ff., insb. 7630 ff.; on the extent of parliamentary supervisory control over the courts, viewpoints from legal theory, see Bericht vom 11. März 2002 der Parlamentarischen Verwaltungskontrolstelle zuhanden der Geschäftsprüfungskommission des Ständerates, BBl 2002 7690 ff.

¹⁵ Art. 26 para. 1 ParlA, with its wording about "... supervisory control over management" gives the misleading impression that only the management is meant, whereas in fact judicial activity itself is excluded. That this cannot be the case is clearly apparent from the powers of supervisory control over the Assembly and the Federal Government, which in no way relate only to management, but include the actual carrying out of duties.

¹⁶ This understanding of the term basically reflects the practice of the Administrative Control Committees of the Swiss Parliament.

¹⁷ In this respect, the dispute between the Administrative Control Committees and the Federal Criminal Court in the case "Blocher-Roschacher" has served to rekindle the discussion (Neue Zürcher Zeitung, [NZZ] July 4, 2008).

¹⁸ This is, however, actually excluded in Art. 26 para. 4 sentence 2 ParlA ("Control of the content of judicial decisions is excluded").

[11] In accordance with a generally broad definition, the following *admissible* elements of supervisory control can be adduced:¹⁹

- general supervision of court management/administration
- general instructions for improving organisational management
- examination of procedures for reaching decisions
- right to request information, political discussion and (mild) criticism (trends and tendencies, general development of legal precedent)
- examination of equality of access to courts
- general instructions on the fair and equitable application of legislation
- examination of cases involving the denial of legal rights or of delays as well as related general criticism
- examination of examples where fundamental procedural principles are violated
- information on court rulings in respect of a certain law
- content analysis of court rulings and practice as a means of checking on implementation
- monitoring of legislative success and effectiveness (detached from individual cases)
- evaluation of legislation
- legislative measures

[12] This shows clearly that the parliamentary supervision of the judiciary is not limited exclusively to administration but is also in a narrow sense concerned with the judgments and rulings.

[13] Even in the case of a broad definition of the concept; however, supervisory control rules out as unlawful in particular the following measures:²⁰

- binding performance requirements (there can be no instructions influencing adjudication)
- interference in ongoing court proceedings
- correction or repeal of judicial decisions that have been properly reached (with the exception of pardons provided for by legislation)²¹
- checking the content of a judge's decisions²² (criticism of a judgment)
- threat of supervisory measures in the event of unpopular decisions
- inspection of court files covering ongoing proceedings
- disproportionate supervisory activity interfering with the fulfilment of tasks

[14] In general, it emerges from this that supervisory control is essentially concerned with checking the *management and administration* of the courts (including financial management) and is thus checking whether the system of court management is working properly. A component of this supervision, however, is an analysis of the *quantitative* results of court activity, but in principle this analysis cannot relate to any individual judge. A *qualitative* examination (control) of judgments is largely excluded, though, at least insofar as it relates to an individual case.²³

Criteria For The Supervisory Control Of The Administration Of Justice

[15] At federal level, Art. 26 para. 3 of the Parliament Act (ParlA) provides the following *criteria* for parliamentary supervisory control, which also apply to the judiciary:²⁴

- proper procedures and legality
- expediency (necessity, appropriateness and conformity to purpose)

¹⁹ See also *Andreas Lienhard*, *Staats- und verwaltungsrechtliche Grundlagen für das New Public Management in der Schweiz, Analyse – Anforderungen – Impulse*, Bern 2005, p. 191, with further references.

²⁰ See also *Andreas Lienhard*, Note 19, p. 193, 465 f., with further references.

²¹ Cf. for the federal level Art. 26 para. 4 sentence 1 ParlA.

²² Cf. for the federal level Art. 26 para. 4 sentence 2 ParlA.

²³ This is also basically the case for internal court relations, where it is possible to subject decisions delivered by courts of first instance to scrutiny by appealing them to higher courts.

²⁴ *Philippe Mastronardi*, in: Bernhard Ehrenzeller/Philippe Mastronardi/Rainer J. Schweizer/Klaus A. Vallender, *Die Schweizerische Bundesverfassung, Kommentar*, 2nd. ed. Zürich/St. Gallen 2008, Rev. 20 on Art. 169 BV.

- economic use of resources (cost efficiency)
- effectiveness (achievement of objective)

[16] It thus becomes clear that the *effectiveness* and efficiency of *state activity* have their own *self-contained importance* alongside legality and the observance of proper procedure. Parliamentary supervisory control therefore also examines whether the resources allocated to the courts are being deployed economically. This includes, for example, whether the number of judgments passed corresponds to what had been planned for financially. Or it may be checked in the course of an evaluation whether or not a state of law and order as the *effective goal* of the judicial system has been strengthened or weakened.²⁵ It thus also becomes clear that parliamentary supervisory control constitutes a component of a circular guidance system, consisting of appraisal, planning, decision-making, deployment, and comparison.²⁶

Instruments For The Supervisory Control Of The Administration Of Justice

[17] Parliament carries out its mandate for supervision and supervisory control using the following main *instruments*, provided for constitutionally and specified in detail in legislative enactments.²⁷

- approval of the annual business report, the budget and the accounts²⁸
- rights to information (information and inspections)²⁹
- parliamentary initiatives and requests (interpellations/queries, postulates, motions)³⁰
- appointments/re-appointments

[18] The *right to information* is organised in tiers in relation to who is entitled to be told how much (members of parliament, legislative committees, supervisory committees, as well as delegations and parliamentary fact-finding committees).³¹

[19] Depending on the degree of the administrative independence of the courts (in particular in relation to budget, staff, preparation of legislation), *parliamentary requests* are addressed to the courts themselves (and not to the government). In principle, however, they are permitted only in the area of court administration (management and financial budget), and *not* in the area of material judicial activity (court judgments).³²

Structures For The Supervisory Control Of The Administration Of Justice

[20] In *structural* respects, parliament has at its disposal various instruments for carrying out its supervision.³³

- Parliament (plenary session with fully comprehensive democratic legitimacy)
- Parliamentary committees
 - Model 1: judiciary committee (administrative control and preparation for appointments)³⁴

²⁵ See also *Andreas Lienhard*, Staatsrechtliche Rahmenbedingungen für modernes Justizmanagement, in: Institut für öffentliches Recht der Universität Bern (ed.), *Der Staat vor den Herausforderungen des 21. Jahrhunderts*, Anthology of 2nd Bern/Prague seminar on public law, Bern 2004, esp. p.101 f.

²⁶ *Andreas Lienhard*, Note 19, p. 185, with further references.

²⁷ See *Heinrich Koller*, Note 13, Rev. 37 ff.

²⁸ Cf. for federal level Art. 162 para. 1 let. a and b ParlA.

²⁹ Cf. for federal level Art. 153 para. 4 BV; Art. 7, 45, 150, 153, 166 ParlA.

³⁰ Cf. for federal level Art. 107 ff., 118 ParlA. According to Art. 118 para. 4 ParlA motions are not admissible. The report justifies this as follows (BBl 2001 3583): "Parliamentary requests now have to be addressed to the Federal Supreme Court when they relate to its administration of business or financial conduct (Cf. commentary on Title 8, Art. 161 ParlA, Communication between the Federal Assembly and the Federal Supreme Court). Motions are excluded, since this instrument requires in a subsidiary manner the preparation of a draft enactment, and accordingly the exercise of the right to an initiative by the addressee of the motion. The Federal Supreme Court, however, possesses no such initiative right. Parliamentary requests to the Federal Supreme Court may therefore serve only for the carrying out of supervisory control by Parliament." Despite this, I hold the view that motions on the regulations of the federal courts would be conceivable. Moreover, motions in the area of jurisdiction would be possible if the courts had been granted to right make applications in respect of the acts in question, as is the case, for example, in the Canton of Zug (§ 54 para. 3 of the Constitution of the canton of Zug of January 31, 1894 [SR 131.218]).

³¹ See e.g. *Regina Kiener*, Note 7, p. 373 f.; *Giovanni Biaggini*, Informationsrechte der Geschäftsprüfungskommissionen der Eidgenössischen Räte im Bereich der Strafverfolgung aus verfassungsmässiger Sicht, Gutachten im Auftrag der Schweizerischen Eidgenossenschaft (GPK-N), Zürich June 5, 2008, p. 23 ff., with further references (www.parlament.ch/SiteCollectionDocuments/gpk-rechtsgutachten-biaggini-2008-06-05.pdf [Status: 16 December 2008]).

³² *Andreas Lienhard*, Note 19, p. 473, with further references (whereby in the case of a broad understanding of supervision – see on this fig. 2.2. above – interpellations, for example, would be conceivable in the case of alleged court delays).

³³ *Heinrich Koller*, Note 13, Rev. 33 ff.

- Model 2: administrative control committee(s)³⁵ and judicial committee (preparation for appointments, removal from office)³⁶; Swiss Confederation: in addition the Control Delegation (sub-committee of the Control Committee)
 - finance committee (supervisory control of the financial budget)³⁷; Swiss Confederation: in addition the Finance Delegation
 - parliamentary fact-finding committees³⁸
- Judicial council
 - Parliamentary Services/Parliamentary Supervision Board³⁹
 - Financial control bodies

[21] A *multiple unit committee structure* holds the risk that responsibilities may overlap or be left out, and accordingly requires a relatively high level of coordination. This is still further accentuated if legislative committees are set up to deal with draft legislation relating to the judiciary.

[22] At the *interface between supervisory control and supervision*, individual cantons have recently made attempts to use the concept of a supreme *judiciary council* in accordance with the French and Italian models. Such supreme councils (Conseil Supérieur de la Magistrature) enjoy crossover powers and are put together in multidisciplinary ways (members of parliament, members of government, public prosecutors, lawyers and academics). Depending on their structure, judiciary councils assume duties of supervision⁴⁰ and/or supervisory control, and are in addition entrusted with further tasks, such as preparing for or making judicial appointments, or dealing with disciplinary matters. The *Canton of Fribourg* has enshrined this concept in its constitution and has implemented it through legislation.⁴¹ Similar authorities exist in the cantons of Geneva⁴², the Ticino⁴³ and Jura^{44, 45}. Efforts to follow the same path are also underway in the Canton of Schaffhausen.⁴⁶

[23] A parliament comprising part-time members (known in Switzerland as a “Milizparlament” or militia parliament) as well as judiciary councils depends on the support of their *professional (parliamentary-) services* (committee secretariats, council secretariats and parliamentary administrative control bodies).

[24] Parliaments (as well as judiciary councils) are further supported by financial control bodies⁴⁷, whose area of supervision regularly includes the courts⁴⁸. Their mandate increasingly contains a requirement to examine the economical use of resources⁴⁹.

Court Management

Definition And Significance Of Court Management

³⁴ See e.g. Art. 23 of the Act of the Canton of Bern of 18 November 1988 on the Cantonal Parliament (Cantonal Parliament Act; GRG, BSG 151.21).

³⁵ Cf. for federal level Art. 52 ParlA.

³⁶ Cf. for federal level Art. 40a ParlA.

³⁷ Cf. for federal level Art. 50 ParlA.

³⁸ Cf. for federal level Art. 162 para. 1 let. d ParlA.

³⁹ Cf. for federal level Art. 10 of the Ordinance of Parliament of 3 October 2003 on the Parliament Act and Parliamentary Administration (Parliamentary Administration Ordinance; ParlAO, SR 171.115).

⁴⁰ That is significant especially in relation to the upper courts, which after all are otherwise subject solely to supervisory control (analogous to the upper executive board).

⁴¹ Art. 125 of the Constitution of the Canton of Fribourg of 16 May 2004 (SR 131.219), Act of 6 October 2006 on the Council of Justice (JRG, BDLF 130.1); see also *Antoinette de Weck*, Election, réélection et surveillance: rencontre des pouvoirs judiciaire et politique, *Die Schweizer Richterzeitung* (Justice – Justiz – Giustizia) 2008/4.

⁴² Art. 124 of the Constitution of the Republic and Canton of Geneva of 24 May 1847 (SR 131.234).

⁴³ Art. 79 of the Constitution of the Republic and Canton of Ticino of 14 December 1997 (SR 131.229).

⁴⁴ Art. 65 ff. of the Act on Judicial Organisation of 23 February 2000 (RSL 181.1).

⁴⁵ *Stephan Gass*, Wie sollen Richterinnen und Richter gewählt werden? Wahl und Wiederwahl unter dem Aspekt der richterlichen Unabhängigkeit, *Allgemeine Juristische Praxis (AJP/PJA)* 2007 S. 602 f.; *Reinold Raemy*, Organisation der Gerichtsbehörden, *Freiburger Zeitschrift für Rechtsprechung (FZR)* 2005, p. 280 f.

⁴⁶ Art. 3 of the proposal for a new Justice Act ([www.sh.ch/Vernehmlassung-Justizgesetz.3072.0.html?&no_cache=1&sword_list\[0\]=justizgesetz](http://www.sh.ch/Vernehmlassung-Justizgesetz.3072.0.html?&no_cache=1&sword_list[0]=justizgesetz) [Status: 16 December 2008]).

⁴⁷ Cf. for the federal level Art. 1 para. 1 let. a und Art. 8 para. 2 FAOA.

⁴⁸ Cf. for the federal level Art. 8 para. 2 of the Federal Act of 28 June 1967 on the Federal Audit Office (Federal Audit Office Act; FAOA, SR 614.0).

⁴⁹ Cf. for the federal level Art. 5 FAOA.

[25] Court Management means the administration of the courts, i.e. the “administrative activity that creates and maintains the resources and personnel required for arriving at court judgments and rulings.”⁵⁰ The essential matters here are the administrative procedures and financial management of the courts⁵¹, namely those areas that represent the *central component of supervisory control*.⁵²

[26] The former President of the Cantonal Supreme Court of the Canton of Zurich, *Rainer Klopfer*, described the importance of court management as follows:

“Courts, as major institutions providing services, and as the most important supervisory body, need a professional, efficient administration. This does not happen without management, but this in no way means that the independence of judges is compromised, just the opposite. It produces better working conditions for the judges and means that they can better fulfil their core duty, namely to adjudicate.”⁵³

Constitutional Foundations of Court Management

[27] *At federal level*, the requirements in terms of court management can (likewise) be derived from three *provisions in the Federal Constitution*.

[28] First we should mention the *right of the courts to self-government* as described for the Swiss Federal Supreme Court in Art. 188 para. 3 of the Federal Constitution⁵⁴. This right of a court to self-government includes the right to request and manage its own budget, the power to appoint staff and decision-making powers as regards infrastructure. The right to self-government as an essential component of the institutional independence the judiciary is simultaneously a right and an obligation for a functioning system of court management.⁵⁵

[29] An essential requirement for court management is also the constitutional requirement that public resources should be used economically. This *efficiency requirement* at the federal level laid down in Art. 126 para. 1 of the Federal Constitution⁵⁶ applies not only to administrative authorities but is also valid for the courts⁵⁷. Since courts never receive sufficient resources to meet their notions of quality, the result is an ongoing drive for efficiency.

[30] And a decisive, ultimately in fact the most decisive, guideline is the constitutional requirement in Art. 170 of the Federal Constitution stipulating that public duties must be carried out *effectively*. Court management should accordingly ensure that the courts can in fact fulfil their duties (“effectiveness goals”). This means guaranteeing the protection of the law, the consistent application of the law, development of case law, all the time observing proper procedural guarantees (Art. 29 ff. Federal Constitution) such as prompt and timely adjudication.⁵⁸ In other words: court management is a necessary precondition for guaranteeing proper adjudication.

Elements of Good Court Management (Overview)

[31] Business administration in the public sector can provide an approximate model for guidelines in the form of areas of responsibility⁵⁹ for operational guidance⁶⁰:

⁵⁰ *Regina Kiener*, Note 8, p. 292, with reference.

⁵¹ For the concept of justice administration, see e.g. *Hans Wipfli*, *Justizielle Selbstverwaltung*, in: Benjamin Schindler/Patrick Sutter (ed.), *Akteure der Gerichtsbarkeit*, Zürich/St. Gallen 2007, p. 122 ff.

⁵² See fig. 2.2. above.

⁵³ NZZ Nr. 141 of 20 June 2005, p. 35.

⁵⁴ Version according to justice reform; see also Art. 13 und 25 BGG; Cf. also the regulations in the canton of Zug (§ 63 para. 1 KV).

⁵⁵ See *Heinrich Koller/Christina Kiss*, in: Bernhard Ehrenzeller/Philippe Mastronardi/Rainer J. Schweizer/Klaus A. Vallender, *Die Schweizerische Bundesverfassung, Kommentar*, 2nd ed. Zürich/St. Gallen 2008, rev. 29 ff. on Art. 188 BV; *Heinrich Koller*, in: Marcel Alexander Niggli/Peter Uebersax/Hans Wiprächtiger (eds.), *Basler Kommentar zum Bundesgerichtsgesetz*, Basel 2008, Rz. 2 ff. on Art. 13 BGG; *Pierre Tschannen*, *Staatsrecht der Schweizerischen Eidgenossenschaft*, 2nd ed. Bern 2007, § 40 rev. 19; *Paul Tschümperlin*, *Gerichtsmanagement am Bundesgericht: Stand und Entwicklungstendenzen*, in: Daniel Kettiger (ed.), *WOV in der Justiz, SGVV-Schriftenreihe Band 44*, Bern 2003, p. 101 f.

⁵⁶ *Andreas Lienhard*, Note 19, p. 140 f., with additional references.

⁵⁷ *Andreas Lienhard*, Note 19, p. 462 f., with additional references (u.a. auch vergleichsweise auf Wolfgang Hoffmann-Riem, *Modernisierung von Recht und Justiz*, Frankfurt a.M. 2001, S. 211 ff., 228).

⁵⁸ See also *Andreas Lienhard*, Note 19, p. 468 f.

⁵⁹ *Norbert Thom/Adrian Ritz*, *Public Management, Innovative Konzepte zur Führung im öffentlichen Sektor*, 4rd ed. Wiesbaden 2008, p. 48 f.

⁶⁰ Distinctions are made on three guidance levels altogether: level of political guidance, level of operational deployment and level of service provision.

- *Responsibility for setting out goals* in the sense of operational (not political) strategies and targets for the institution
- *Responsibility for results* for the achievement of the agreed output while observing the required standards, etc.
- *Responsibility for organisation* in the sense of suitable co-ordination and a proper division of labour
- *Responsibility for staff motivation and promotion*
- *Financial responsibility* for compliance with budgetary requirements
- *Responsibility for providing information* to employees as well as to outside groups entitled to it (with the agreement of the political bodies in charge)

[32] It goes without saying that these various areas of responsibility, as formulated in the first place for *central government*, cannot simply be transferred indiscriminately to court management. The obvious reason is that first of all management in the judiciary must take account of the independence of judges. It does however seem perfectly possible to borrow from business administration some individual elements that could be applied in a specific form to the management of courts.

[33] In recent times, endeavours to improve court management in theory and practice⁶¹ have produced a number of constituents for a system of good court management that can be listed as follows:

1. Strategic basis
2. Client-friendly
3. Job satisfaction
4. Management structures
5. Management support and responsibility for court administration
6. Steering instruments
7. Caseload management
8. Court controlling
9. Quality management
10. Certification

[34] These *ten selected elements of a system of good court management* will be explained below and illustrated through examples.

Strategic Basis

[35] Courts need strategies for the implementation their allotted tasks and duties. The essential requirement here is to operationalize their constitutional and statutory mandate, e.g. for the court in question to show how it can and will fulfil its tasks and duties. Strategies devised to achieve this are addressed in particular to the court's essential objectives (e.g. the development of case law, exercising supervision), to quality control (e.g. definitions of quality, dealing with clients), to the larger context (e.g. current or impending amendments of legal principles) and to positioning (e.g. in comparison with other courts), to resources and further general conditions (e.g. continuing professional education) or to special development priorities (e.g. information technology).

[36] Example: In the course of their recent reorganisation projects "Restruct" and "Reorg", the Cantonal Supreme Court and the Administrative Court of the Canton of *Bern* dealt with strategic questions. The draft bill laid before the cantonal parliament proposing legislation on the organisation of court authorities and the Office of the Cantonal Prosecutor also refers explicitly to the strategy of these two highest courts and leaves the task of reaching a decision in the hands of parliament.⁶²

Client-Friendly

⁶¹ Art. 38 para. 2 let. a, Art. 51 para. 2 let. a E-GSOG (Version of 17 December 2008).

⁶² Art. 38 para. 2 let. a, Art. 51 para. 2 let. a E-GSOG (Version of 17 December 2008).

[37] A further basic feature of a good system of court management is that it should also take account of the needs of its “clients”.⁶³ The most important thing in this regard is not the actual adjudication, for the relevant requirements here arise from the constitution and legislation. The foremost factor is rather the context of the adjudication, the manner in which the litigants achieve their legal rights. Or in other words: how the clients are treated by the courts. It must not be overlooked here that the court’s relations with the parties and their lawyers, as well as with other interested persons (e.g. expert witnesses) can contribute significantly to satisfaction in respect of the court’s adjudication. A clearly intelligible judgment delivered in a friendly manner can without doubt increase its acceptability and thereby potentially help avoid recourse to further proceedings.

[38] Example: The *Canton of Bern* carried out some time ago a comprehensive survey covering the judiciary⁶⁴. The questionnaires were provided and/or sent via the Cantonal Supreme Court, the primary civil and criminal courts and the offices of examining magistrates. The recipients were litigants, lawyers and witnesses, as well as expert witnesses involved in civil and criminal proceedings. Information was gathered on the quality of service provided, in relation to length of proceedings, language/intelligibility, ambience (waiting times, treatment on arrival, seating arrangement), administration (accessibility, provision of information). The response rate amounted to around 20 % (ca 4,800 questionnaires). Scope for a number of potential improvements was identified through the exercise.

Job Satisfaction

[39] It is well-known that employees constitute the most important resources. The recruitment, retention and development of personnel are therefore a matter of supreme importance. In addition to extrinsic features of motivation (especially salary and prospects for promotion), *intrinsic* factors must likewise be held in high regard. Particularly worth mentioning here are personal job satisfaction, recognition and appreciation by superiors and colleagues, a sense of well-being in the workplace and flexible conditions of employment. A variety of suitable measures are available to address these aspects: they range from staff surveys and suggestion boxes to seminars and models aiming to optimise infrastructure and enhance employee rights.

[40] Example: The Office of the Cantonal Prosecutor of the Canton of *Solothurn* – to name one example of a judicial body of this type – initiated in the autumn of 2007 a project called “Stawa-flow”, designed “to optimise staff job satisfaction in a sustainable way by focusing on the so-called soft factors”⁶⁵. The project arose out of a staff survey on job satisfaction carried out in 2006. The representative *working group* meets regularly and develops implementation ideas or initiates projects for changing the culture in Cantonal Prosecutor’s Office. The management board is informed periodically about developments. Topics addressed include social competence and personal competence (communication, management culture, feedback, dealing with employees, dealing with workloads, enhancement of conflict avoidance and further learning opportunities within the organisation).⁶⁶ In December 2007, the project was extended by being more firmly established at *management level* (management-flow) and in the meantime two management workshops have been organised.⁶⁷

Management Structures

[41] A further essential element, indeed a necessary precondition, for a good system of court management, are effective management structures. These include a readiness to discard the over-broad democratic model that confers overall responsibility to the court as a whole⁶⁸ and instead transfer essential competencies to management or to a management board.⁶⁹ One of the particular goals of this is also to lighten in a decisive manner the administrative burden weighing on judges (and on their respective divisions). The most important powers, however, are still reserved to the highest body, and in a multi-judge court this is the *plenary session (plenum)*, which typically possesses the following administrative powers:

⁶³ For details, see *Daniel Kettiger*, Parteien – Rechtsunterworfenen oder Kundinnen und Kunden, in: Benjamin Schindler/Patrick Sutter, *Akteure der Gerichtsbarkeit*, Zürich/St. Gallen 2007, p. 245 ff.

⁶⁴ BEJUBE, Report on justice activity in the Canton of Bern, or what do clients gain from our work?, Summary of results, April 2001.

⁶⁵ Quoted from in-house newspaper “StawaAktuell”.

⁶⁶ Details provided by *Verena Mügler Bühl* (involved in project); for details on the whole project, see also *Andreas Lienhard/Daniel Kettiger/Thomas Bichsel*, Organisationsüberprüfung der Staatsanwaltschaft des Kantons Solothurn, Schlussbericht zuhanden des Bau- und Justizdepartementes des Kantons Solothurn, 21 September 2007, p. 25.

⁶⁷ See also *Andreas Lienhard/Daniel Kettiger/Elena Kanavas*, Organisationsüberprüfung Staatsanwaltschaft des Kantons Solothurn, Konzept zur Umsetzung des Expertenberichts des KPM, Bericht der Arbeitsgruppe an den Regierungsrat, 10 June 2008, p. 7.

⁶⁸ In accordance with the management model “Judges only” (*Paul Tschümperlin*, in: Marcel Alexander Niggli/Peter Uebersax/Hans Wiprächtiger [eds.], *Basler Kommentar zum Bundesgerichtsgesetz*, Basel 2008, rev. 2 on Art. 26 BGG).

⁶⁹ And indeed without the delegating body having the right to take the business back to itself (on the other hand, see *Marianne Ryter*, *Gerichtsverwaltung und richterliche Unabhängigkeit: Überlegungen am Beispiel des Bundesverwaltungsgerichts*, in: *Schweizerische Vereinigung für Verwaltungsorganisationsrecht* [ed.], *Verwaltungsorganisationsrecht – Staatshaftungsrecht – öffentliches Dienstrecht*, Jahrbuch 2007, Bern, p. 63).

- approval of certain strategic essentials (e.g. strategy, guiding principles, procedures for supervision and control)
- enactment of regulations (in particular organisation and supervision)
- assignment of judges to divisions
- elections (in particular those of division executive committees)
- appointment of the general secretary
- approval of budget and annual report

[42] In cantons with several upper courts, certain co-ordinating powers may be transferred to a *joint court management board*, consisting of the individual executive committees (these powers include, for instance, regulations on the accreditation of media representatives or strategic terms of reference for bookkeeping)).

[43] Examples: This model is planned to be put into practice, for example, in the *Canton of Bern*.⁷⁰ Reference should also be made to the *Canton of Aargau*, where the management body of the courts (the administrative committee of the Cantonal Supreme Court) itself functions as the actual managing and administrative body of all judicial authorities of the canton of Aargau as well as of the Cantonal Supreme Court.⁷¹

[44] The implementation of the highest strategic terms of reference is the responsibility of a *management board* (it is still common practice in the case of multi-judge courts to refer to this as the “administrative committee”), which possesses the following main powers enabling it to carry out its responsibility for court administration:

- making decisions on task allocation and financial planning
- making decisions on the budget and the annual report
- determining performance goals
- responsibility for appointments (if this power is not delegated)
- responsibility for supervision (internally and over the court of first instance)
- further powers not assigned to another body

[45] The last-mentioned general subsidiary power is meant to ensure the court administration’s freedom of action. It, i.e. this presumption of authority belonging to the management board, must be seen against the background that the court presidents, unlike their counterparts outside Switzerland, possess relatively few powers. A “drawing or pulling power”, as it is sometimes called, i.e. the gravitation of power towards the plenary session, would unnecessarily disturb the established equilibrium.

[46] Example: This division of power between the plenary session and the management board is characteristic of the Cantonal Supreme Court as well as of the administrative court of the *Canton of Bern*, and it resulted from the reforms projects “Restruct” and “Reorg”, and has now been taken up in the draft for a new act on court organisation.⁷²

[47] The *president of the court* represents the court in dealings with the outside world (in particular vis-à-vis parliament and the government). This is in particular the case in respect of the budget and the annual report with the annual accounts, and is also the case, insofar as this power exists, in respect of planned legislation. In addition, the president in multi-judge courts chairs meetings of plenary sessions and the management board.

[48] Examples: This reflects in principle the regulation of the *Federal Supreme Court*, where it is not mandatory for the president of the court himself to assume this function, which can be assumed by a member designated by the court⁷³, who can participate in or be represented on committees by persons in the service of the Swiss government⁷⁴. A right to propose amendments to legislation affecting the judiciary, for instance, is available to the *Cantonal Supreme Court of the Canton of Zug*.⁷⁵

⁷⁰ Art. 17 f. E-GSOG (Note 6).

⁷¹ § 96 para. 1 und § 97 para. 5 of the Constitution of the Canton of Aargau of 25 June 1980 (SR 131.227); § 35 ff. of the Decree on the Organisation of the Supreme Court, the Commercial Court, the Insurance Court and the Administrative Court (Gerichtsorganisationsdekret; GOD, SAR 155.110); see also www.ag.ch/justizmanagement/de/pub/leitungdergerichte.php [Status: 7 January 2009].

⁷² Art. 38 f., 51 f. E-GSOG (Note 6); see on this *Frédéric Kohler*, *Zivil- und Strafgerichtsbarkeit des Kantons Bern: Der grosse Umbau*, *Die Schweizer Richterzeitung* (Justice – Justiz – Giustizia) 2008/2.

⁷³ Art. 162 para. 2 ParlA.

⁷⁴ Art. 162 para. 3 ParlA.

⁷⁵ § 54 para. 3 Cantonal Constitution.

[49] The *presidents of the divisions* are managers of the divisions and they preside over divisional meetings. They are responsible for organisation and planning (finances, staff) in the divisions. They also monitor the consistency of adjudication and its publication, and they guarantee the liaison between division and management board.

Management Support and Responsibility for Administration

[50] The basic responsibilities of the plenary session and management board outlined above show that the essential issue at stake is the *power to make decisions*. The corresponding items of business need therefore to be thoroughly prepared. In order to lighten the burden on judges (and thereby that of their divisions as well) in this regard, *efficient and capable* (staff) services are needed by the president, the plenary session and the management board. In addition to this it is also a requirement that the *administration of court should be guided in an operational manner*, thus ultimately ensuring proper management of business. This double function⁷⁶ – the fulfilment of both staff and guidance tasks – is also apparent from time to time in the title used to designate the person responsible for them; sometimes s/he is referred to as the “general secretary”, while other courts prefer the term “director” of court administration or again simply “justice manager”. The older term “chief court clerk” already has a dated ring to it. The job description of a general secretary or director of court administration would contain the following major tasks and duties:

- support of the president, plenary session and management board
- budgeting and performance planning
- human resources (including advanced training)
- finance and accounting
- controlling (internally and court of first instance)
- infrastructure (in particular IT and space allocation⁷⁷; library and archiving⁷⁸)
- information/communication

[51] For larger courts with extensive administrative independence, the responsibility for resources, research/scientific services or control should be assigned separately.

[52] Examples: This understanding of the role of general secretary or director of court administration corresponds to some extent to *the federal courts* (Federal Supreme Court⁷⁹, Federal Administrative Court⁸⁰ and Federal Criminal Court⁸¹) as well as to *various cantonal courts* (Cantonal Supreme Court and Administrative Court of the Canton of Bern⁸²).

Steering Instruments

[53] Against the background of higher demands for efficiency directed at the courts, prudent and careful performance planning and allocation of resources assume a position of special importance. The budget approved by parliament must be properly allocated, and in the twin-level model of supervision, this also means between the *upper and lower courts*. Expenditures are now increasingly not only being devoted to personnel, infrastructure and other such matters, but must also be deployed in order to cover planning figures (target indicators and values) for the provision of services.⁸³

[54] Various indicators – such as, for example, settlement coefficients, frequency of appeals, consistency of adjudication and levels of costs covered – can already be obtained from the *statistics section* of the courts’ *business reports*. Although the figures given here are retroactively collected, they nonetheless also possess a certain *prognostic value* that has so far not really led to any doubts arising as to their constitutionality. Even though indicators cannot be inter-

⁷⁶ Cf. e.g. Art. 13 and Art. 49 of the Regulations for the Federal Supreme Court of 20 November 2006 (BGerR, SR 173.110.131).

⁷⁷ In collaboration with the relevant offices of central government.

⁷⁸ Research services.

⁷⁹ Art. 26 FSCA, Art. 49 BgerR.

⁸⁰ Art. 28 of the Federal Act of 17 June 2005 on the Federal Administrative Court (Federal Administrative Court Act; FACA, SR 173.32), Art. 8 of the Standing Orders of 17 April 2008 of the Federal Administrative Court (VGR, SR 173.320.1); on this, see *Christoph Bandli/Mathias Kuhn*, Erste Erfahrungen am Bundesverwaltungsgericht – Interne Zuständigkeitsfragen und Beziehungen zu anderen Staatsorganen, in: Bernhard Ehrenzeller/Rainer J. Schweizer (eds.), *Das Bundesverwaltungsgericht: Stellung und Aufgaben*, St. Gallen 2008, insb. p. 53 ff.

⁸¹ Art. 24 of the Federal Act of 4 October 2002 on the Federal Criminal Court (Federal Criminal Court Act; FCCA, SR 173.71), Art. 6 of the Standing Orders of 20 June 2006 of the Federal Criminal Court (SR 173.710).

⁸² Art. 41 or Art. 53 E-GSOG (Note 6).

⁸³ Indicators are e.g.: number of completions, duration of proceedings, frequency of appeals, consistency of judgments, costs.

preted in isolation, they do all the same provide in their totality a (quantitative as well as qualitative) picture of a court's performance.⁸⁴

[55] Useful points of departure for performance planning are the “product” in the sense of the performance of court activity perceived by the outside world, thus in particular in the sense of judgments in the areas of the civil, criminal and administrative judiciary.⁸⁵ This thus suggests a transformation taking place from *input orientation to output orientation*.

[56] A steering instrument for this is the so-called *resources agreement*. These agreements are made on the one hand between the upper and the lower (supervised courts. But they can also serve as tools of guidance within the court itself, for example between the entire court and its divisions.

[57] These planning figures can be calculated and applied internally to the judges and court clerks. It can, for example, readily be investigated how many adjudications each year a judge should participate in (with or without delivering a formal report).⁸⁶

[58] In the case of these resource agreements, it goes without saying that they are not genuine contracts, but rather a group of *consensually agreed procedures*. And it is equally clear that performance requirements in resource agreements (e.g. in particular the number of judgments and the length of time involved) cannot be binding, if only as a result of judicial independence, but must always be seen as pure planning activities. These figures are furthermore *mean values* for a certain type of case or for a certain subject area and accordingly do not refer to an individual judgment.⁸⁷

[59] As planning instruments, these resource agreements can be contrasted with *reporting*, i.e. as the formalised, periodic accounting for the provision of services and the use of resources. This *transparent reporting* serves at the same time as the basis for reporting to the supervisory authority, in which case the relevant data is appropriately condensed and consolidated. I shall return to this matter.

[60] Examples: The concept of the “resource agreement” as a guidance instrument between the upper authority and the lower courts is supposed to be introduced in the *Canton of Bern* as part of the ongoing reform of the judicial system.⁸⁸ In the *Canton of Lucerne*, the Cantonal Supreme Court and the courts and authorities subordinate to it (with the exception of justices of the peace and debt collection offices) each exchange service or performance mandates. These mandates from the lower courts and authorities must be approved by the Cantonal Supreme Court.⁸⁹ Major features of the service mandates include the services to be provided, indicating in each case the goals and performance figures, the global budget available and the overall general conditions.⁹⁰ In the *Canton of Zurich*, the definition of service groups forms the basis of the consolidated development and financial plan (KEF)⁹¹. Service groups are defined through tasks and overall conditions, together with the effects and performance aimed at, along with evaluation criteria (indicators), and if necessary the performance of comparable service providers, the major elements of progress and the required financial resources.⁹² The allocated resources are transferred in-house to district courts via performance agreements.⁹³ In the *Canton of Solothurn*⁹⁴, the committee on court administration, as the supervisory authority for the lower courts, reaches performance agreements with them on an annual basis. The Cantonal Supreme Court is not subjected to the supervision of the court administrative committee. Individual chambers, however, do set themselves performance targets that are geared formally to the performance agreements (same indicators) and that are approved by the management board of the Cantonal Supreme Court.⁹⁵ In the *Canton of Aargau*, the Cantonal Parliament, at the request of the courts’ managing body,⁹⁶ operates the “judiciary sector”. The court management body is responsible for the product groups, while the responsible organisations are responsible for the actual products.⁹⁷ The administrative committee agrees annual contracts with those responsible (including a budget breakdown

⁸⁴ *Andreas Lienhard*, Note 19, p. 467 f.; see also *ibid*, Note 25, p. 103 f.

⁸⁵ Other products are e.g.: supervision, public work, contacts with other government agencies.

⁸⁶ For the Federal Supreme Court, See *Arthur Aeschlimann*, Justizreform 2000 – Das Bundesgericht und sein Gesetz, Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht (ZBl) 2008 413 f.

⁸⁷ *Andreas Lienhard*, Note 25, p. 103 ff.

⁸⁸ Art. 39 para. 2 let. n, Art. 52 para. 2 let. I E-GSOG (Note 6).

⁸⁹ § 37^{bis} para. 2 GOG.

⁹⁰ § 37^{bis} para. 3 GOG.

⁹¹ § 11 f. of the Act on Controlling and Accounting of 9 January 2006 (CAA, LS 611). In accordance with § 217 of the Act on the Constitution of Courts of 13 June 1976 (CCA, CRG 211.1) the courts are subject to the CAA and to its provisions.

⁹² § 12 para. 1 CAA.

⁹³ *Daniel Kettiger*, Wirkungsorientierte Verwaltungsführung in der Justiz: Ausgangslage – Entwicklungen – Thesen, in: *ibid.* (ed.), WOV in der Justiz, SGVV-Schriftenreihe Vol. 44, Bern 2003, p. 26.

⁹⁴ Pursuant to § 3 para. 1 of the Act on Effective Government Management of 3 September 2003 (WoV-G, BGS 115.1) this Act is also applicable to court management.

⁹⁵ Information provided by *Roman Staub*, court administrator.

⁹⁶ § 8 para. 1 of the Act on effective guidance of duties and finances of January 11, 2005 (GAF, SAR 612.100), which in accordance with § 1 para. 2 is also applicable to the courts.

⁹⁷ Judgments of the supreme court, the special administrative courts, the district courts, justices of the peace; the insolvency proceedings of the bankruptcy office, supervisory proceedings and credentials (law society) as well

with financial codes and case figures); on the basis of a system of case weighting (Cantonal Supreme Court) and workload (district courts), a relatively good allocation of resources is possible.⁹⁸

Caseload Management

[61] It is obvious that not all cases generate the same amount of work. In order to plan with some consistency for the allocation of cases and workload involved and for the provision of the required resources (and to guarantee harmony within the court and among its divisions) some idea is needed as to how much time a case in one area of the law (or in a particular class of case) is likely to call for. There are various possibilities (sociological methods) for obtaining this:

- *Variant 1 (estimate)*: The judges and court clerks are asked in a survey how a case in a specific legal area (or in a particular class of case) would be placed on average on a *scale of difficulty ranging, for example, from 1 to 5*. The survey can be carried out and evaluated relatively quickly. It is, however, not free of the uncertainties inherent in estimated values. The results, moreover, are not really comparable to those of other courts (isolated system of reference).
- *Variant 2 (statistics)*: The average workload is established on the basis of statistics. Although this method provides accurate information, the statistical data required, especially the number of full-time staff expressed as percentages in each legal field (or case category) may not be available.
- *Variant 3 (combined approach)*: This approach, in the sense of a triangular methodology, works through combining statistical values (in particular case numbers per legal area or case category, the number of staff as full-time equivalents) and estimated data (number of positions as percentages in each legal field or case category).
- *Variant 4 (interviews)*: The average workload in each legal field (or case category) is collected and verified in the form of structured interviews with selected judges (e.g. division chairpersons) and with court clerks (e.g. chief clerks). Although the personal discussion may also allow finer and more subtle details to be perceived, the problem with this approach is that it misses the bigger picture.
- *Variant 5 (measurement)*: For a certain time the judges and court clerks keep a time sheet as in a normal business management investigation and make a note of the respective time devoted to a case. This variant produces relatively accurate results, but it suffers from the stop-watch effect, even though this is only for a limited period.

[62] Examples: Variant 1 corresponds essentially to the methodology hitherto used at the *Federal Supreme Court*. The investigation carried out by the *Administrative Court of the Canton of Lucerne*, incorporating all the highest administrative and social insurance courts of Switzerland, is based at present on Variant 3.⁹⁹

[63] Even the most reliable method, however, cannot divert attention from the fact that we are dealing with a mere *quantitative record*. This means first of all that the values collected are in need of an *explanation*, especially in the case of comparisons between several courts – and above all with regard to what rights of review (whether of legality or appropriateness) the court has, and what the form of the lower court is (judicial authority or ruling administrative authority). On the other hand, the values may only possess a *qualitative informative validity* if they can be seen in relation to frequency of appeals or consistency of adjudication. Or in other words: there is no art involved in spending little time on a judgment. Whether it is a “good” judgment or not is another question altogether.¹⁰⁰ In the words of the former President of the Federal Supreme Court *Arthur Aeschlimann*:¹⁰¹

“It is not the task of the highest court to clear up a multiplicity of cases.”

Court Management Controlling

[64] A contemporary system of court management requires more than a simple review of business with annual statistics. What it needs is an actual system of comprehensive court management controlling. This system must be in a position to periodically ascertain discrepancies between planning and actual results achieved in order to make any adjustments that may be called for. A proper court controlling system serves first of all as a support instrument enabling the management board to carry out its planning and management function, and thus its supervisory tasks,

as recusal procedures and denials of the supervisory committee, are each deemed to be a *product group*. The judgments of the justice units of the Federal Supreme Court as well as the individual special administrative courts are deemed to be *products* (Budget 2009). See also *Urs Hodel*, Die Aargauer Justizreform im Zeichen von WOV, in: *Daniel Kettiger* (ed.), WOV in der Justiz, SGVV-Schriftenreihe Vol. 44, Bern 2003, p. 59.

⁹⁸ Information provided by *Urs Hodel*, Director of justice administration of the Supreme Court of the canton of Aargau.

⁹⁹ *Andreas Lienhard/Daniel Kettiger*, Geschäftslastbewirtschaftung der obersten kantonalen Verwaltungs- und Sozialversicherungsgerichte der Schweiz, Bern 2009 (to be published).

¹⁰⁰ Indicators of good judgments can be named based on the “efficiency targets” (see fig. 3.1. above) e.g.: duration of proceedings, clarity, intelligibility, legal development, environment, costs, frequency of appeals, consistency of judgment (for more on this, see e.g. *Andreas Kämpfer*, Was ist gute Justiz? – Qualitätskriterien für die Richtertätigkeit, in *Daniel Kettiger* [ed.], WOV in der Justiz, SGVV-Schriftenreihe Vol. 44, Bern 2003, p. 129 ff.).

¹⁰¹ *Arthur Aeschlimann*, Note 86, p. 411.

whether they be within the court itself or in respect of the court of first instance. The data derived from the controlling system, moreover, is available as a basis for supervisory control.

[65] In the area where various constitutional principles come together and sometimes clash, however, there are some *special features* of a court controlling system that must be taken into particular account,¹⁰² and prominent among these are two key questions: the first question concerns the *objective* of the controlling system, while the second concerns the *addressees* of the controlling process. In relation to the objective, it must in particular be clarified whether the process should or indeed may go beyond average case numbers and average duration of proceedings in order to encompass the performance of the individual judge and the time s/he spends achieving it as well. In order to ensure an appropriate and balanced workload within the court, it seems essential to have access to these indicators and to case statistics related to specific persons. The former Chief Justice of the Federal Supreme Court, *Arthur Aeschlimann* recently had this to say on the matter.¹⁰³

“Each division president will have to work with objectives for his or her division members and staff and keep themselves up to date on individual caseloads.”

[66] This does not mean, however, that this information must also be made available to the *supervisory authority*. This is because the primary objective of the supervisory function is to ensure that the court as a whole is working properly, and that it is not normally the case that there are, for example, delays in proceedings or obvious inefficiency. For this purpose it is sufficient to have general statistical data on the organisation of workload and the resources allocated to it. A somewhat different issue arises in respect of the *(re)appointment power* of parliament, for here, unless re-appointment is automatic, it is necessary to have specific information on the performance of judges up for re-appointment. Even here, though, the information can generally be restricted to a basic assessment by the court's managing body without any details on individual judicial performance having to be divulged. Only in cases where there has been an accumulation of *objectively inexplicable deficiencies* over a long period will it be necessary to allow the (re)selection board or responsible committee to receive more detailed *information*.

[67] These considerations lead to the following basic requirements for a system of court controlling:

- A system of court management controlling is an indispensable consequence of the courts' self-governance and a prerequisite for an efficient judiciary.
- Control must also cover the performance of judges.
- The information collected in the course of controlling is primarily available to the court itself or to the court managing body in support of its function.
- In condensed form, the data arising from control must also be made available to supervisory or (re)appointment authorities, but this availability is to be restricted to the committees with the relevant responsibility.
- In still further condensed form, the information from the controlling exercise will appear in the annual report and thus be made available to the public.
- The information generated by the controlling process is accordingly to be disseminated in a differentiated and increasingly diffuse manner to court management committees, parliament and the general public.

[68] The very establishment of a system of court management controlling serves *to inspire trust*, and it is not essential to make full details of its organisation and results available to the supervisory and (re)appointment authorities.¹⁰⁴ This applies especially to data on the performance of specific judges. Such data should be collected for internal purposes, in order to monitor efficiency. However, in order to preserve judicial independence, the data should only be passed on to the supervisory control body in exceptional cases.

[69] Example: It is well-known that the Federal Assembly, in the Ordinance of 23 June 2006 on Appointments to the Federal Supreme Court,¹⁰⁵ requires the *Supreme Court* to set up a controlling procedure to serve as the foundation for Parliament to exercise supervision and to determine the number of judges. The Federal Supreme Court is required to comment in its annual report on the trends in the workload and in general terms on the results of the controlling process. The Federal Supreme Court subsequently, together with the supervisory control committees of the Federal Coun-

¹⁰² For what follows, see *Andreas Lienhard*, Controllingverfahren des Bundesgerichts, Die Schweizer Richterzeitung (Justice – Justiz – Giustizia) 2007/2, with further references; *ibid.*, The Swiss Federal Supreme Court: A Constitutional Assessment of Control and Management Mechanisms, International Journal for Court Administration (IJCA), Second Issue, October 2008, www.iaca.ws/mc/page.do?sitePagelD=77964 (Status: 23 December 2008).

¹⁰³ *Arthur Aeschlimann*, Note 86, p. 413.

¹⁰⁴ *Andreas Lienhard*, Note 102, fig. 3.

¹⁰⁵ SR 173.110.1.

cils, elaborated a plan for implementing this requirement (see *Konzept Controlling Bundesgericht zuhanden der GPK, March 5, 2007*) in an amicable *co-operative agreement on power-sharing* between legislature and judiciary.¹⁰⁶

[70] It goes without saying that the *development of management control into an actual controlling system* is supported by recourse to *information technology (IT)*. Well-known software solutions such as TRIBUNA¹⁰⁷ or JURIS¹⁰⁸ can serve as a basis for this, as can independently developed programs. Such products are also able to provide or develop means for further facilitating the management of justice. These include, e.g., an actual case-flow management, with which the procedural progress of a case can be guided and the status of the proceedings examined at any time.

Quality Management

[71] The various elements of good management are increasingly summarised as quality standards. This had led to the successive development of principles for the public sector taken over in a modified form from private sector methods¹⁰⁹. Special reference should be made here to the *common assessment framework (CAF)*. The CAF is a concept that facilitates for institutions in the public sector a simple entry into quality management. The CAF itself was developed by the European institutions for Public Administration (EIPA), the European Foundation for Quality Management (EFQM) and the European Union (EU). The CAF is a version of the EFQM model¹¹⁰ that has proved itself in many companies, adapted for use in the public sectors.

[72] Prominent standards for central management that are also well-known in Switzerland are the *ISO standards 9001*¹¹¹ and *14001*, which were devised by the International Organization for Standardization (ISO)¹¹² based in Geneva, and which represent globally the most widespread standards for quality management systems (QMS).¹¹³

[73] Example: The provision ISO 9001 (2002) is divided into eight Chapters as follows:

- Chapters 1 – 3: Foreword/General Remarks
- Chapter 4: Quality management system (general requirements, documentation, QM manual)
- Chapter 5: Responsibility of Management
- Chapter 6: The Management of Resources
- Chapter 7: Generating the Product
- Chapter 8: Measurement, Analysis, Optimisation

[74] Quality requirements such as these cannot of course simply be transferred just as they are to the process of jurisdiction. Certain forms of them, however, modified to reflect the constitutional peculiarities of the courts, have started to spread outside Switzerland.¹¹⁴ Thus in the USA the National Center for State Courts (NCSC) has developed quality standards for courts: Trial Courts Performance Standards & Measurement system¹¹⁵.

[75] Example: The standards put forward in the Trial Courts Performance Standards & Measurement system affect the following areas, but are directly related to adjudication:¹¹⁶

- Access to Justice
- Expeditiousness and Timeliness
- Equality, Fairness and Integrity
- Independence and Accountability
- Public Trust and Confidence

¹⁰⁶ The concept can be found in the annex to the contribution by *Andreas Lienhard*, Note 102.

¹⁰⁷ See www.deltalogic.ch/produkte.html?&singleItemUid=2&cHash=83ef542306 (Status: 23 December 2008).

¹⁰⁸ See www.abraxas.ch/html/Juris/1830_1841.asp (Status: 23 December 2008).

¹⁰⁹ For instance, the Total-Quality-Management (TQM) of the European Foundation of Quality Management (EFQM) with essentially the following target values: clients, employees, process, product.

¹¹⁰ Data in accordance with www.zhaw.ch/de/management/ivm/beratung/change-management/common-assessment-framework-caf.html (Status: 23 December 2008).

¹¹¹ ISO 9001:2008 replaces the version of the year 2000, which was implemented by public sector organisations and business in 170 countries.

¹¹² www.iso.org/iso/home.htm (Status: 23 December 2008).

¹¹³ www.compad.com.au/clients/iaf/indexPrev.php?updaterUrlPrev=articles&artId=249 (Status: 23 December 2008).

¹¹⁴ For an overview, see *Pim Albers*, The assessment of court quality: a breach of the independence of the judiciary or a promising development? (www.coe.int/t/dg1/legalcooperation/cepej/quality/Qualityofjudiciary_en.asp [Status 23 December 2008]).

¹¹⁵ The quality standards can be found at www.ncsonline.org/D_Research/tcps/Forms.htm (Status: 23 December 2008) and with commentary at www.ncsonline.org/D_Research/tcps/TCPsDeskRef.pdf (Status: 23 December 2008).

¹¹⁶ See also the references in *Paul Tschümperlin*, Note 55, p. 98 f.

[76] At *European level*, it is mostly the European Commission for the Efficiency of Justice (CEPEJ) that deals with this topic, and its main stress is on the administrative components of quality.¹¹⁷ The members of this committee include representatives (experts) from all 47 states of the Council of Europe. Switzerland is accordingly also represented on it.¹¹⁸ The CEPEJ has produced a number of works on court management, including in particular a broad-based evaluation of the judiciaries in Europe¹¹⁹, a study on time management in the European courts¹²⁰ and a study on the duration of legal proceedings in Member States¹²¹.

[77] Other approaches worth mentioning are the efforts being made in *the Netherlands* to advance quality assurance and enhancement in the courts. Quality management here is based on the EFQM-model and basically contains the following elements, which are also closely tied to adjudication: clear statement of objectives, the ability to function properly (independence/integrity, grasp of subject, procedure, uniformity, duration of proceedings), measuring instruments (performance, clients, staff), other instruments (peer review). The quality system is has been named "Rechtspraak".¹²²

[78] In *Germany* as well there are moves being made to introduce a countrywide system of quality management for the courts. To this end comparative groups of different types of court are being formed, which in accordance with matching criteria are surveying 18 figures relating to management and 38 figures relating to adjudication. They are also introducing methodologically identically structured transformation processes in order that findings arrived at can be implemented by judges and other officials, including the prosecutor's office.¹²³

[79] Altogether it can thus be ascertained that for some years there have been world-wide efforts to produce a system of actual quality management in courts, *without* as yet, however, seeing the emergence of concrete standards that make a clear distinction between court management and adjudication. And yet quality standards of this kind could well be of considerable value in the very area of tension and conflict where supervisory control meets and mingles with independence and self-government. In any case, the existence of quality standards contributes further to the optimisation of court management by virtue of *inspiring confidence in systems of supervisory control*.¹²⁴

Certification

[80] Thinking further along the lines of quality assurance and enhancement leads to *certification*. This would consist of an examination of the existing instruments of quality management by an external specialist agency, especially accredited for this purpose. In Switzerland, for example the Swiss Association for Quality and Management-systems (SQS), as an organisation recognised by the Swiss Accreditation Agency (SAS)¹²⁵, is entitled to carry out the certification of *administrative authorities*.¹²⁶

[81] Now it is perfectly conceivable to have the courts' adherence to quality directives also tested by an accredited institution. The judicial authorities tested in this way would accordingly be *certified*, they would thus have a formal external confirmation that their system of court management satisfied certain demands.¹²⁷

[82] Example: As far as can be seen, it is true that in Switzerland so far no court has been certified in this way¹²⁸. The idea of certification for judicial authorities is perfectly realistic, however, as is shown by the example of the Office of

¹¹⁷ www.coe.int/t/dg1/legalcooperation/cepej/ (Status: 23 December 2008).

¹¹⁸ By the acting General Secretary of the Federal Supreme Court.

¹¹⁹ Evaluation of European Judicial Systems, 2008

(www.coe.int/t/dg1/legalcooperation/cepej/evaluation/2008/Rapport2008_en.pdf [Status: 23 December 2008]); see also *Jacques Bühler*, Gute Bewertung der Schweizer Justiz durch den Europarat, *Die Schweizer Richterzeitung* (Justice – Justiz – Giustizia) 2008/4.

¹²⁰ Time management of justice systems: a Northern Europe study – CEPEJ Studies No. 2, 2006 (www.coe.int/t/dg1/legalcooperation/cepej/Delais/GestionTemps_en.pdf [Status: 23 December 2008]).

¹²¹ Length of court proceedings in the member states of the Council of Europe based on the case-law of the European Court of Human Rights, CEPEJ Studies No. 3, 2006 (www.coe.int/t/dg1/legalcooperation/cepej/Delais/Calvez_en.pdf [Status: 23 December 2008]).

¹²² *Netherlands Council for the Judiciary* (ed.), *Quality of the judicial system in the Netherlands*, The Hague, March 2008; see also *Philip Langbroek*, Entre responsabilisation et indépendance des magistrats: La réorganisation du système judiciaire des Pays-Bas, *Revue française d'administration publique* 2008 p. 67 ff.

¹²³ *Mathias Volker/Michael Kalde/Ralf-Günther Lüpkes*, Qualitätsmanagement der Oberlandgerichte, *Deutsche Richterzeitung* (DriZ) Oktober 2008, p. 269 ff.

¹²⁴ Cf. also *Philip Langbroek*, *Autonomy for courts and judicial organisations – or creating public trust by developing and implementing quality standards for court services*, paper for the EGPA Conference 2001 (Vaasa, Finland).

¹²⁵ A service agency of the State Secretariat for Economic Affairs (seco); www.seco.admin.ch/sas/index.html?lang=de (Status: 23 December 2008).

¹²⁶ A further organisation is the Swiss Association for Quality (SAQ; www.saq.ch/de/ [Status: 23 December 2008]).

¹²⁷ See *Andreas Lienhard*, Note 102, p. 3.

¹²⁸ Information provided by *Alfred Urfer*, SQS.

the Cantonal Prosecutor of *Bolzano* in Italy¹²⁹. Although this office has no judicial powers (in particular no authority to impose fines), its independence matches that of the courts. The following areas have been certified: the administrative procedures for cases under criminal and civil law and the issuing of extracts from criminal records. Certification is based on ISO norm 9001 (2000). The Prosecutor's Office was certified by the DEKRA Certification GmbH agency based in Stuttgart. It is planned to extend this process of certification to further judicial authorities in Italy. At the beginning of 2008, around 100 interested parties had registered, from whom around 40 have been selected (2 to 3 per region). This will permit further experiences to be collected

Conclusions

[83] An intensive interrelationship exists between supervisory control and court management; at the political level, supervisory control guarantees the ability of *the judiciary* to function, while court management assures a *framework for adjudication* at the operational level. Supervisory control is thus based on court management, indeed presupposes its existence. On the other hand, a constructively critical system of supervisory control results in a strengthening of court management and thereby ultimately guarantees proper adjudication.

[84] *Supervisory control* is however by its nature subject to restrictions; it may, as indicated, just be a system for checking trends, and is not basically supposed to be dealing with details. In respect of adjudication, moreover, supervisory control is subject to a further special restriction on account of judges' independence. The main objective of supervisory control is accordingly the administration of the courts, in other words *court management*.

[85] In the light of these considerations, special emphasis must ultimately be given to two of the ten elements of good court management mentioned: *quality standards* for courts, and *certification* of systems of court management; on the one hand quality standards and certification lead to an *optimisation of court management*, and thus *raise standards of court adjudication*. *At the same time*, quality standards and relevant certification, by their very virtue of inspiring confidence, relieve the supervisory control body from probing into sensitive constitutional areas.

¹²⁹ Under the direction of the State Prosecutor *Cuno Tarfusser*.