



## *Law Clerks In Switzerland – A Solution To Cope With The Caseload?<sup>1</sup>*

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### Abstract:

In Switzerland, law clerks hold an important position, which is a particularity of the Swiss judicial system. Law clerks have a wide range of tasks. For instance, they are involved in the instruction of the cases, as well as in the decision-making process. The number of law clerks is continuously increasing, which is namely due to the growing caseload. Nowadays, at many courts in Switzerland there are more law clerks than judges. The result of this development is that judges have a different role than in the past. Despite the crucial role of law clerks, science has paid little attention to their function.

This article aims to describe the important role of law clerks from a legal point of view. It also enumerates concerns connected to the position of law clerks. Methodologically, the paper is based on a document analysis and on the results of a quantitative survey. Specifically, the article will discuss the following question: Is the Swiss legal system – where law clerks are key-players – a reasonable solution in order to cope with the increasing caseload in an efficient way?

The paper is divided into six parts:

1. Introduction
2. The Swiss judicial system
3. Definition and function of law clerks
4. Development and legal issues
5. Performance targets for law clerks
6. Conclusion and research needs

**Keywords:** *Law clerks, Switzerland, Judicial Independence, Lay judges, Judicial assistants, Performance targets.*

### 1. Introduction

The caseload has been increasing steadily at Swiss courts over the last decades, whereas financial resources have become scarce. Therefore, the efficiency of the judiciary has moved into the spotlight of public interest and political discussions. Even the highest courts are under pressure to perform effectively and efficiently.<sup>2</sup>

There are different ways to cope with the increasing caseload.<sup>3</sup> Firstly, the number of judges could be increased. However, this would be associated with more costs and it would be more difficult to maintain a consistent jurisdiction within a court.<sup>4</sup> Secondly, the procedural law could be reformed (e.g. to broaden the scope of application of summary proceedings).<sup>5</sup> Though this may be compatible with the right to a fair trial only to a certain degree (see Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms; ECHR). Thirdly, organizational and management reforms may lead to a more efficient jurisdiction (keywords: caseload studies, caseload management, performance measurement, knowledge sharing, more transparency etc.). Lastly, E-Justice has a lot of potential as well.<sup>6</sup>

<sup>1</sup> Special thanks for their useful suggestions and ideas go to Andreas Lienhard, Daniela Winkler, Andreas Müller and Michelle Ammann.

<sup>2</sup> See Lienhard (2004), p. 97; Lienhard (2008), p. 43; Lienhard (2009), p. 30; Kettiger, pp. 9 ff.

<sup>3</sup> Nay, p. 568.

<sup>4</sup> Leuenberger, p. 104.

<sup>5</sup> The (new) Swiss Civil Procedure Code (CPC; SR 272; in force since January 2011) holds that the court shall declare the case admissible under the summary procedure where the facts are undisputed or immediately provable and the legal situation is clear (Art. 257 CPC). Pursuant to Article 348 ff. of the Swiss Criminal Procedure Code (CrimPC; SR 312.0; in force since January 2011) the accused may request the public prosecutor to conduct accelerated proceedings provided that the accused admits the matters essential to the legal appraisal of the case and recognizes, if only in principle, the civil claims.

<sup>6</sup> See Lienhard (2009), pp. 35 ff.; Kettiger, pp. 21 ff.

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In Switzerland, also for historical reasons, an additional option to cope with the caseload has often been chosen in the recent years: More law clerks have been hired. Compared to the number of judgeships, the number of law clerks has disproportionately increased over the last years.<sup>7</sup> In other words, the ratio between judges and law clerks has changed dramatically. For instance, in 1875 the Federal Supreme Court only consisted of two law clerks and nine judges.<sup>8</sup> At the end of the 1980ies, the ratio between judges and law clerks was one law clerk on one judge.<sup>9</sup> Today there are around 132 law clerks at the Federal Supreme Court, whereas it has only 38 ordinary judges and 19 part-time judges.<sup>10</sup>

The increased importance of law clerks raises several legal issues. For instance, how many law clerks should work for one judge, so that the judge can still carry out his or her responsibility? Should the number of law clerks be restricted? From a constitutional point of view, two guarantees are important: the judicial independence and the right to a lawful judge. Below, the paper discusses these issues. It aims to answer the question whether the Swiss system is a lawful solution in order to cope with the increasing caseload. Initially, the Swiss judicial system will be explained; afterwards, the term “law clerk” is defined. Subsequently, the development of the importance of the law clerk’ role is explained more in detail. Finally, the paper describes empirically how law clerks meet performance targets at Swiss courts.

## 2. The Swiss Judicial System

To get a better understanding of the Swiss context, it is necessary to start with a few explanations of the Swiss judicial system.

The Swiss Judicial system is heterogeneous because each of the 26 cantons (*Kantone*, the states) has far-reaching autonomy due to the structure of its justice system.<sup>11</sup> As a result of the federal structure, both Confederation (*Bund*) and the 26 cantons have their own judicial systems.<sup>12</sup> Therefore, the courts in Switzerland are organized in a wide variety of ways.<sup>13</sup> The federal judiciary contains, on the one hand, the Federal Supreme Court which’s role is to adjudicate appeals of the highest cantonal courts of appeals and the decisions of the federal courts of first instance. Its jurisprudence ensures uniform application of federal and international law throughout Switzerland and its continued development. On the other hand, the federal judiciary consists of the Federal Administrative Court, the Federal Criminal Court and the Federal Patent Court.<sup>14</sup>

At cantonal level, each of the 26 cantons has its own constitution and its own court system. There are district courts, serving as courts of first instance in civil and criminal matters, and a cantonal court, serving as a court of appeal. In most cantons there are also a number of specialized courts: for instance, specialized administrative courts, juvenile courts or labor courts.<sup>15</sup> The varying size of the cantons and the structural diversity in court organization lead to considerable differences in the size of the courts. This ranges in Switzerland from ordinary cantonal civil and criminal courts with one professional judge, to the Federal Administrative Court, which has around 75 professional judges.<sup>16</sup> The composition of courts varies considerably according to legal discipline or type of case. Often, decisions are taken by single judges (*Einzelrichter*).<sup>17</sup>

Judges usually are elected by popular vote or by a parliament. They must periodically run for re-election (typically every four to six years).<sup>18</sup> This is a peculiarity of the Swiss judicial system compared with other continental European countries. Elections and re-elections shall give the judges a specific democratic legitimation.<sup>19</sup> Traditionally, lay judges hold an important position at the courts in Switzerland – namely at courts of first instance. This is another characteristic of the Swiss case. Lay judges shall bring in the common sense in the decision-making process. The high number of lay judges is a consequence of the democratic system as well.<sup>20</sup> Only in a minority of cantons is legal education a statutory eligibility

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<sup>7</sup> See Feller, p. 281 ff.; Leuenberger, p. 100.

<sup>8</sup> See Federal Supreme Court, Die Geschichte des Bundesgerichts (<[http://www.bger.ch/geschichtliches\\_bger.pdf](http://www.bger.ch/geschichtliches_bger.pdf)>, accessed 27 July 2015).

<sup>9</sup> Reiter, N. 561.

<sup>10</sup> See <<http://www.bger.ch/index/federal/federal-inherit-template/federal-richter.htm>>, accessed 30 March 2016; see Wurzbürger (2011), p. 111.

<sup>11</sup> Lienhard, Kettiger, Winkler, p. 44; Bieri, N. 10.

<sup>12</sup> Kiener (2012), p. 405.

<sup>13</sup> Lienhard, Kettiger, Winkler, p. 44.

<sup>14</sup> See Federal Supreme Court, p. 10 f.; Kiener (2012), p. 405 f.

<sup>15</sup> Kiener (2012), p. 406 f.; Bieri, N. 13.

<sup>16</sup> Lienhard, Kettiger, Winkler, p. 44 f.

<sup>17</sup> Federal Supreme Court, p. 13.

<sup>18</sup> Lienhard (2014), p. 29 f.

<sup>19</sup> See Kiener (2012), p. 411.

<sup>20</sup> See Ziegler, p. 66 ff.

criterion. De facto, legal experience and professional skills play a vital role in the selection process, though. Nowadays in Switzerland, a trend towards a higher professionalization of justice can be observed. The important role of lay judges seems to be decreasing.<sup>21</sup> Nevertheless, still some district courts are composed of lay judges. It is even possible, that law clerks are the only trained jurists taking part in the law-finding process.<sup>22</sup>

### 3. Definition and Function of Law Clerks

Law clerks are the judicial (not the administrative) staff of the judges. They belong to the judging body when the decision is taken by collegiate judging body, as well as by a single judge. Furthermore, they are involved in all stages of a process. For instance, their main functions are defined in Article 24 of the Federal Supreme Court Act (*Bundesgerichtsgesetz*<sup>23</sup>). In addition, these tasks are specified in Art. 3 of the Regulations on the Federal Supreme Court (*Bundesgerichtsreglement*<sup>24</sup>). For example, before a hearing they prepare a memorandum and are involved in the instruction of the cases. In a written procedure they often write a judgment proposal (on their own or under the direction of the responsible judge). They take part in the hearing and record in writing the proceedings. In the majority of the cases they write the reasoning of a judgment after the hearing. The fact that a judgment is usually co-signed by the law clerk emphasizes their important role in the judicial system of Switzerland.<sup>25</sup>

In the decision-making process, law clerks have wide-ranging rights. Usually, they have an advisory vote during the deliberation; sometimes they even have a right of application.<sup>26</sup> However, they do not have a voting right.<sup>27</sup> Law clerks should be able to bring new ideas into the discussion.<sup>28</sup> Their involvement as sparring partners contributes to the quality of adjudication.<sup>29</sup> The following examples shall illustrate the wide-ranging powers of law clerks in Switzerland: At the Federal Criminal Court, a law clerk can request an oral deliberation instead of a circulation resolution.<sup>30</sup> In the Canton of Glarus, a law clerk can be a substitute of a judge in a collegiate judging body with all the rights and duties of a judge.<sup>31</sup> In the Canton of Thurgau, the leading law clerk makes decisions in terms of deferment of payment or reduction of procedural costs. There, a law clerk also has competences in the field of legal aid.<sup>32</sup> In the Canton of Zurich, a law clerk can add his or her dissenting opinion to the records.<sup>33</sup>

As illustrated, the functions of law clerks come close to those of a judge. Considering that, the German term "*Gerichtsschreiber*" (French: "greffier"; Italian: "cancelliere") is not quite appropriate.<sup>34</sup> Hence, the former federal judge Hans Wiprächtiger introduced law clerks as "junior judges" to foreign visitors.<sup>35</sup> Nevertheless, they are not judges. There are several important differences: on the one hand judges can be distinguished from clerks in terms of their professional status. Judges are elected by popular vote or by the parliament for a limited term of office (usually between 4 and 6 years) and due to that they have a specific democratic legitimation and responsibility.<sup>36</sup> Judges of higher instances are even magistrates. Law clerks, however, are employees; they are employed by a public law-contract and the personal acts are applicable to their employment. The courts are the appointing authority. On the other hand, there are differences in terms of the accountability, the remuneration and the allowance of extra-official activities or the legal protection.<sup>37</sup> For instance,

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<sup>21</sup> See Schmid, p. 556 ff.

<sup>22</sup> Kiener (2012), p. 412.

<sup>23</sup> Bundesgesetz vom 17. Juni 2005 über das Bundesgericht (Bundesgerichtsgesetz, BGG; SR 173.110).

<sup>24</sup> Reglement vom 20. November 2006 für das Bundesgericht (BGerR; SR 173.110.131).

<sup>25</sup> Uebersax (2004), p. 95.

<sup>26</sup> As an example of the advisory vote see Article 24 section 2 BGG und Article 39 BGerR. In the Canton of Basel-Landschaft, law clerks have by law a right of application (see § 6 section 2 of the Cantonal Court organization Act [Gesetz über die Organisation der Gerichte vom 22. Februar 2002; Gerichtsorganisationsgesetz; GOG; SGS 170]). See also Feller, p. 293.

<sup>27</sup> Hauser, Schweri, Lieber, § 133 N. 20.

<sup>28</sup> Reiter, N. 476

<sup>29</sup> Holvast (2016), p. 25.

<sup>30</sup> See Article 18 section 3 and Article 19 section 3 of the organizational regulations of the federal criminal court (Organisationsreglement vom 31. August 2010 für das Bundesstrafgericht [Organisationsreglement BStGer, BStGerOR; SR 173.713.161]).

<sup>31</sup> See Article 27 of the Cantonal Court Organization Act (Gesetz vom 6. Mai 1990 über die Gerichtsorganisation des Kantons Glarus [Gerichtsorganisationsgesetz, III A/2]).

<sup>32</sup> See § 12c section 2; § 44 section 3 of the ordinance of the criminal and civil justice process (Verordnung vom 27. Mai 2010 des Obergerichts über die Zivil- und Strafrechtspflege [Zivil- und Strafrechtspflegeverordnung, ZRSV; RB 211.11]).

<sup>33</sup> See § 124 of the Cantonal Court Organization Act. Gesetz vom 6. Mai 1990 über die Gerichtsorganisation des Kantons Glarus [Gerichtsorganisationsgesetz, III A/2]).

<sup>34</sup> Uebersax (2007), p. 84.

<sup>35</sup> Heimgartner, p. 296; see also Mosimann, p. 91.

<sup>36</sup> In terms of judges see Kiener (2012), pp. 411 ff. In terms of law clerks see Feller, pp. 294 ff.;

<sup>37</sup> See Uebersax (2004), pp. 96 ff.

unlike judges' remuneration, the salaries of law clerks are often performance-related. Summing up, a law clerk is involved in the deliberation but not in the rendition. The judges are solely responsible for the verdict.<sup>38</sup>

Law clerks are highly qualified lawyers. They need at least a law-degree, sometimes the licence to practice as an attorney-at-law (bar exam) is required as well. The formal criteria of appointment for judges often are lower.<sup>39</sup> Different to other European countries, Switzerland does not have a career judiciary.<sup>40</sup> Consequently, there is no procedure for promotion of a law clerk to the position of a judge. Law clerks, usually, are employed for an indefinite time and they are not necessarily young lawyers, they can be older as well.<sup>41</sup> Still, the job as a law clerk is frequently an entry point in the judicial system. Therefore, later on a part of the law clerks become judges or prosecutors.<sup>42</sup>

The variety of the Swiss system is also reflected in the different organizational inclusion of the law clerks in the courts. On the one hand, law clerks can be personal employees of a judge; on the other hand, pool-systems exist. In a pool-system, law clerks support all judges of a court. Usually within a team of law clerks there is no hierarchy. However, most of the courts have a "leading law clerk" that is responsible to fulfill tasks in the field of court administration (e.g. responsible for the case assignment among the clerks).<sup>43</sup> They are sometimes also a member of the management body of a court.<sup>44</sup>

Legal assistants are not exceptional at courts in European countries.<sup>45</sup> However, in comparison with many other countries in Europe, in Switzerland law clerks fulfill a wider range of tasks and have more influence on the jurisdiction. They support judges in their judicial function in a more substantial manner.<sup>46</sup> In particular, law clerks write the reasoning of a judgment whereas in other countries this is typically the task of the judge.<sup>47</sup> This peculiarity has historical reasons: In the past, many judges used to be laypersons that needed legal support and advice in the decision-making process.<sup>48</sup> A judge must be able to deal adequately with the concerns and arguments of the parties. Therefore, the parties' right to an independent judge and to a fair trial may be affected if inexperienced lay judges would decide without the possibility of asking an independent expert.<sup>49</sup> Therefore, namely at courts with lay judges, law clerks traditionally hold an important position. But also at courts, where judges for a long time are well experienced and highly qualified lawyers (e.g. the Federal Supreme Court), the traditional division of work between law clerks and judges takes place.<sup>50</sup>

#### 4. Development and Legal Issues

The role of law clerks has become more and more important in the recent years. On the one hand, due to the increasing caseload their number has disproportionately risen compared to the number of judges.<sup>51</sup> On the other hand, law clerks have taken over functions that used to be those of judges.<sup>52</sup> A caseload-study in the canton of Basel-Stadt showed that law clerks have to bear the brunt of the case processing. This is because the writing of the reasoning takes a lot of time.<sup>53</sup> According to Peter Uebersax, at the Federal Supreme Court law clerks prepare 9 out of 10 proposals of a judgment.<sup>54</sup> To conclude, law clerks are crucial for the proper functioning of the courts in Switzerland – especially in order to cope with the caseload.

Such trends can be ascertained in other countries as well. New public management perspectives often focus on efficient division of labor. Thereto, additional tasks are delegated to the assisting judicial staff (e.g. in the Netherlands or in the US).<sup>55</sup> Several European countries created a new judicial function similar to the German "Rechtspfleger." A Rechtspfleger can be described as a quasi-judge, that does not assist the judge but works alongside him or her and is responsible for

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<sup>38</sup> Leuenberger, p. 106.

<sup>39</sup> See section 2 above.

<sup>40</sup> Kiener (2012), p. 420.

<sup>41</sup> For variations of judicial assistants in relation of their age and their term of employment see also Holvast (2016).

<sup>42</sup> See Kiener (2012), p. 412. The author is not aware of some research on the personal characteristics of law clerks; the statement above is based on the information of law clerks.

<sup>43</sup> See Uebersax (2007), p. 99; Wurzbürger (2011), p. 112.

<sup>44</sup> See for instance Article 9 section 1 of the regulations of organization and operation of the regional court Bern-Mittelland (Geschäftsreglement des Regionalgerichts Bern-Mittelland [GeschR RG BM; BSG 163.23]).

<sup>45</sup> See CEPEJ, p. 174 ff.

<sup>46</sup> Uebersax (2011), N. 1. For further references on the different systems, see Holvast (2014), p. 40, Holvast (2016).

<sup>47</sup> Leuenberger, p. 98; Uebersax (2007), pp. 85 ff.; Uebersax (2011), N. 1.

<sup>48</sup> Uebersax (2004), p. 79.

<sup>49</sup> BGE 134 I 16 E. 4.3 p. 19.

<sup>50</sup> Uebersax (2011), N. 11.

<sup>51</sup> Beusch, N. 4; Donzallaz, p. 208; Felber, p. 436; Nay, p. 568; Reiter, N. 561 f.; Wurzbürger (2014), N. 5.

<sup>52</sup> Donzallaz, p. 208.

<sup>53</sup> See Lienhard, Kettiger, Uster, Winkler, p. 11 ff.

<sup>54</sup> Uebersax (2011), N. 52.

<sup>55</sup> Holvast (2014), p. 41 f.

making independent judicial decisions on specific matters.<sup>56</sup> Nevertheless, a law clerk in Switzerland cannot be compared to a Rechtspfleger. He or she remains an assistant of the judges and is not involved in the decision-making process. The function of Rechtspfleger is rarely known in Switzerland.<sup>57</sup>

In soft law, the issue of “legal assistants“ can be found as well.<sup>58</sup> For instance, the Consultative Council of European Judges (CCJE) points out the need that a genuine reduction of inappropriate tasks performed by judges can only take place by providing judges with assistants, with substantial qualifications in the legal field (“clerks“ or “referendars“), to whom the judge may delegate, under the same judge’s supervision and responsibility, the performance of specific activities such as research of legislation and case-law, drafting of easy or standardized documents, and liaising with lawyers and/or the public.<sup>59</sup> Contrary to that recommendation the Committee of Ministers warns against entrusting legal assistants with judicial functions. It would endanger judicial independence.<sup>60</sup>

The professional images of judges and law clerks are linked. Their areas of responsibility are closely connected as well.<sup>61</sup> Therefore, the development relating to law clerks has also changed the image of a judge. Judges have got a different role than in the past. Nowadays, judges and law clerks work together as team players.<sup>62</sup> Judges need to perform more and more management tasks. Judges lead, delegate and supervise, but do not fulfil the traditional judicial activities.<sup>63</sup> This development is only one part of the general professionalization of judges’ activities in Switzerland. There are also major changes, e.g. in the fields of selection, training, ethical standards, and assessments.<sup>64</sup>

There are three legal issues that are linked to the importance of the role of law clerks: the right to a lawful judge, the judicial independence and the performance assessment of judges.

The main criticism relating to the crucial role of law clerks is that they de facto fulfil tasks that should actually be accomplished by the judges themselves. In German, this issue is known as “*Gerichtsschreiberjustiz*“.<sup>65</sup> Indeed, the question arises which judicial functions are allowed to be delegated.<sup>66</sup>

Art. 30 section 1 of the Federal Constitution of the Swiss Confederation<sup>67</sup> states that any person whose case falls to be judicially decided has the right to have their case heard by a legally constituted, competent, independent and impartial court.<sup>68</sup> Ad hoc courts are prohibited. The right to the lawful judge (“*Recht auf den gesetzlichen Richter*“, see also Art. 6 ECHR) is violated when a court secretary takes a decision instead of a judge.<sup>69</sup> It is, however, compatible with the European Convention on Human Rights and the Federal Constitution that a law clerk prepares the draft or the reasoning of a judgment, even if thereby the law clerk has an influence on the content of the decision.<sup>70</sup> The responsibility must remain with the judge.<sup>71</sup>

In order to be able to exercise this responsibility, judges need to study the case files themselves and form their own opinion; they have to weigh up alternatives and find equitable decisions. Thereto, judges need enough time. These tasks – the actual ultimate decision-making – belong to the non-delegable core of judicial activities. Therefore, a sole plausibility check of the drafts would be insufficient.<sup>72</sup> In this context, according to the right to the lawful judge, there is an upper limit to increasing the amount of law clerks per judge. In the Ordinance of the Cantonal Court Organization of the Canton of Luzern (*Justizverordnung*) is defined, that the ratio of full-time positions between judgeships and law clerks at district courts should, in principle, be one to one.<sup>73</sup>

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<sup>56</sup> CEPEJ, p. 174; Holvast (2014). p. 42.

<sup>57</sup> See CEPEJ, p. 184.

<sup>58</sup> See Tschirky, p. 126 ff.

<sup>59</sup> CCJE, Opinion No. 6 (2004), N. 65.

<sup>60</sup> Tschirky, p. 128

<sup>61</sup> Reiter, N. 557.

<sup>62</sup> See Uebersax (2004), p. 112; Beusch, N. 6.

<sup>63</sup> See Klopfer, N. 16 ff.; see also Felber, p. 440; Grütter, N. 1; Heimgartner, p. 304 f.

<sup>64</sup> See Gass, pp. 1143 ff.

<sup>65</sup> Wurzbürger (2011), p. 112.

<sup>66</sup> See Wurzbürger (2014), N. 7.

<sup>67</sup> Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999 (SR 101).

<sup>68</sup> See also Kiener, Kälin, pp. 521 ff.

<sup>69</sup> BGE 134 I 184 E. 3 ff. (a German translation of the judgment is in: Praxis 2008 Nr. 138).

<sup>70</sup> ECHR, Case Pedro Ramos v. Switzerland, N. 10111/06 (2010), § 50; BGE 138 V 154 E. 3.3 S. 158.

<sup>71</sup> See Hauser, Schweniger, Lieber, § 133 N. 23; Müller, Schefer, p. 927.

<sup>72</sup> Feller, p. 302.

<sup>73</sup> See § 62 section 1 of the Verordnung vom 26. März 2013 zum Gesetz über die Organisation der Gerichte und Behörden in Zivil-, Straf- und verwaltungsgerichtlichen Verfahren (Justizverordnung, JusV; SRL 262).

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Markus Felber takes an opposing view. According to him, reality is different. A judge no longer has to take the responsibility for each case. In the contrary, he or she primarily has to make the judgmental decisions. Furthermore, the judge has to choose, motivate and supervise his assistants. Therefore, social skills and leadership are more important than professional knowledge. The main responsibility of the judge is the good functioning of the team. However, in order to implement this vision of Felber the law would have to be amended.<sup>74</sup>

As a matter of fact, the question arises in which manner a judge must assume his or her responsibility. It seems reasonable to differentiate between routine and leading cases. In terms of routine cases it is sufficient, if the judges define a policy and delegate the settlement of the cases to experienced law clerks.<sup>75</sup>

Another issue is *judicial independence*. On the one hand, it is important to know how independent a law clerk must be. On the other hand, the question arises whether a law clerk can influence a judge in an improper way.<sup>76</sup>

According to Article 30 section 1 Federal constitution, the parties to a case have the right to an independent and impartial judge.<sup>77</sup> Judges often meet higher requirements as to their independence than court staff.<sup>78</sup> Still, law clerks must be independent from the litigants and can be recused for the same reasons as judges when they participate in the decision-making process.<sup>79</sup> Furthermore, in carrying out the advisory vote, they are bound by any instructions. They shall form their own opinion independently and they are obliged to point out legal inconsistencies or possible errors.<sup>80</sup>

Within a collegiate judging body, a judge has to be independent from his or her colleagues and has to form his or her own opinion.<sup>81</sup> Especially when a judge has a backlog of files, there is the risk that he or she accepts a draft of a judgment of another judge without a thorough appraisal. In this situation, the support of a law clerk can strengthen the independence of a judge.<sup>82</sup> However, a judge must also be independent from a law clerk that prepares the proposal of a judgment. A judge must be able to take a decision on his or her own after considering the arguments/reasonings of the law clerk.<sup>83</sup>

Research in the field of decision-making processes shows that most (judicial) decisions result from a combination of reflexive (automatic, rapid and unconscious) and reflective (deliberative, slow and conscious) processes.<sup>84</sup> Judges tend to evaluate first ideas on the basis of intuition. After that, a deliberative process takes place in which judges monitor the intuitively derived judgement to decide whether it needs to be endorsed, corrected or overridden. Among other things, this process needs time and effort.<sup>85</sup> Therefore, it is a problem if a judge has too little time for a critical examination of the matter.<sup>86</sup> Hence, judicial independence is jeopardized if a judge has to supervise too many law clerks. When a large percentage of the judicial work is performed by legal assistants, certain cognitive biases may occur more easily to judges. Especially, a memorandum or a judgment proposal of a law clerk can affect the outcome of a decision and function as an anchor.<sup>87</sup> Furthermore, a judge that has too many judicial assistants, has to concentrate too much on management tasks and cannot care enough about the jurisdiction.

Three constellations can be problematic: Firstly, presumably single judges will be more dependent on the legal advice of their assistants than judges in a collegiate judging body. Secondly, problems for judicial independence may result when a judge frequently changes the court or the chamber, whereas law clerks remain in their positions. Thirdly, lay judges may be particularly dependent on the legal advice of their assistants, because they may lack legal knowledge and experience. Lay judges frequently require judicial assistance to enhance their legal knowledge and to ensure that they fulfil their tasks

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<sup>74</sup> See Felber, pp. 438 ff.; Wurzbürger (2014), N. 7.

<sup>75</sup> Aeschlimann, p. 413.

<sup>76</sup> See Kiener (2001), p. 78; p. 222.

<sup>77</sup> See Kiener (2012), p. 424.

<sup>78</sup> Uebersax (2007), p. 96.

<sup>79</sup> See Kiener (2001), pp. 80 f.; BGE 140 I 271 E. 8.4.1 p. 273 f.

<sup>80</sup> See Uebersax (2004), pp. 89 f.

<sup>81</sup> See Müller/Schefer, pp. 936 ff.

<sup>82</sup> See Leuenberger, p. 110.

<sup>83</sup> Kiener (2001), p. 222.

<sup>84</sup> Casey, Burke, Leben, p. 45, 48.

<sup>85</sup> Holvast (2014), p. 51.

<sup>86</sup> See Hauser, Schweri, Lieber, § 133 N. 23.

<sup>87</sup> Holvast (2014), p. 52 f. Different studies found that judges' decisions were influenced by different heuristics (Casey, Burke, Leben, p. 47, with further references).

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dutifully and lawfully. Therefore, it can be difficult for them to assess the proposals of law clerks critically and to form their own opinion.<sup>88</sup>

Summing up, depending on the situation, a law clerk can be a protector or a threat to judicial independence. In a collegiate judging body a law clerk can support a judge and strengthen his or her independence from the colleagues. However, if a judge has to supervise too many law clerks, he or she can become dependent of them.

In Switzerland, formal individual assessments of judges are unusual.<sup>89</sup> The performance of a judge is closely connected to that of a law clerk and, from the outside, the tasks of a law clerk and such of a judge can often not be clearly distinguished.<sup>90</sup> This close relationship is one reason amongst others why some authors reject the use of indicators to appraise the performance of judges.<sup>91</sup> In order to express it provocatively: A lazy judge can hide behind an excellent law clerk, and a good performance appraisal would be based on the work of the law clerk.<sup>92</sup> Such an argumentation, however, cannot be accepted. A judge is responsible for his or her staff and for the performance of the whole team. Therefore, performance evaluations for judges cannot be declined only because they are supported by law clerks. Nevertheless, in order to implement an appropriate system of performance assessment for judges, it would be necessary to consider that judges are supported by law clerks in different ways.

## 5. Performance Targets for Law Clerks

Another important issue is the setting of performance targets for law clerks. Law clerks are important for the good functioning of the courts. Therefore, it is crucial to know how law clerks can be promoted in an effective way. Of course, there are other and more important management tools (e.g. a caseload-management system) in order to cope with the increasing caseload. Nevertheless, the setting of performance goals and performance assessments of law clerks are issues that should be discussed in practice and science, because the proper functioning of the courts depends substantially on the non-judge members (e.g. their motivation). Judicial reforms have to consider this fact.<sup>93</sup>

Inter alia to answer the question, how the setting of performance target for law clerks concretely is designed at Swiss courts, an empirical research was conducted in 2013. Both quantitative and qualitative data were generated using what were mainly closed but in some cases open questions, together with the opportunity to provide further details and comments.<sup>94</sup> The questionnaire was sent to 45 courts. 27 courts completed the questionnaire (response rate of 60 %). The results are from 18 cantons and from the Federal Supreme Court and the Federal Patent Court.

One finding of the survey is that performance goals for law clerks are very common in Switzerland. In 14 (out of 18) cantons and at the Federal Supreme Court and Federal Patent Court, performance targets do exist for law clerks. Furthermore, the results show the heterogeneity of the Swiss judicial system. Sometimes, within a single canton, there exist different practices (for example there can be differences between the administrative, the civil and the criminal courts). Especially the empirical study demonstrates that performance targets are set differently: At some courts, performance goals are formulated in a general way. Other courts, however, use individual targets for each law clerk (see chart 1).

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<sup>88</sup> See N.L. Holvast (2016), The power of the judicial assistant. Looking behind the scenes at courts in the United States, England and Wales, and the Netherlands, *International Journal for Court Administration* 7 (2) pp. 10-28.

<sup>89</sup> CCJE, Opinion N°17 (2014) on the evaluation of judges' work, the quality of justice and respect for judicial independence, N. 11 (<[http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis\\_en.asp](http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp)>, accessed 4 August 2015); Gass, p. 1149; Lienhard (2014), p. 32.

<sup>90</sup> Leuenberger, p. 99; Neue Zürcher Zeitung, December 29, 2008, p. 9.

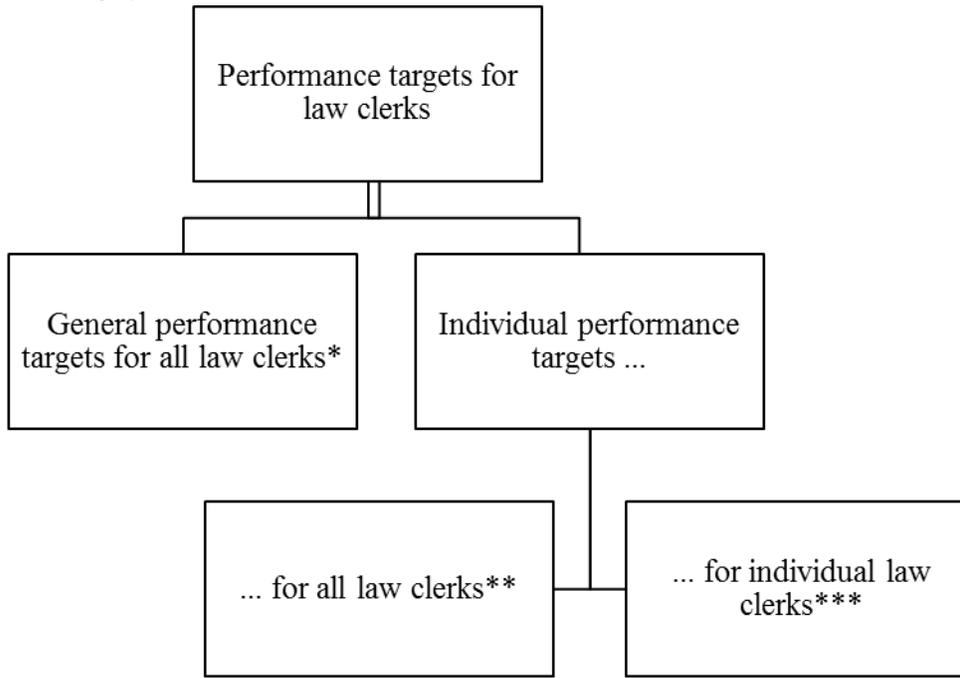
<sup>91</sup> See Raselli, N. 20.

<sup>92</sup> Felber, p. 437 f.

<sup>93</sup> See Hoffmann-Riem, pp. 272 ff.

<sup>94</sup> See Lienhard, Kettiger, Winkler, p. 45.

Chart 1



\*The Federal Supreme Court sets general performance targets for its law clerks. The performance objectives are regarded as benchmarks. 60 cases per year is considered to be a normal performance target. 40 cases per year is the minimum performance target for cases that are considered “medium-difficult”. As the Federal Personnel Act<sup>95</sup> is applicable for law clerks, their wage is performance-related. Inter alia their professional competence, the quantity of settled cases, as well as the work organization contribute to the calculation of the wage increase.

\*\*For example, in the cantons of Solothurn and Waadt, the individual targets are set at the annual appraisal interview for each clerk.

\*\*\*Often law clerks are personal assistants to a judge. That is the reason why at some courts the judges decide on their own, whether or not they want to set performance targets.

These differences are probably due to the varying forms of internal organization and the different sizes of Swiss courts. This variety is also reflected in the different organizational inclusion of the law clerks in the courts.<sup>96</sup> It is difficult to assess which way of setting performance targets is the best. Probably, different models can be accurate for different courts and different cultures. In this field, there is need for further research.

## 6. Conclusion and Research Needs

Law clerks have a role of great importance in the Swiss judicial system. They are key-players helping to cope with the growing caseload. In general, it is lawful to increase the ratio of law clerks to judgeships. However, from a constitutional point of view, there is an upper limit to the number of additional law clerks a court should establish. Otherwise, a judge can no longer assume his or her responsibility and would become dependent of his or her law clerks.<sup>97</sup>

Despite the crucial role of law clerks, empirical research has given little attention to their function so far. There is need for further research (e.g. on the relation between judges and law clerks and on their division of work). Especially, the best practice to set performance targets and the assessment of law clerks need to be discussed. Furthermore, in an international context it would be of major interest to differentiate between the different types of assistants, their responsibilities and their fields of activity.

<sup>95</sup> Bundespersonalgesetz vom 24. März 2000 (BPG; SR 172.220.1).

<sup>96</sup> See section 2 and 3 above.

<sup>97</sup> See also Hauser, Schweri, Lieber, § 133 N. 23.

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