



## *Between Management and the Rule of Law*

### *Results of the Research Project “Basic Research into Court Management in Switzerland”*

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#### Abstract:

The courts are the jewel of any state governed by the rule of law. Yet even the judicial system must modernize its methods of organization and management if it is to guarantee sustainable jurisdiction. But how much management is sustainable within the judicial system? And what is the right way towards an optimized judicial system and well performing courts?

An interdisciplinary research team from six universities under the lead of the Centre of Competence for Public Management at the University of Bern has considered this question in several dissertations and studies as part of a project funded by the Swiss National Science Foundation.

This paper will provide a summary and a reflection of the research work and future fields of research.

#### Keywords:

## 1. Introduction

### 1.1 Aims of the Research Project

The long-term aim of the research project was to devise a general, integrated management model for the judiciary that incorporates good practices and good governance. It should ultimately be possible to create a management model which – like the St. Gallen management model<sup>1</sup> – has as its object integrated control and management of and within courts and, in doing so, takes equal account of the special position of the judiciary as the third branch of the state, the complex environment surrounding judicial activity and the complex internal structure of judicial authorities. Account must also be taken of the fact that the judiciary, as the third branch of the state, is embedded in the politico-administrative apparatus and that a management model of this type for the judiciary must take the context of state control into consideration.

In Switzerland, little empirical and theoretical research has been carried out so far into how courts operate. Another objective of the research project was therefore to acquire basic knowledge about the Swiss judicial system as a sub-system of democratic society and as an organization.

### 1.2 Research Questions and Methodology

The *research question* overarching the entire project is: what is the best organization of the judiciary in order to guarantee sustainable adjudication? In various sub-projects and one cross-sectional project, more specific issues are identified accordingly.

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<sup>1</sup> Details see further on II./3.

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The intention was to take an *interdisciplinary* approach to any questions that arose. The project relates to issues from the fields of legal science, business studies, administrative science, (legal) sociology, psychology (in particular occupational psychology and the psychology of decision-making) as well as issues of political and media science.

The *methodology* used in the research project follows the particularities of the various disciplines involved. It is therefore based *inter alia* on analyses of literature and documents, comparative analyses, legal comparisons, interpretation and on empirical studies (surveys, interviews) in Switzerland and abroad.

### 1.3 The Structure and Organization of the Research Project

The research project was conducted in *six interdisciplinary sub-projects*, each of which considered specific issues.<sup>2</sup> The structure of the research project followed a subdivision into a study of the internal organization of the judiciary on the one hand and a study of its environment on the other. The study of the internal organization follows the elements inherent in all the common management models<sup>3</sup> (a distinction is made between them to an extent): resources, processes, organization (structure) and culture. The general political and administrative issues that arose were dealt with in a cross-sectional project. Internal coherency was ensured by an overall project management committee as well as regular administrative and content-related coordination meetings and workshops.

### 1.4 Basic Research Assumptions

The project was based on the following fundamental *hypotheses*, and the aim in the course of the project was to verify or falsify these, explicitly or by implication:

- The demands placed by society on the judiciary differ considerably in Switzerland depending on the geographical context (urban-rural, language regions, etc.).
- The general organization, internal organization and the culture in the judicial authorities in Switzerland have developed over the course of history and differ considerably depending on the geographical context (urban-rural, language regions, etc.).
- Even within identical judicial authorities, there is no uniform judicial image.
- Coping with the constantly growing demands that the judiciary faces means that a court management system must be put in place in the medium term.
- If it is to be accepted and successful, the management of courts and other judicial authorities must take account of the special social functions and general constitutional conditions that apply to the judiciary (the third branch of the state) as well as the special working methods and professional characteristics of its members.
- Although the work of the judiciary is shaped by procedural law and has fixed processes, there is potential for optimizing the efficiency and quality of judicial work by optimizing processes in the business management sense.
- By optimizing the deployment of resources, the output and the quality of the judiciary can be increased.

## 2. Main Research Findings

### 2.1 Court Management in a Constitutional Context<sup>4</sup>

The requirements that apply in court management can essentially be derived at federal level (i.e. for the federal courts) from the three provisions of the Federal Constitution discussed below. For the requirements for court management in the cantonal courts, there are similar provisions in the cantonal constitutions and in the cantonal laws on the organization of courts.

The first provision that should be mentioned is the courts' right of self-administration, as outlined for the Federal Supreme Court in Article 188 paragraph 3 of the Federal Constitution. This right of self-administration, an essential element of the institutional independence of the judiciary, is both a right and an obligation for effective court management.<sup>5</sup> Furthermore, an essential precondition that applies in court management is the constitutional requirement that public funds must be used economically. This efficiency requirement, laid down at federal level in Article 126 paragraph 1 of the Federal Constitution,<sup>6</sup> not only applies in public administration, but also applies to the courts.<sup>7</sup> Courts never receive sufficient

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<sup>2</sup> For more information on the organization of the project see Lienhard/Kettiger (2016), p. 10-12, and [www.justizforschung.ch](http://www.justizforschung.ch) (Status: 01.03.2017).

<sup>3</sup> Details see further on II./3.

<sup>4</sup> This section closely follows LIENHARD (2009), para. 27-30.

<sup>5</sup> See e.g. TSCHANNEN (2016), § 40, para. 19.

<sup>6</sup> See LIENHARD (2005), p. 140 ff.

<sup>7</sup> See LIENHARD (2005), p. 462.

resources to meet their ideals of quality; they are under constant pressure to be more efficient. A crucial – ultimately in fact *the* most crucial – guideline lies in the constitutional requirement imposed in Article 170 of the Federal Constitution to fulfil public tasks effectively. Court management should therefore make it possible for courts to actually fulfil their tasks - guaranteeing the protection of legal rights, applying the law in a uniform manner, developing the law – while at the same time taking account of the procedural guarantees (Art. 29 ff. Federal Constitution) such as the requirement that justice be dispensed speedily.<sup>8</sup> In other words, good court management is an essential requirement for guaranteeing that justice is dispensed correctly and efficiently.

## 2.2 From Judicial Administration to Court Management<sup>9</sup>

The term “judicial administration” (*Justizverwaltung*) has been defined in German-language specialist literature for decades in a largely uniform manner as follows: “[J]udicial administration is the governmental regulatory activity that encompasses neither legislating nor the dispensing of justice but which is carried on for the purpose of providing the material and personal basis for adjudicating, understood as the dispensing of justice by the judges responsible, in individual court systems.”<sup>10</sup> More loosely (leaving out the idea of excluding legislating and dispensing justice), judicial administration can also be defined as “the administrative activity which provides and maintains the material and personal basis for adjudicating.”<sup>11</sup> This more open formulation takes account of the fact that the preparatory procedure for legislating can also be an administrative activity. This definition also corresponds to that used in more recent German specialist literature (which also employs the term “court administration” (*Gerichtsverwaltung*) due to the close relationship with the courts).<sup>12</sup> This formulation focuses on the *function*.<sup>13</sup> Judicial administration in this material or more specifically functional<sup>14</sup> sense is thus administration carried out in the service of the judiciary. Administrative activity for the benefit of the judiciary may theoretically be the responsibility of any state organ.<sup>15</sup> The *independence of the courts* in their institutional form assumes that courts are *self-governing*, i.e. that the courts carry out the tasks of court management largely on their own, with their own resources, and separately from the central administration.<sup>16</sup> With regard to *tangible resources*, judicial administration involves, for example, providing and maintaining the required buildings or rooms, furnishings and fittings, as well as providing, maintaining and operating the telecommunications and computer systems. With regard to *staff resources*, it involves staff management, staff supervision, the organization of court operations and continuing and advanced professional education and training; finally, *interaction with other public administration agencies* (e.g. legislative consultation proceedings) and *with the public* (e.g. media and public relations) are also part of judicial administration.<sup>17</sup>

The judiciary – like all state organs – is coming under increasing pressure to engage in reforms: on the one hand the workload, complexity of the material and the procedural requirements are steadily increasing, while on the other hardly any additional resources are being made available.<sup>18</sup> In addition, in Switzerland a trend towards ever larger court organizations can be detected.<sup>19</sup> This puts pressure on the judiciary to raise its efficiency levels,<sup>20</sup> and this can ultimately only be achieved through smoothly functioning court management.<sup>21</sup> Mere “administration” of the courts no longer suffices. The former president of the Zurich Cantonal Court of Appeal, Judge Rainer Klopfer (2005), explained the importance of court management in the following manner: “If a court is to be a major service provider and important supervisory body, it needs professional, efficient administration. That is impossible without management, but this in no

<sup>8</sup> See also LIENHARD (2005), p. 468 f.

<sup>9</sup> This section closely follows LIENHARD/KETTIGER (2013), para. 13 ff.

<sup>10</sup> EICHENBERGER (1986), p. 32, with further references [translated from the original German text].

<sup>11</sup> KIENER (2001), p. 292 (using the term “Gerichtsverwaltung”) [translated from the original German text]; in this sense, see also LIENHARD (2009), para. 25 and LIENHARD/KETTIGER (2009), p. 415.

<sup>12</sup> See WITTECK (2006), p. 16, with references: “... in this work, ‘Gerichtsverwaltung’ should be understood as all tasks that must be carried out to provide the human and material resources the activities of the courts in terms of adjudication and the administration of the justice system.” [translated from the original German text]; see also EICHENBERGER (1986), p. 34.

<sup>13</sup> See KISS (1993), p. 85; KISS/KOLLER (2008), Art. 188, para. 28.

<sup>14</sup> On the difference between administration in the functional and organisational sense, see TSCHENTSCHER/LIENHARD (2011), para. 343.

<sup>15</sup> See KIENER (2001), p. 292; WIPFLI (2007), p. 122.

<sup>16</sup> See instead of many LIENHARD/KETTIGER (2013), para. 16 ff.

<sup>17</sup> See KIENER (2001), p. 292; WITTECK (2006), p. 16 f.

<sup>18</sup> See LIENHARD (2005), p. 461 f.; KETTIGER (2003), p. 9 ff.

<sup>19</sup> In most cases, this is the result of reorganisation processes. The size of the courts in Switzerland is nevertheless below average in comparison with other countries. For example the Dutch Regional Court has around 100 judges.

<sup>20</sup> See LIENHARD (2005), p. 461 f.; MAIER (1999), p. 2; HOFFMANN-RIEM (2001), p. 211 ff., references truth, justice, independence and efficiency as the “magic square of the third power” [translated from the original German text].

<sup>21</sup> For more detail on the court management, see LIENHARD (2009), para. 25 ff.; LIENHARD/KETTIGER (2009), p. 415 f.

way compromises judicial independence; on the contrary, it means that the judges can carry out their core task, i.e. judging, better".<sup>22</sup>

When understood from *this management standpoint*, the concept of court management corresponds in the narrower sense to the concept of judicial administration defined above and encompasses management *within the judiciary*. If the judiciary is regarded as the third branch of the state and thus as part of the politico-administrative apparatus, this also gives rise to the question of managing the judiciary as part of the task of managing the state. When considered from the *standpoint of control*, court management also includes in a broader sense the management *of the judiciary*. In this publication, the concept of court management is normally understood in the narrow as well as in the broad sense.

### 2.3 How Court Management has Developed

First approaches of court management in Switzerland can be traced back to the 19<sup>th</sup> century.<sup>23</sup> In the 1960s and 1970s, research in the field of economics concentrated on management, i.e. the question of how to control and manage businesses. The aim was to develop *theoretical concepts of management* which take account of both the complex internal structure of *companies* and their setting in a multi-layered environment. This research led not only to findings being made in relation to individual issues but also gave rise to practical management models. The best known management model – at least in continental Europe – that emerged from this work is the *St. Gallen Management Model*, first published in 1972.<sup>24</sup> As these scientifically-based, integral management models established themselves, the University of St Gallen fine-tuned its model to develop the New St. Gallen Management Model<sup>25</sup>, one of the essential pillars of business management today. Further well-known management models include the 7-P model (McKinsey 7-P Framework)<sup>26</sup> and the 5-P model (Purpose, Principles, Processes, People and Performance).<sup>27</sup>

In the course of the debate that arose around New Public Management (NPM), in the second half of the 1980s specific *management models for public administration* were developed in Switzerland.<sup>28</sup> These management models were developed when it was recognized that, although integral control and management was also a necessity in modern public administration, the models developed for private-sector companies were not suitable for the specific requirements and tasks of public administration and could not therefore simply be imported, unmodified, into the public sector. There was also a need for a specific management model for non-governmental organizations (NGOs) and non-profit organizations (NPOs) owing to their special status and tasks in society.<sup>29</sup>

Around the same time as this debate on management models for public administration, a discussion also arose about *management in the judiciary*. In Germany, this debate, which covered a broad academic spectrum and was at times rather heated, originated in part from a book written by a former judge in the German Federal Constitutional Court, Prof. Dr. Wolfgang Hoffmann-Riem.<sup>30</sup> However, it did not result in any management model being developed – or even in any groundwork for such a model. Whether specific projects in this field were successfully implemented in certain German Länder remains unclear. In Switzerland, the discussion on court management was conducted primarily in the context of NPM projects in the cantons, but was often limited to the question of whether the judiciary should be included in the new NPM model concerned and thus to the question of *management of the judiciary*.<sup>31</sup> The publishers of this report (the Cantons Bern and Aargau) were among those involved in this work. As a result, the courts in certain cantons (e.g. Bern, Lucerne, Solothurn) are nowadays integrated into a system of new public management. The issue of court management was only raised sporadically, for example at a symposium given by the Swiss Society of Administrative Sciences (SSAS) in Olten in 2003.<sup>32</sup> In more recent times, the topic has been taken up again, and elements of good court management have been sketched out.<sup>33</sup>

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<sup>22</sup> KLOPFER (2005) [translated from the original German text].

<sup>23</sup> See also II./5 and II./6.

<sup>24</sup> See ULRICH/KRIEG (1972).

<sup>25</sup> St. Gallen Management Model 3<sup>rd</sup> generation, see RÜEGG-STÜRM (2002); since replaced by the St. Gallen Management Model 4<sup>th</sup> generation, see RÜEGG-STÜRM/GRAND (2015).

<sup>26</sup> See PETERS/WATERMANN (2006).

<sup>27</sup> See PRYOR/WHITE/TOOMBS (1998).

<sup>28</sup> See THOM/RITZ (2008), p. 41 ff.; SCHEDLER/PROELLER (2011), p. 19 ff., in particular p. 22.

<sup>29</sup> A substantial volume of literature has originated relation to this see e.g. SCHWARZ (1984); TIEBEL (2006); LICHTSTEINER/GMÜR/GIROUD/SCHAUER (2015).

<sup>30</sup> HOFFMAN-RIEM (2001).

<sup>31</sup> For more detail on the definition of court management and on this difference, see Section II./2 and II./3.

<sup>32</sup> See KETTIGER (2003).

<sup>33</sup> See LIENHARD (2009); *ibid.* Indikatoren, Controlling, Zertifizierung und andere Innovationen des Justizmanagements, Lecture given on 30 January 2009 to the Swiss Judges' Academy (unpublished).

At an international level, in particular in the Anglo-American world, a longer tradition of scientific interest in court management exists. In Australia, for example, the Australasian Institute of Judicial Administration (AIJA)<sup>34</sup> has been in existence for decades and deals with general issues of court management. In the USA, research and education on the matter of court management was institutionalized in 1971 with the creation of both the Federal Judicial Center to serve the federal judicial system and the National Center for State Courts (NCSC)<sup>35</sup> and the Institute for Court Management (ICM) to serve the state judicial systems.<sup>36</sup> In Europe, a working group, the European Commission for the Efficiency of Justice (CEPEJ), considers issues of court management as part of the activities of the Council of Europe.<sup>37</sup> The fact that court management is increasingly becoming a topical issue in Europe is shown by the launch in 2008 of a new professional journal focusing on court management, the *International Journal for Court Administration* (IJCA).<sup>38</sup>

To date, however despite these various activities, there is still *no integral management model for the judiciary*.

A study from May 2012 illustrates the *state of management in Swiss courts*.<sup>39</sup> Overall, it may be concluded from the survey of the higher cantonal and the federal courts that *various elements of court management* have already *infiltrated* the management and organization of the Swiss judiciary. The *level of implementation* is however markedly *heterogeneous*. This heterogeneity relates not only to the *selection* of the individual elements of court management, but also to *content-related structure* (e.g. objectives).<sup>40</sup>

## 2.4 Court Management in the Context of the Judiciary's Pluralistic Organization

The investigations indicate from several perspectives and disciplines the various rationales (or "worlds") in the judiciary: the legal rationale, management rationale and commercial-bureaucratic rationale (industrial world, social world, market world, domestic/family world). The largest divergences exist between those carrying out judicial activities and those responsible for court management.<sup>41</sup> Persons involved in judicial activities tend to take a rather critical view of court management instruments. However, the study carried out in relation to the Federal Supreme Court revealed that the judges recognize the importance of management in the Federal Supreme Court and accept management concerns and reforms that aim to improve adjudication processes. A mutual social acclimation within the court organization is possible; a hybridization can be observed. This can be encouraged through social activities (e.g. informal meetings) and social exchange (e.g. forums). It can also lead logically to the requirement that lawyers entrusted with court management tasks should have received training in (public) management.

If specialist lay judges are to be involved in the adjudication process, then various constitutional requirements must be met. The subject and extent of these requirements essentially depend on the role intended for these specialists lay judges. Thus when it comes to using such judges, a distinction can be made between their expert witness role, advisory role, intermediary role, mediator role and legitimating role.

## 2.5 Court Management in the Context of a State Concept Involving the Separation of Powers

Rather unusually (though a similar system exists in some states of the USA), Switzerland has an election and re-election process for judges (generally election by parliament or by the people); only in the canton of Fribourg is re-election not possible. Several studies have shown this process to be problematic in view of the principle of judicial independence. A different system with fixed terms of office and removal mechanisms based on the rule of law (adequate protection of legal rights) could be an alternative. In addition, it has been found that the professionalism and expertise of parliamentary committees are factors that favor the appointment of judges by parliaments, while election by the people has a positive influence on the assessment of the courts' independence from political influence.

Judicial councils (in the sense of independent bodies<sup>42</sup>) are a possible way to organize the supervision of the courts, but are not essential, especially as there is parliamentary oversight anyway. A depoliticization with regard to the election of judges can therefore be combined with a constitutional gain with regard to the removal of judges. On the other hand judicial councils are in principle not necessary, in particular with regard to the budgetary and reporting processes at the interface between the judiciary and parliament.<sup>43</sup>

<sup>34</sup> <http://www.aija.org.au> (Status: 01.03.2017).

<sup>35</sup> <http://www.ncsc.org/> (Status: 01.03.2017).

<sup>36</sup> <http://www.ncsc.org/Education-and-Careers/ICM-Certification-Programs/Court-Management-Program.aspx> (Status: 01.03.2017).

<sup>37</sup> See [http://www.coe.int/T/dghl/cooperation/cepej/default\\_en.asp](http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp) (Status: 01.03.2017); see in particular CEPEJ (2008).

<sup>38</sup> See for the latest on this issue also LANGBROEK/MAHONEY (2008), p. 1 f.

<sup>39</sup> See LIENHARD/KETTIGER/WINKLER (2012).

<sup>40</sup> See LIENHARD/KETTIGER/WINKLER (2012), p. 14 f.

<sup>41</sup> See DE SANTIS/EMERY (2015), p. 28 ff.

<sup>42</sup> E.g. canton of Fribourg: <http://www.fr.ch/cmag/de/pub/zusammensetzung.htm>.

<sup>43</sup> See Frey Haesler (2017).

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With little change since the start of the 19<sup>th</sup> century, statistics have been vitally important for court management not only as an instrument of comparison, supervision and management, but also as a basis for trust and legitimacy. It is assumed that management personnel in the judiciary rely on certain quantitative information. Parliaments – in particular at times when there are crises of confidence or resources – demand increasingly detailed statistics from the courts. The studies however also show that statistical surveys take too little account of the deliberative legal factors in judicial work. The over-prioritization of a quantitative approach leads to a limited perspective of what the courts achieve. Resistance from the judiciary is frequently observed as a response to such prioritization. Court statistics are subject to restrictions with regard to personalized data on judges; these essentially result from the need to protect personal privacy (data protection) and in certain circumstances (where judicial activities could be influenced by factors that should have no relevance) from judicial independence. Since as far back as the mid-19<sup>th</sup> century, however, efforts have been made to standardize court statistics and thus make them more readily comparable.

In relation to the principle of legality, the following new findings have been made with regard to court management:

- The principles governing how judicial panels are composed must have an adequate basis in legislation. On the one hand, the allocation of cases to a specific panel of judges must be regulated in abstract and comprehensible terms (principle of the judge prescribed by law); on the other, any deviation from the rules on allocation – this requires objective grounds – must also be clearly regulated.
- The content of the courts' annual reports – in particular the mandatory minimum content – should be set out in a legal provision.

## **2.6 Court Management as an Aid in Judges' Work**

The prevailing opinion is that court management should primarily or exclusively serve to ensure (i) the effective protection of legal rights (in particular the right to a timely and objective decision based on a fair procedure) and (ii) the efficient expenditure of public funds. This opinion can be dated back to the 19<sup>th</sup> century. Here the speed of proceedings is of crucial importance. To this extent, there is no fundamental conflict between court management and the protection of legal rights. With regard to certain elements of the situation, however, there are contradictions:

- Court management operates in the institutional dichotomy between accountability and independence. The optimum level of effective protection of legal rights is achieved if the two principles are in equilibrium. Court management and judicial independence are, therefore, not mutually exclusive in principle.
- Court management operates in the dichotomy between the quantity and quality of judicial performance. Rapid judgments (in line with the requirement that justice be dispensed speedily) and many judgments (in line with the requirement of efficiency) are not necessarily good judgments in formal respects (in terms of procedural guarantees) or in substantive respects (in terms of material accuracy). Here again, management must be used to find a balance between the diverging constitutional requirements.

Systematic caseload management is constitutionally required as an element in court management (based on the right to the protection of legal rights, the requirement of speedy justice, and the principle of equality before the law); especially in larger judicial authorities with several divisions.<sup>44</sup> However, the personal privacy (data protection) of individual judges must be protected and it must be ensured that judicial independence is not compromised. For caseload studies, three methods have been identified as expedient: measurement by means of time recording, estimation by means of a written survey or Delphi questioning, or a combination of methods. The quantitative surveys of the workload require supplementary qualitative analyses, ideally combined with an organization analysis.<sup>45</sup> The values recorded in respect of the workload must be periodically updated if they are not already being routinely recorded. In caseload studies and as part of caseload management, sufficient attention must also be paid to the quality of adjudication (procedural quality and quality of judgments).

Members of the judicial profession are basically in favor of good judicial work in qualitative terms and thus quality development in the judicial field. On the other hand, they take a skeptical view of traditional business quality management systems (in particular Total Quality Management, TQM). Quality development and assurance systems for courts must therefore take account of the requirements and idiosyncrasies of the judiciary. The personal initiative shown by the judiciary is an important factor here. With this in mind, quality development systems with a qualitative approach such as quality circles or status meetings have been developed.

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<sup>44</sup> On the constitutional aspects of caseload management, see MÜLLER (2016).

<sup>45</sup> See LIENHARD/KETTIGER/WINKLER/USTER (2015).

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Knowledge management generally and the knowledge exchange among judges in particular are vitally important to achieving consistency in judicial decisions – and thus to ensuring trust in the judiciary.<sup>46</sup> Contrary to expectations, information and communications technology (ICT) is only assigned a support function as a knowledge management instrument if the judges are already prepared to share their knowledge. The decisive factors for successful knowledge exchange are exclusively social, in particular, the existence of a social network and mutual trust within the court.

## 2.7 Court Management in the Context of (Media) Society

As far as the *self-concept of the judiciary* is concerned, in Switzerland there are few *differences between the linguistic regions*, and these are not pronounced. In the French-speaking region, for example, there is less openness towards court management than in German-speaking Switzerland. However, in the French-speaking cantons, judicial independence is accorded greater importance. It is interesting to note in this connection that it is only in the French-speaking cantons that the supervisory model involving judicial councils is found.

Overall, public trust in the courts, both federal and cantonal, is high. In estimating the level of trust and even more so in estimating the degree of equal treatment by the courts and in assessing the independence of the courts, clear differences in the average assessments can be identified depending on the canton.

A distinction should be made between transparency in relation to judicial activities based on statistics and transparency in relation to court activities achieved by publishing judgments. The latter is not only required by the Constitution, but also seems to increase the legitimacy of and trust in the judiciary.

The research confirms that communication by the courts is vitally important in two respects:

- Professional *communication with the outside world* in relation not only to judicial activities but also to organizational matters increases transparency and thus reinforces trust in the judiciary. Proactive communication can in some cases serve to counter negative reports on court activities in the media and so prevent the undermining of confidence.
- *Adequate internal communication* can strengthen trust within the courts and thus contribute to a hybridization of rationales and to more extensive knowledge exchange.

## 3. Reflection

### 3.1 The Results in the Light of the Basic Assumptions

At the start of the project, certain *fundamental assumptions* were made (and are reproduced below in italics).<sup>47</sup> The aim now is to reflect on the research results in the light of these basic assumptions.

*Fundamental assumption: the demands placed by society on the judiciary differ considerably in Switzerland depending on the geographical and anthropological contexts (urban-rural, language regions, etc.).*

When interviewing people outside the judiciary, the questions related primarily to trust in the judiciary and views on the independence of the courts and equal treatment by the courts. The demands that society or different social groups make of the judiciary were only occasionally and indirectly surveyed. As a result, no conclusive statement can be made about this fundamental assumption. There is a need for further research into the demands and claims made by society on the judiciary.

In addition, there are indications that – at least in relation to the Federal Supreme Court – the requirements for a good judiciary have not changed over the course of time. There are also indications that actors outside the court system (e.g. lawyers, accredited journalists) see potential for optimization with regard to the services provided by the courts, and in particular in relation to transparency and communication.

The results clearly showed that there are differences in the frequency with which the Swiss make use of the courts across the country. Whereas in Geneva, 44 per cent of people say that they have had dealings with a court, this value in the canton Zug is as low as 14 per cent; people clearly make more use of court services in the French-speaking cantons than in the German-speaking cantons, while Italian-speaking Switzerland lies somewhere in-between.<sup>48</sup>

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<sup>46</sup> On knowledge management in the judiciary, see TAAL (2016).

<sup>47</sup> See I./4.

<sup>48</sup> SCHWENKEL/RIEDER (2014), para. 20 f.

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*Fundamental assumption: general organization, internal organization and the culture in the judicial authorities in Switzerland have developed over the course of history and differ considerably depending on the geographical context (urban-rural, language regions, etc.).*

Contrary to the fundamental assumptions, in Switzerland there is in general little difference between the linguistic regions with regard to the self-concept of the judiciary.<sup>49</sup> These research results must still be verified in more detailed studies. One exception are judicial councils as supervisory bodies. One will only find this organizational model in French-speaking cantons.

A further finding is that the historical dimension with regard to judicial culture and court management has been given too little attention thus far. It was possible to demonstrate that the efficiency-oriented thinking and the statistical bias of the accountability reports (“legitimacy through figures”) have their roots in the 19<sup>th</sup> century and have been characterized by the mechanics and the culture of the Swiss political system.<sup>50</sup> Research is still needed into the question of which major theoretical and historical movements have influenced the Swiss judiciary and whether linguistic regional differences exist.

*Fundamental assumption: even within identical judicial authorities, there is no uniform judicial image.*

The investigations show that within and between the groups of persons carrying out judicial activities in the courts (judges, law clerks) largely uniform rationales predominate, the same fundamental values are shared, and thus a uniform self-image exists. On the other hand, persons involved in the adjudication process display recognizably different rationales from those involved in court management and apply different fundamental values with regard to what is a “good judiciary”.<sup>51</sup> The internal court culture is therefore often hybrid, and this will probably become more pronounced (permeation of cultures).

There are indications that subcultures form in larger courts based on their divisions or locations.

*Fundamental assumption: coping with the constantly growing demands that the judiciary faces means that a court management system must be put in place in the medium term.*

There were repeated indications that the judiciary requires a system of management and that certain management instruments can support the courts’ adjudication process, the “core business” of the judiciary.<sup>52</sup> At the same time, the prevailing opinion is that court management should primarily or even exclusively serve to secure the effective protection of legal rights.<sup>53</sup> The finding that certain issues relating to court management already existed in the 20<sup>th</sup> century gave rise to the question of whether the call for more court management is solely due to the current rapid changes in society and technology<sup>54</sup> and the major reorganizations of the Swiss judiciary in recent years, or whether in the judiciary, as in any other organization, a certain degree of adequate management is not a basic organizational requirement.

Certain elements or instruments of court management – for example caseload management – are not only objectively desirable but constitutionally required.

*Fundamental assumption: to be accepted and useful, the management of courts and other judicial authorities must take account of the special social functions and general constitutional requirements of the judiciary (the third branch of the state) and the special working methods and professional characteristics of its members if it is to be accepted and successful.*

This fundamental assumption was confirmed on various occasions and based on the viewpoints of various scientific disciplines; for the sake of accuracy, it should be noted that the assumption relates not only to the management of courts but also to management *within* courts.<sup>55</sup>

*Fundamental assumption: although the work of the judiciary is shaped by procedural law and has fixed processes, there is potential for improving the efficiency and quality of judicial work by optimizing processes in a business management sense.*

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<sup>49</sup> For more detail, see above Section II./7.

<sup>50</sup> For more detail, see above II./5.

<sup>51</sup> For more detail, see above II./4.

<sup>52</sup> For more detail, see above II./6.

<sup>53</sup> See II./6.

<sup>54</sup> KETTIGER (2003), p. 9 ff.

<sup>55</sup> With regard to the two dimensions of court management, see II./2.



The research work focused in different ways on concepts and instruments that can serve to improve the core, management and support processes in the courts and thus achieve the greatest degree of justice possible – from caseload management to quality systems. The work, however, restricted itself largely to identifying the theoretical potential and the adjustments that have to be made to business management instruments to adapt them to the specific requirements of the judiciary. The effectiveness of court management instruments in relation to process optimization was not investigated. This fundamental assumption must accordingly be verified or falsified *ex post* in the near future by means of evaluations. For such research to be possible, in projects to reform the judiciary it is vital to survey and establish the state of the system before new court management instruments are introduced.

*Fundamental assumption: by optimizing the deployment of resources, the output and the quality of the judiciary can be increased.*

From a theoretical viewpoint, this fundamental assumption might be correct; here again it will be necessary to verify the fundamental assumption *ex post* by conducting evaluations of the management instruments.

### 3.2 Relevance of the Findings in an International Context

The principles of good court management in Switzerland – as identified in the present research project – are based to a large extent on *international sources*, as the individual sub-projects and the present summary of the findings show. Convincing proof of this is already provided by the literature list for this publication summarizing the research results and the bibliography on research into judiciaries<sup>56</sup> compiled in the course of this project. The fact that the subject matter of the investigation, the objective and issues raised in this research project, which focus on the core of the Swiss judiciary, have *international relevance* is also shown in other areas. In the following remarks, a few examples of these connections are highlighted.

At a pan-European level, the *European Commission for the Efficiency of Justice (CEPEJ)* of the Council of Europe deals with issues of court management. In particular, the CEPEJ examines questions relating to the organization of the judiciary, the quality of the judiciary, the timely issuing of judgments, performance assessment and evaluation of judicial systems – areas similar to those that were the object of the present research project. With Georg Stawa (CEPEJ President), Jacques Bühler (President of the Working Group on judicial time management at the CEPEJ) and François Paychère (President the Working Group on quality of justice at the CEPEJ), three contributors to this research project at the same time work for this international organization. The knowledge exchange that resulted from this collaboration was a significant success factor in our research work.

The *European Group for Public Administration (EGPA)* is one of the most important research networks in Europe for administrative theory and the management of public institutions. As part of the present research project, the new permanent study group on “Justice and Court Administration” was established within the EGPA.<sup>57</sup> At the annual conferences of the EGPA in various cities in Europe (Bergen, Edinburgh, Speyer, Toulouse), the research group held events on various aspects of court management, such as quality management, caseload management, alternative dispute resolution mechanisms (ADR), social media or information and communications technology (ICT). Researchers, judges and members of judicial administrations from various countries – including non-European countries such as the USA, Canada and Australia – presented their findings and took part in the debate.<sup>58</sup> The study group will focus in the coming years on other topics such as access to justice (taking account of aspects such as legal aid and gender), consistency of judicial decisions, performance management, responsive justice, eJustice and judicial cooperation.

The aim of the *International Association for Court Administration (IACA)* is to facilitate research, knowledge transfer and practical experience on court and judicial systems around the world.<sup>59</sup> Around 250 representatives of the judiciary, administration and academia attended its conference held in Sydney in 2014, representing around 40 countries. Topics included the judiciary in a changing environment, court organization and management, performance and evaluation, eJustice and access to courts and alternative dispute resolution.<sup>60</sup> It was found that judiciaries *around the world face very similar challenges* and that international institutions are therefore an ideal forum for exchanging knowledge and

<sup>56</sup> <http://www.justizforschung.ch/index.php/homepage/bibliographie-zur-justizforschung> (Status: 01.03.2017).

<sup>57</sup> <http://www.iias-iisa.org/egpa/groups/permanent-study-groups/psg-xviii-justice-and-court-administration/> (Status: 01.03.2017).

<sup>58</sup> The reports to the conferences by doctoral candidates involved in this research project can be found in the Swiss judges' journal “Justice – Justiz – Giustizia” at: [www.justizforschung.ch/index.php/homepage/egpa-study-group](http://www.justizforschung.ch/index.php/homepage/egpa-study-group) (Status: 01.03.2017).

<sup>59</sup> <http://www.iaca.ws/> (Status: 01.03.2017).

<sup>60</sup> See LIENHARD (2014).

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developing judicial administration. An important organ in this respect is the *International Journal for Court Administration (IJCA)*, which is available online and generally accessible.<sup>61</sup>

In an effort to constantly optimize court management, the International Consortium for Court Excellence has developed the *International Framework for Court Excellence*. It focuses on key areas of court management such as organization and management, management processes, resources, planning, access and satisfaction, and trust.<sup>62</sup> The Consortium plans to regularly optimize the Framework. A delegation from the present research project has also been invited to contribute to this work. Even if this management tool cannot be introduced into the Swiss judiciary in its present form, there are considerable similarities between the Framework and the subject areas considered in this research project.

The research project on “Basic Research into Court Management in Switzerland” has not only brought findings of relevance to the Swiss judiciary but has also attracted widespread attention and established links with the *international research community and international practitioners*. The subject areas of court management investigated in the course of the research project are also of *international relevance* – they are in a certain sense *ubiquitous*. Future research into systems of justice will be carried out by *international networks* – the existing gaps in the research and the needs of the judiciary are simply too similar for them to be filled in one after the other in successive projects.

## 4. Need for Further Research

### 4.1 Special Issues in the Organization of the Judiciary

*Structure of the cantonal court organization:* a specific analysis of how the cantonal courts are organized and the supervision and principles derived therefrom for the harmonization of best practices could be beneficial to informing the development of court management approaches and methods.

*Judicial councils:* judicial councils are a relatively new institution in Switzerland and little experience has been gained with regard to their mechanisms and impacts. In particular, the question arises of whether the legitimacy of the courts can be optimized through judicial councils. The mechanisms of judicial councils in the Swiss judicial system therefore require evaluating once additional experience with them has accumulated.

*Caseflow management:* the research so far has concentrated on the structural organization of the courts. Knowledge of procedures (core processes, management processes, support processes) is still fairly modest. What could be of interest is research in the field of case (flow) management or justice chains (for example: police investigation > cantonal prosecutor > courts).<sup>63</sup> It would also be interesting in this connection to conduct research into relations between organizations, their procedures and the quality results they achieve.

### 4.2 Use of Special Categories of Court Members

*Specialist lay judges:* so far there has been very little research into the benefits of using specialist lay judges and what impact their use has, if any, on the quality of adjudication.

*Part-time judges:* so far there has been very little research into the benefits of using part-time judges as far as the quality of adjudication is concerned.

*Single judges:* there is a growing trend towards using a single judge rather than a panel of judges. There is a lack of knowledge as to the effects of using only one judge, in particular with regard to the consistency of judicial decisions. Clarification is also needed as to whether and, if so, to what extent efficiency can be increased by using only one judge.

*Law clerks:* a large portion of the workload of the courts is handled by law clerks.<sup>64</sup> This gives rise to various legal and administrative questions relating to the organization and division of work, and also to the question of the optimum ratio of law clerks to judges.

### 4.3 Dealing with Different Rationales

*Hybridisation of rationales:* it would be interesting in a longitudinal comparison to demonstrate how the hybridization of bureaucracy and management rationales revealed in this study will develop.

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<sup>61</sup> <http://www.iacajournal.org> (Status: 01.03.2017).

<sup>62</sup> [www.courtexcellence.com/](http://www.courtexcellence.com/) (Status: 01.03.2017).

<sup>63</sup> As an example, see the Swiss criminal justice chain as described by KETTIGER/LIENHARD (2016), p. 53 f.

<sup>64</sup> See BIERI (2016).

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*Educational research into persons working in the court system:* persons working in the judiciary find themselves facing not only different rationales (worlds), but also special professional requirements. This raises the question of what minimum qualifications this requires and what significance this has for the basic and continuing professional education and training of court staff.

#### **4.4 Quality and the Question of Its Measurability**

*Legitimacy through figures:* more detailed research would be required into the reasons for the proven high level of trust in figures as a basis for legitimacy.

*Performance measurement and assessment:* the question of whether and if so how the performance of the courts and of their staff can be measured and assessed has only been covered to a limited extent. Whereas certain ideas on quantitative indicators exist, there is a lack of clarity, in particular as to what key elements comprise a “good judgment” in qualitative terms.

*Effects of various approaches to quality assurance and development:* there are virtually no comparative academic studies into the effectiveness of quality assurance and quality development systems; in particular in the judiciary. A study could be conceived that compares the effectiveness of management approaches and “soft” approaches to improving quality.

#### **4.5 Justice and Its Interdependencies with Other Systems**

*Effects of judicial activity on the economy and society:* little is yet known about the relationship between court management and good justice on the one hand and economic and social development on the other. This field of research poses special challenges, both with regard to data sources and with regard to methodology.

*The judiciary and the legal profession:* both the job profile for court staff and the job profile for lawyers are undergoing change. In Switzerland, little research to date has examined the interaction between the legal profession and court staff. From the point of view of quality, the level of acceptance of the judiciary by the legal profession is of interest. Taking a broader view of court management, it could be interesting to examine whether a general increase in quality and efficiency could be achieved by better organizing interactive processes, for example with regard to eJustice.

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