

Sinergia research project CRSII1_136243

Basic Research into Court Management in Switzerland

Scientific report

1 May 2012 – 30 April 2016

13 June 2016

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1. Overall project overview

Prof. Dr. Andreas Lienhard / Mag. rer. publ. Daniel Kettiger
University of Bern, Center of Competence for Public Management (CCPM)

The Sinergia research project „Basic Research into Court Management in Switzerland“ started on 1 May 2012 and was successfully finished on 30 April 2016. In total, 12 dissertations and two studies were running within the project. These are only two dissertations less than originally planned, despite the financial cut. This was possible due to substantial university funds, particularly of the University of Bern, as well as third-party funds. Five dissertations have been completed by now;¹ three of them are already published.² One research study will not be submitted as a dissertation.³ The six remaining dissertations and the two studies will presumably be completed by the end of 2016.⁴ The details regarding the status and results of the research work of the five subprojects and the cross-sectional project as well as the dissertations and studies will be described in chapters 2 to 7. To begin with, an overview of the development and the activities of the overall project and the project leaders is given.

During the project duration, several coordination meetings and workshops took place at the University of Bern (22 June 2012, 25 October 2012, 25 April 2013, 6 February 2014, 5 February 2015, 19 June 2015, 11 December 2015); another coordination conference took place at the Swiss Federal Supreme Court in Lucerne (11 June 2014). The meetings were organised by the Center of Competence for Public Management (CCPM). Most of them were attended by PhD students, researchers, subproject leaders as well as members of the academic board of the project; some of them were held amongst subproject leaders only. These meetings were essential in order to facilitate the coordination of the empirical research work among the researchers, to benefit from the multidisciplinary of the project, to share knowledge and experiences between researchers and practitioners and to discuss the status of the research work as well as research results of the subprojects. In addition, they allowed settling administrative matters.

The international networking (coordination group for international networking and connections K2) was primarily guaranteed by a new Permanent Study Group XVIII „Justice and Court Administration“ of the European Group for Public Administration (EGPA). The study group, which has been initiated during this research project, is co-chaired by Andreas Lienhard, Daniel Kettiger, Philip Langbroek and Marco Fabri (IRSIG-CNR Bologna). The study group and its network function as a multi-disciplinary exchange and discussion platform and as an incubator for international cooperation in research related to the functioning of courts and other organisations and institutions in the justice field.⁵ During the project, the study group held four meetings at the EGPA annual conferences (5-7 September 2012 in Bergen, Norway; 11-13 September 2013 in Edinburgh, Scotland; 10-12 September 2014 in Speyer, Germany; and 26-28 August 2015 in Toulouse, France). At each conference, 15-20 papers related to different topics of court management were presented, amongst them case management, caseload and caseflow management, performance measurement, quality management or media and ICT. More than 30 participants from different European countries, the United States of America, and Australia actively participated in each of the successful and intense conferences, amongst them practitioners as well as academics from different fields. Several researchers involved in this research project participated in the meetings and presented their results. The reports of the conferences were published in the “Schweizer Richterzeitung” by PhD students of the project.⁶ The EGPA

¹ Lorenzo DeSantis (SP5), Andreas Müller (SP2), Catherine Reiter (CP1), Christof Schwenkel (SP1), Sandra Taal (SP3).

² Lorenzo DeSantis (SP5), Catherine Reiter (CP1), Sandra Taal (SP3).

³ Nadine Küng (CP1).

⁴ Stephan Aerschmann (SP1), Peter Bieri (CP1), Lorenzo Egloff (SP5), Angela Eicher (SP4), Mirjam Frey Haesler (CP1), Philip Langbroek/Mirjam Westenberg (SP3), Anna Rüefli (SP4), Daniela Winkler (SP2).

⁵ For more information on the Study Group, please visit: www.ias-iisa.org/egpa/groups/permanent-study-groups/psg-xviii-justice-and-court-administration/.

⁶ Winkler, Daniela/ Eicher, Angela (2012); Müller, Andreas/ Schenkel, Christof (2013); Bieri, Peter/ De Santis, Lorenzo (2014); Eicher, Angela/ Schwenkel, Christof (2015).

Study Group will continue its annual meetings and network function.⁷ The fifth meeting is currently being organised and will take place at the 2016 EGPA annual conference in Utrecht, The Netherlands, from 24-26 August 2016.

As to the knowledge transfer within Switzerland (coordination group for knowledge transfer K3), in November 2013, the project leaders (Andreas Lienhard and Daniel Kettiger) presented the research project at the “Tag der Richterinnen und Richter” in Lucerne. Furthermore, together with a PhD student each from subproject 1 (Christof Schwenkel) and 4 (Angela Eicher) they presented insights into court management and first results of the research work within the framework of the “Lehrgang Judikative” of the Swiss Judge Academy of the University of Lucerne, in May 2014. In September 2014, Andreas Lienhard held a presentation on performance assessment in courts at the International Association for Court Administration (IACA) conference in Sydney, Australia. In October 2014, Daniel Kettiger attended the international conference „Modernization of the Criminal Justice Chain. The Importance of Trust, Cooperation and Human Capital” in Brussels as a discussant. A contribution is published in the conference book. During a meeting of the “Stiftung für die Weiterbildung schweizerischer Richterinnen und Richter” in February 2015, Andreas Lienhard held the presentation “Herausforderungen der Justizverwaltung in der Schweiz”, including a contribution by Angela Eicher. At the same meeting, Daniel Kettiger chaired a Workshop on „Interdependenzen zwischen Justizmanagement und Verfahrensrecht“.

In order to further guarantee the knowledge transfer to a wide public, the conference “Justiz zwischen Management und Rechtsstaat – Ergebnisse aus dem Forschungsprojekt ‘Grundlagen guten Justizmanagements in der Schweiz’” was successfully held on 13 November 2015 at the University of Bern. The conference was organised by the CCPM. In his keynote speech, Gilbert Kolly, President of the Swiss Federal Supreme Court, addressed current challenges in court administration. Thereafter, the researchers of each subproject presented their research findings, each presentation followed by a practical appraisal by a member of the academic board. The conference was concluded with a summary of the overall findings by the overall project leaders as well as a reflection and outlook by the president of the academic board. More than 100 participants attended the conference, amongst them many court presidents, court administrators, judges and court staff from Swiss courts.⁸

During the project several publications on court management were published (see publication list in chapter 8), many of them in the International Journal for Court Administration⁹. Moreover the project has led to the “Schriftenreihe zur Justizforschung”¹⁰, from which volume 1, 2, 4, 5 and 10 were already published. In addition, a few more volumes are in the pipeline, amongst them dissertations of the project. The fifth volume of the “Schriftenreihe zur Justizforschung” which was published in March 2016 is the final publication (German version) for the whole project. The publication contains a summary of the research work of each subproject (with contributions of all researchers involved in the project) as well as the overall findings of the project. The final publication in English respectively French is expected to be published in June 2016.

Furthermore, the project website (www.justizforschung.ch) was continuously updated with relevant information on the overall project as well as the subprojects. The website is also linked to an intranet which aimed at facilitating the coordination of research and exchange of information amongst the PhD students. The website contains also a bibliography on court management, which has over 1900 views to date.

Within different national and international frameworks, further research work in the field is under review or already initiated. As requested by most of the collaborators of the project, a research network will be established to facilitate permanence.

⁷ For the program 2015-2019 see www.iias-iisa.org/egpa/wp-content/uploads/program-2015-2019-Studygroup-Justice-and-Court-Administration_def.pdf.

⁸ For more information and the program see www.justizforschung.ch/index.php/homepage/schlusskonferenz.

⁹ Philip Langbroek is the managing editor of the journal.

¹⁰ Andreas Lienhard, Daniel Kettiger, Yves Emery and Philip Langbroek are members of the editorial board of the Schriftenreihe.

2. Subproject 1: Environment of Justice

Prof. Dr. Michele Luminati / Dr. Stefan Rieder
University of Lucerne / Interface Politikstudien Forschung Beratung

The goals of the first subproject were to elaborate a typology of Switzerland's subnational justice systems (1), to investigate reform debates in selected cantons (2), to provide an overview of the population's perception and acceptance of the judicial systems (3) and to investigate causes that explain the differences in the institutional arrangements and the development of subnational judicial systems as well as the diversity of the population's perception and acceptance of the judicial system (4).

The first part of the subproject mainly analysed the reports of the cantonal Supreme Courts from the 19th century until now. Due to financial cuts, this historical study couldn't explore all 26 Swiss cantons. In a first phase, the reports of the cantonal Supreme Court of Lucerne were examined in detail. In a second phase, the reports of the following cantonal Supreme Courts were taken into account with the aim of generalizing the outcomes: Aargau, Freiburg, Solothurn, Thurgau, Uri, Wallis, Zug and Zurich. The results show that the triumph of statistics in Europe at the turn of the 19th century in state bureaucracies also took hold of and had a long-term effect on the Swiss judicial system. The idea that the judiciary can be run better – i.e. more effectively and rationally – by using statistical information gradually spread throughout Switzerland from the 19th century onwards. Accordingly, figures were regarded as an important management instrument for a long time. In the course of the 20th century, however, a paradigm shift took place. The significance of statistics was increasingly questioned. They were no longer considered to provide an absolutely correct and true picture of legal reality and the informative value of the figures was increasingly qualified. Despite this, statistics on the judicial system have become indispensable and have recently experienced a genuine revival. This is due to reforms made to the judicial system following a management model, which are based on the workings of commercial enterprises and which have also infiltrated the judicial system under the heading of New Public Management. These reforms are all heavily based on quantitative objectives and therefore encourage the demand for figures and data.

In the second part of the subproject, the population's perception and more precisely the confidence in cantonal courts was investigated by conducting a quantitative survey with 3'400 persons in all cantons. The results show a mostly positive perception of the cantonal courts, but reveal significant differences between the 26 cantons. In order to explain confidence in courts, a framework consisting of 25 hypotheses in total was proposed, which considered institutionalist and culturalist independent variables (both on the macro- and the micro-level), which were tested in a multilevel analysis. Information about the institutionalist independent variables was provided through a detailed description of the subnational justice systems. The results show that only one factor at macro-level in relation to the institutional design of the cantonal judicial authorities has an influence on the dependent variable: the election procedure. In cantons where judges are elected by the people, the cantonal courts tend to be regarded as more independent from the political institutions than if the judges are appointed by parliament. Other examples of relevant factors explaining different levels of public confidence are the level of information about courts, detailed reporting in the media about irregularities in the cantonal judicial system and personal experience with cantonal courts.

The results of Subproject 1 have been presented at the Swiss Judicial Academy in May 2014 and the seminar "politics and the judiciary in Switzerland" at the University of Lucerne in November 2014. They have also been covered in several media as Tagesanzeiger, Der Bund, Neue Luzerner Zeitung, NZZ am Sonntag, Blick Online, Le Temps, Tribune de Genève, Corriere del Ticino and il Caffè.

3. Subproject 2: Resources of the Judiciary

*Prof. Dr. Andreas Lienhard / Mag. rer. publ. Daniel Kettiger
University of Bern, Center of Competence for Public Management (CCPM)*

The primary control parameter for resource management in courts is judges and court staff. Therefore, the competent handling of human resources and efficient processing of the workload are of utmost importance for courts. Against this background, subproject 2 focused on caseload management and involved two studies: 1) A legal science dissertation on the legal principles underlying caseload management in the Swiss judicial system, focusing on the legal consequences of the individual components of caseload management, and 2) an administrative science dissertation on the methodology of weighted caseload studies in courts in Switzerland, focusing on the empirical determination of case weights as a basis for caseload management. The (preliminary) findings of the studies were presented at the conference "Justiz zwischen Management und Rechtsstaat" in November 2015 and summarized in the overall publication on the research project.¹¹

Legal framework for caseload management in the Swiss judicial system (Andreas Müller)

The research question of the thesis can be formulated as follows: What are the constitutional and administrative law requirements for caseload management in the Swiss judicial system? In methodological terms, the study is of legal dogmatics and is a comparative analysis. Administrative science factors are also involved. The work defined the term "caseload management" as the management of the proceedings to be processed, and subdivided it into the three elements: the caseload study or analysis as the preliminary stage in ascertaining the case weights on the one hand, and management of resources and case allocation as actual management on the other (caseload management in the narrower sense). The constitutional requirements with regard to systematic caseload management are relatively relaxed. For example, nothing is expressly stated or implied about the legality of case weights. The strong foundations of federalism and the resulting heterogeneity of the Swiss judicial system pose certain obstacles. They obstruct efforts towards further organisational standardisation and make it difficult to conduct extensive caseload studies. The dissertation has been completed and is expected to be published in May 2016.

Methodology of weighted caseload studies for Swiss courts (Daniela Winkler)

The aim of the thesis is to 1) show what methods and instruments are there for ascertaining the workload in courts and for what purpose the values obtained are or were used, 2) identify the methodological success factors and challenges, 3) formulate a rational, credible and practicable method proposal for future objective weighted caseload studies in Swiss courts. The dissertation is based on a systematic literature and document analysis of reports and academic publications on workload studies and projects carried out in particular in Switzerland, the USA, Germany, the Netherlands and Austria as well as ten expert interviews with judges, administrative staff and academics from Switzerland, USA and the Netherlands. The preliminary findings of the thesis indicate that case weights can be obtained by measurement by means of time recording, by estimate based on a written survey or Delphi questionnaire or by a method combination; a method combination consisting of time recording and qualitative questioning for the purpose of validation is regarded as the optimum method, especially for larger courts. The draft of the dissertation, which was started only in February 2013, will be completed by the end of July 2016.

Within the framework of subproject 2, two additional dissertations with a direct link to the cross-sectional project on basic constitutional and political questions were being written: One dissertation deals with the supervision of the judiciary, the other one with the data protection of judges (see chapter 7). Due to the original and substantial financial cut, the development of a court workload database for Switzerland was not pursued within this project.

¹¹ Winkler, Daniela/ Müller, Andreas/ Lienhard, Andreas/ Kettiger, Daniel (2016): Ressourcen (Teilprojekt 2), in: Lienhard, Andreas/ Kettiger, Daniel (Hrsg.): Justiz zwischen Management und Rechtsstaat. Ergebnisse aus dem Forschungsprojekt "Grundlagen guten Justizmanagements in der Schweiz". Bern: Stämpfli, S. 57-76.

4. Subproject 3: Processes inside Courts

*Prof. Dr. Mandy van der Velde / Prof. Dr. Philip Langbroek
Utrecht University, The Netherlands*

Quality indicators and their operations in courts in a comparative empirical perspective (Prof. Dr. Philip Langbroek and Dr. Mirjam Westenberg)

During the past few years literature reviews and about 40 interviews were conducted, which have resulted in the following outcome. The first is, that developing and implanting standards for Total Quality Management in a judiciary or in Court administration is likely to become a failure from an organization development perspective as it does not respect the sense of deeply rooted professional autonomy that for judges is related to judicial independence. The standards of a remote council for the judiciary or a ministry of justice are unlikely to be accepted by judges. That does not mean at all that cooperation between a ministry and the courts is impossible. Measuring judicial performance is unlikely to be successful if it is used to only remotely influence the content of judicial work. Soft approaches, where judges are stimulated to take responsibility for the quality of their work are much more likely to succeed. They can also be considered to be part of ongoing quality development for many aspects of the work of the courts, and for judges and court clerks alike – integrity and impartiality, juridical quality, hearing performance, productivity, social media and so on.

From an analytical perspective it may be defensible to conclude that there is a tension between professional, managerial and political rationalities. Sometimes political ratio takes the upper hand, as recently in Geneva and in 2000-2002 in the Netherlands. The message of this study however, is that these tensions can be reconciled if professional judicial autonomy is overtly respected by court administrators and by politicians. This means that measuring judicial performance by others than judicial authorities will be counterproductive. Stimulating and trusting judges taking responsibility for the quality of their work is likely to get much more support and to be more effective than efforts for performance measurement and control.

The findings of the study have been presented at various conferences and meetings (EGPA, IACA, CEPEJ, Justiz zwischen Management und Rechtsstaat). The results of the study are to be published in the Schriftreihe zur Justizforschung in the summer of 2016. The delays in publication have been caused by management responsibilities taken on by Prof. Dr. Langbroek since January 2012 in his faculty. Further publications (articles) are expected later in 2016 and 2017.

Enhancing efficiency and consistency of case management and judging in an international comparative perspective (Sandra Taal, Prof. Dr. Mandy van der Velde, Prof. Dr. Philip Langbroek)

Referring to studies on consistency of case law, Sandra Taal has focused her research on the necessary precondition for consistency of case law, that is the willingness of judges to cooperate and share skills and information. Knowledge sharing is a subject in organisation psychology, and knowledge sharing behavior has never been researched in judiciaries before, let alone in an international comparative perspective. For her research she developed a questionnaire and a research model, based on other researches into knowledge sharing. The research took administrative judges as a research subject in Germany, the Netherlands and Switzerland. The current literature on knowledge sharing was reviewed and four categories of knowledge sharing enablers (technological, managerial, social and motivational enablers), one knowledge sharing barrier (role overload) and one knowledge sharing outcome (overall job performance) were identified.

The findings suggest that professional administrative law judges are relatively active knowledge sharers. A group comparison between the three countries showed that this is true for judges in Switzerland, Germany and the Netherlands. When comparing the three countries, the respondents also scored rather similar on the other variables included in the research model. A multiple regression analysis showed that the social and motivational enablers accounted for the largest share of variance in knowledge sharing. Amongst the knowledge sharing enablers, social trust and social network were clearly the most salient predictor variables of knowledge sharing. ICT support, management support and professional image lost their predictive

power when other variables were included in the regression analysis. Despite some minor differences between the three countries, the overall picture appeared to be similar.

From a theoretical perspective, the results suggest that the category of social knowledge sharing enablers are the most salient predictors of knowledge sharing. However, the managerial enabler – management support – is not significantly related to knowledge sharing. This result indicates that, although management support has shown to be a relevant knowledge sharing enabler in other contexts, in the judicial context the social enablers are far more relevant. Among the social enablers, social trust is the most salient factor. The results suggest that trusting each other is more important than the belief that one’s participation in knowledge exchanges is beneficial for that person’s professional image.

From a practical perspective, the study results provide an initial clue about how court organizations can facilitate and stimulate collegial knowledge sharing in the future. First, the findings of this study convincingly show that ICT support is not significantly related to knowledge sharing. Therefore, the credentials given to knowledge management systems, such as Wiki’s or Intranets, are to be reconsidered. On the basis of the findings, it is suggested that building more advanced ICT systems should not be the first step to stimulate collegial knowledge sharing in court organizations. Instead, the social components of knowledge sharing should be dealt with first.

The results of the study have been published in several articles and presented at various conferences (EGPA, CEPEJ, Justiz zwischen Management und Rechtsstaat). The PhD thesis of Sandra Taal on “Working separately together: A quantitative study into the knowledge sharing behaviour of judges” has been published in the Schriftenreihe zur Justizforschung and will be defended on 24 June 2016.

5. Subproject 4: Court Organisation

Prof. Dr. Kuno Schedler / Prof. Dr. Benjamin Schindler
 University of St. Gallen

Courts in the conflict between multiple rationales (Angela Eicher)

Research Question	Method & Data Sources	Results
<i>Which central developments currently characterize the working environment of Swiss courts?</i>	<i>10 narrative interviews</i> , with court members of distinct courts in the German speaking area of Switzerland.	Courts are facing increasing, sometimes even contradicting expectations from their environment concerning their organization and management, which are connected to distinct logics.
	Analytical Strategy <i>Qualitative Content Analysis</i> (Mayring, 2000: 59 ff.) The findings served as a bases for the elaboration of the further research questions.	
<i>What kinds of logics exist within the studied court with regard to court management?</i> <i>How are these logics characterized?</i>	<i>Case study</i> with a district court in the German speaking area of Switzerland: 39 interviews with different court actors of the district court and 7 interviews with members of its higher court.	To some degree these logics increasingly also become depicted within the courts, were 3 different logics have been found to co-exist with respect the CM: a management logic, a judicial logic, and a bureaucratic logic.
	Analytical Strategy <i>Directed Qualitative Content Analysis</i> (Hsieh & Shannon, 2005)	
<i>Which practices do find application to handle situations in</i>	<i>Case study</i> : 46 interviews, 9 hours non-participant observation in internal meetings at the examined court, two focus	Courts face multiple situations in which they face institutional complexity and thus have to deal with contradicting logics. Both, in their internal, as well

<i>which the interviewed court members simultaneously face multiple, contradictory logics?</i>	groups with the court management, 4 verification interviews.	as in their external relations. Not all complexity forms, though bear the same potential for conflicts. Generally, conflicts are more likely to occur in relation with external actors, since the variety as well as the heterogeneity of logics is higher, than between the distinct internal logics. Depending on the form of complexity, a court and its members apply several instruments, such as boundary spanning, activation of hybrid professionals or forming strategic alliances to cope with the challenges associated with institutional complexity.
	Analytical Strategy	
	<i>Grounded Theory Approach</i> (Strauss & Corbin, 1996; Charmaz, 2006)	

Deviations from the research plan: Due to the massive amount of data, it took more time to systematically and carefully analyse it. In addition, we needed some extra time to discuss the results with the court. We are currently still in negotiations about which citations we are allowed to use in the dissertation. Because of these two reasons the dissertation took more time than expected to finish. The dissertation will be handed in at the latest on the 31th of July 2016.

Important events: Final discussion in April or May 2016 with the court management with regard to the use of the distinct citations.

Specialist lay judges and related constitutional conflicts (Anna Rüefli)

Research Questions	Method & Data Sources	Results
<p><i>What are the characteristics of the «Fachrichter/-innen»?</i></p> <p><i>What are the legislative reasons for the participation of «Fachrichter/-innen»?</i></p> <p><i>What are the typical rights and duties of «Fachrichter/-innen»?</i></p>	analysis of literature, case law as well as the federal and the cantonal legislation on court organisation with specific reference to eight courts (Kantonsgericht Luzern, Kindes- und Erwachsenenschutzgericht Bern, Familiengerichte Aargau, Verwaltungsrekurskommission St. Gallen, Verwaltungsgericht Waadt, Bundespatentgericht, Handelsgericht Zürich, Jugendgericht Basel-Stadt)	<p>«Fachrichter/-innen» are judges who provide knowledge of a discipline other than law and who have a specific expertise appropriate to the court or tribunal concerned.</p> <p>With the participation of «Fachrichter/-innen» the legislator tries to enhance the effectiveness, the efficiency and the legitimacy of jurisdiction.</p> <p>In general, «Fachrichter/-innen» have the same rights and duties as the other judges in court. Because of their special knowledge other than law they usually play an important role in the procedure of taking evidence.</p>
<p><i>What kind of conflicts of constitutional principles can amount from the participation of «Fachrichter/-innen» in Swiss courts?</i></p>		<p>The possibility of staffing panels with qualified technical experts from a given field ensures that these panels are highly competent and able to provide the parties with judgments that will be accepted and form the basis for compromise solutions. However, the effectiveness of the participation of «Fachrichter/-innen» can get into a conflict with the principle of jurisdictional independence. This conflict is also emphasized in the case law of the European Court of Human Rights. The Court regularly holds that «lay assessors, who have special knowledge and experience in the relevant field, contribute to a court’s understanding of the issues before it and appear in principle to be highly qualified in the adjudication of disputes. [...] In particular cases, however, the assessors’ independence and impartiality may be open to doubt.»</p> <p>Other conflicts are related to the way the «Fachrichter/-innen» are appointed (conflict with the jurisdictional independence and the principle of general eligibility), are designated as members of the panels (conflict with the right to be heard by a tribunal established by law) or participate in the procedure of taking evidence (conflict with the right of a fair hearing).</p>

Deviations form the research plan: Anna Rüefli joined the project at the beginning of August 2012 working on a part-time (50%) basis. Due to the thematic coordination with the cross-sectional project on basic constitutional and political questions (especially with Catherine Reiter, UZH), a thematic readjustment became necessary at the end of 2012. Because of these three reasons (delayed start, working on a part-time basis and thematic readjustment), the dissertation is not yet finished. The dissertation will be handed in at the latest in the end of 2016.

6. Subproject 5: Cultural Aspects of the Judiciary

Prof. Dr. Yves Emery

Swiss Graduate School of Public Administration (IDHEAP)

The Issue

Since the reforms of 1999, Swiss justice has launched initiatives linked to the managerial repertoire and try to better integrate the expectations of its stakeholders. These strategies consider judicial systems as “public services”, but do not contest the fundamental principle of the third power, stating that judges are constitutionally independent and must be able to work freely, without external pressure. This part of the global Justizforschung-project (TP5) analyses this question from the perspective of the judiciary’s culture, in order to evaluate the extent it already does or does not include the values put forward by managerial approaches. The main research question is therefore: “how receptive is the judiciary’s culture to managerial approaches, and in particular to management-oriented values?” In comparison with other public organizations, the judiciary seems to be rather reluctant to adopt managerial reforms, a situation which may result from cultural resistances, in particular from judges.

The methodology

The methodology adopted in this project is a combination of a qualitative part based on more than 80 interviews with stakeholders (judges, court managers, politicians, lawyers, journalists, clerks, prosecutors, administrative staff, non-professional judges, and academic) in first and second instance courts in civil, administrative and criminal tribunals of nine cantons¹² in the three linguistic regions of the country; and a quantitative part made of a large survey in the same cantons by the same actors. Using a statistical analysis, we compare the key expectations associated with the idea of “good justice”, as well as the perceptions of reality as experienced in the courts by several stakeholders of the Swiss judiciary and discuss them using the worlds of Boltanski and Thévenot.

The results (for first and second instance courts, similar results for the Supreme Court available at the end of 2016)

The values and expectations of the different stakeholders appeared relatively convergent and consistent with those of NPM (i.e. managerial values) after the qualitative analysis of the interviews performed previously. For instance, the two most quoted expectations by our interviewees (including judges) when defining “good justice” were *fast* and *communicative*, which are compatible with NPM principles. Nevertheless, some resistance to managerial ideas and values was already noticed during the interview phase, especially when it comes to judges, who basically argue that management instruments are not suited to the judiciary.

“Good justice” is, according to our exploratory factor analysis of the quantitative results (which account for approximately 51% of the variance): 1) a *“reliable partner”*: respects the professional secrecy, courteous and respectful of the litigants, credible, respectful of equal treatment between litigants, trustworthy, considers the litigants’ point of view seriously; 2) *“integrated in society, serves the citizens”*: humane and close to the people, a service for the public, receptive, communicative (media, public), lay judges also render judgements; 3) *“accessible and effective”*: simple and pragmatic, fast, understandable (decisions), transparent and open to society, effective to repair the damage; 4) *“impact-oriented”*: severe (in the sanctions),

¹² The French-speaking cantons (Geneva, Vaud, Neuchâtel, Fribourg, Valais, and Jura) are the core of the analysis while the German-speaking ones (Schaffhausen and Luzern) and the Italian region (Ticino) are used for comparisons.

intimidating, effective to prevent recidivism (criminal), not too expensive for the taxpayer (% of state budget); 5) *“competent, well equipped and functional”*: has enough staff, well equipped (infrastructure), has competent staff, efficient and well organized; 6) *“free from any pressure, fair”*: impartial, independent, not arbitrary, not corrupted.

All these factors are hybrid and mobilize values emanating from different worlds according to Bolstanski & Thévenot. Nevertheless, the most important factors from the point of view of judges (and also, even less predominantly, for other stakeholders), i.e. factors 1) and 6), reflect the civic world, which is also still the most relevant in the Swiss Judiciary. Moreover, the cultural “Röstigraben” (i.e. gulf, split) observed between German-speaking and French-speaking regions of the country in other fields of public management does not seem to be present in the judiciary, as the observed significant differences.

The factors’ misfits (i.e. the difference between expectations and perceptions) are predominantly high when it comes to items related to managerial values, indicating that improvements are most wanted in this domain. The misfits perceived by judges is smaller than for the other actors, because judges are always more satisfied than the other actors of the judiciary.

The conclusions

Overall, our results suggest that Swiss courts, like other branches of government, will probably take the path of a certain hybridization, or even of a fusion between “good governance” and “good justice”, revealing a post-bureaucratic culture tending to integrate managerial values and classic-bureaucratic ones without fundamentally challenging the managerial approach but suggesting a tailor-made model to the judicial institution.

7. Cross-sectional project: Basic constitutional and political questions

Prof. Dr. Regina Kiener / Prof. Dr. Giovanni Biaggini
University of Zurich

The cross-sectional project “Key issues of public law and policy” commenced according to plan. Four researchers participated, based partly in Zürich (Küng, Reiter) and partly in Bern (Bieri, Frey Haesler). Owing to the autonomous nature of the four sub-projects, this report does not provide an overall summary, but rather four individual project round-ups.

Processing personal data about judges (Peter Bieri)

Based on an analysis of jurisdiction, doctrine, the legal bases (e.g. the ECHR, the Federal Constitution, the Federal Act on Data Protection and the applicable cantonal law) and other relevant documentation (e.g. courts’ annual reports) a detailed research plan for the dissertation was drawn up in 2012. The objective of the project is to devise recommendations for processing data about judges from a human rights standpoint, taking account of the constitutional requirements. An empirical survey was carried out at the four federal and all the higher cantonal courts in June 2013. This study served to describe the degree to which personal data is utilised within the Swiss judicial system today. In addition, an online survey of judges was conducted from April until June 2014. The goal of this survey was to identify the opinions of judges with regard to the collection and use of judge-related statistics. A first draft of the thesis was finished in June 2015. The final version will be submitted for evaluation by the end of May 2016. Publication will follow in the second half of 2016. Furthermore, two articles, which are linked to the thesis, were written during research.

Supervision of the judiciary (Mirjam Frey Haesler)

The thesis on the supervision of the judiciary will be submitted to the supervisors for examination. The aim of the dissertation is an illustration of the different authorities who supervise the judiciary or are supervised, of the instruments and objects of supervision as well as of different types of supervision at federal and, exemplarily, on cantonal level in Switzerland. The main question is how far supervision of the judiciary can and must go in order to be in accordance with international, federal and also cantonal law. Results can be

shown in each of the three organisational areas of supervision (objects, authorities and instruments of supervision). One of the main results is that the dissertation regards the current re-election process on federal level as a considerable risk to judicial independence. As judges depend on being nominated by their political parties, there is a risk of not being re-elected if a judge has attracted attention while in office by making decisions that go against the political majority. The dissertation also concludes that the mechanisms of judicial management as well as the certification of courts can help to increase the public's trust in the judiciary and the proper functioning of the courts.

Internal court organisation: best practices (Catherine Reiter)

The sub-project "Internal court organisation: best practices", in its first year, analysed the legal bases of the heterogeneous organisation of courts of Switzerland. In its second year, these legal bases were benchmarked against the parameters and requirements constitutional and international law prescribe for court organisation. Based on this comparative analysis guided by constitutional and international law a catalogue of 70 criteria for best practices was developed in year three of the project. A summary of this work is contained in Catherine Reiter's dissertation "Gerichtsinterne Organisation: Best Practices" (Zurich 2015). In particular, the catalogue of criteria can assist legislators and those applying the law when balancing, e.g., requirements of efficiency with the essential demand for judicial independence. The thesis, which was awarded the highest honors (summa cum laude), was presented at the conference "Justiz zwischen Management und Rechtsstaat" ("The judiciary between management and the rule of law") on November 13th 2015. Furthermore, Federal Judge Thomas Stadelmann reviewed the dissertation in the journal "Justice – Justiz – Giustizia" (issue 2016/1).

Selection and qualifications of judges (Nadine Küng)

Research on the topic "Selection and qualifications of judges" commenced on October 1st 2012 and came to an end on January 31st 2015. The questions explored were which professional and personal requirements the Federal Constitution and the law in force prescribe for judges and how selection procedures are regulated. These questions had, so far, not been investigated. Research centred on comparison of the relevant cantonal regulations. Besides analysing the legal bases pertaining to the selection and qualifications of judges in international law, the Federal Constitution and federal as well as cantonal law, account was taken of the relevant literature, jurisprudence and legislative procedure documentation. Informal interviews were conducted with mandate holders for a better understanding, particularly of the different cantonal arrangements for selection – the latter being regulated by law only rudimentarily, if at all. Originally, the research was to be submitted as a dissertation. This has been refrained from in agreement with the supervisors of this sub-project and the overall cross-sectional project management in spring 2015. The overall project management received an exposition of the research findings including all interpretative documentation in November 2015. The findings are summarised in the volume "Justiz zwischen Management und Rechtsstaat" (ed. A. Lienhard / D. Kettiger, Bern 2016).

8. Publications (Research Output)

1st project year

- Eicher, Angela/ Schedler, Kuno (2012): Management Responses to Multiple Rationalities in Courts – A Review. *The International Journal for Court Administration, Special Issue, December 2012*, 20-34.
- Eicher, Angela/ Schedler, Kuno (2012): Multiple Rationalitäten in Gerichten – eine neue Managementtherausforderung. *IMPacts, Ausgabe 03. Juni 2012*.
- Kettiger, Daniel (2013): Zur Gehaltseinreihung von Richterinnen und Richtern: Anmerkungen zu BGE 138 I 321, in: *Justice – Justiz – Giustizia, 2013/1*.
- Langbroek, Philip/ Zimmer, Markus/ Lienhard, Andreas/ Fabri, Marco/ Palma, Luis/ Kettiger, Daniel (2012): The EGPA Studygroup on Justice and Court Administration: European Cooperation in Court Administration Studies, in: *International Journal for Court Administration (IJCA), Editorial, Special Issue, December 2012*.
- Lienhard, Andreas (2013): Stand des Justizmanagements in der Schweiz. In: *Public Governance – Entwicklungen und Herausforderungen. Jubiläumsschrift zum 10-jährigen Bestehen des KPM. KPM-Schriftenreihe Nr. 50*.
- Lienhard, Andreas/ Kettiger, Daniel (2012): Forschungsprojekt "Grundlagen guten Justizmanagements in der Schweiz" gestartet, in: *Justice – Justiz – Giustizia, 2012/2*.
- Lienhard, Andreas/ Kettiger, Daniel/ Winkler, Daniela (2012): Status of Court Management in Switzerland, *The International Journal for Court Administration, Special Issue, December 2012*, 41-67.
- Lienhard, Andreas/ Kettiger, Daniel/ Winkler, Daniela (2013): Stand des Justizmanagements in der Schweiz, in: *Justice – Justiz – Giustizia, 2013/1*.
- Lienhard, Andreas/ Palma, Luis Maria (2013): Court Administration in a Time of Changes - IACA's First Conference in Latin America – The Importance of Research, in: *International Journal for Court Administration (IJCA), Editorial, February 2013*.
- Rüfli, Anna (2013): Spezialisierung an Gerichten, in: *Justice – Justiz – Giustizia, 2013/2*.
- Winkler, Daniela (2012): IACA Konferenz, 13. – 15. Juni 2012, Den Haag, in: *Justice – Justiz – Giustizia, 2012/4*.
- Winkler, Daniela/ Eicher, Angela (2012): Bericht über die EGPA Jahrestagung 2012: Study Group "Justice and Court Administration", in: *Justice – Justiz – Giustizia, 2012/4*.
- Winkler, Daniela/ Lienhard, Andreas/ Kettiger, Daniel (2013): Neue Schriftenreihe zur Justizforschung, in: *Justice – Justiz – Giustizia, 2013/4*.

2nd project year

- Bieri, Peter (2014): Die Gerichte der Schweiz - eine Übersicht, in: *Justice – Justiz – Giustizia, 2014/2*.
- Bieri, Peter/ De Santis, Lorenzo (2014): Bericht über die EGPA Jahreskonferenz 2014: Study Group "Justice and Court Administration", in: *Justice – Justiz – Giustizia, 2014/4*.
- Bieri, Peter/ De Santis, Lorenzo (2014): Resconto della Conferenza EGPA 2014: Gruppo di lavoro permanente XVIII "Amministrazione della giustizia e dei tribunali", in: *Justice – Justiz – Giustizia, 2014/4*.
- Kettiger, Daniel (2014): Braucht es Pikettgerichte?, in: *Justice – Justiz – Giustizia, 2014/3*.
- Kettiger, Daniel (2014): Die Schlichtungsbehörde im Kanton Bern als Erfolgsmodell?, in: *Justice – Justiz – Giustizia, 2014/3*.
- Lienhard, Andreas (2014): 7. Konferenz der International Association for Court Administration (IACA) in Sydney, in: *Justice – Justiz – Giustizia, 2014/4*.

- Lienhard, Andreas/ Kettiger, Daniel/ Winkler, Daniela (2013): Stand des Justizmanagements in der Schweiz, Schriftenreihe zur Justizforschung, Band 1, Bern: Stämpfli Verlag AG (German version of the publication in IJCA special issue of December 2012).
- Müller, Andreas/ Schwenkel, Christof (2013): Bericht über die EGPA Jahrestagung 2013: Study Group "Justice and Court Administration", in: Justice – Justiz – Giustizia, 2013/4.
- Müller, Patrick M. (2014): Geschäftslastbewirtschaftung mittels Lastenkennziffer. Erfahrungen am Verwaltungsgericht des Kantons Luzern, in: Justice – Justiz – Giustizia, 2014/2.
- Schwenkel, Christof/ Rieder, Stefan (2014): Die Wahrnehmung der Justiz durch die Bevölkerung. Resultate einer Bevölkerungsbefragung in 26 Kantonen, in: Justice – Justiz – Giustizia, 2014/1.

3rd project year

- Eicher, Angela/ Schwenkel, Christof (2015): Bericht über die EGPA Jahreskonferenz 2015 in Toulouse: Permanent Study Group "Justice and Court Administration", in: Justice – Justiz – Giustizia, 2015/4.
- Emery, Yves/ De Santis, Lorenzo Gennaro (2014): What Kind of Justice Today? Expectations of 'Good Justice', Convergences And Divergences Between Managerial And Judicial Actors And How They Fit Within Management-Oriented Values, in: International Journal for Court Administration (IJCA), June 2014.
- Lienhard, Andreas (2014): Leistungsbeurteilung in der Justiz, in: Stadelmann, Thomas/ Gass, Stephan/ McCombe, Richard (Hrsg.), Richterliche Unabhängigkeit und Leistungsbeurteilung, Die Beurteilung richterlicher Tätigkeit im Spannungsverhältnis zur richterlichen Unabhängigkeit im europäischen Vergleich: Dike Verlag.
- Lienhard, Andreas (2014): Performance Assessment in Courts – The Swiss Case, Constitutional appraisal and thoughts as to its organisation, in: International Journal for Court Administration (IJCA), Vol. 6 No. 2.
- Lienhard, Andreas/ Kettiger, Daniel (2015): Justizforschung – Nationalfondsprojekt auf der Zielgerade, in: Justice – Justiz – Giustizia, 2015/3.
- Lienhard, Andreas/ Kettiger, Daniel/ Winkler, Daniela (2014): Ein Justizforschungsprojekt liefert erste Erkenntnisse zum Stand in der Schweiz, in: Schweizerische Gesellschaft für Verwaltungswissenschaften SGVW (Mai).
- Schwenkel, Christof (2014): Confidence in Alternative Dispute Resolution: Experience from Switzerland, in: International Journal for Court Administration (IJCA), June 2014.
- Taal, Sandra (2014): Understanding Knowledge Sharing between Judges: A Quantitative Analysis, in: Recht der Werkelijkheid, 50-55.
- Taal, Sandra/ van der Velde, Mandy/ Langbroek, Philip (2014): Reducing Unwarranted Disparities: The Challenge Of Managing Knowledge Sharing Between Judges, in: International Journal for Court Administration (IJCA), December 2014.

4th project year

- Aerschmann, Stephan/ Schwenkel, Christof/ Rieder, Stefan/ Luminati, Michele (2016): Umfeld (Teilprojekt 1), in: Lienhard, Andreas/ Kettiger, Daniel (Hrsg.): Justiz zwischen Management und Rechtsstaat. Ergebnisse aus dem Forschungsprojekt "Grundlagen guten Justizmanagements in der Schweiz". Schriftenreihe zur Justizforschung, Band 5, Bern: Stämpfli, 35-55.
- Biaggini, Giovanni/ Kiener, Regina/ Reiter, Catherine/ Küng, Nadine/ Bieri, Peter/ Frey Haesler, Mirjam (2016). Staatsrechtliche und staatspolitische Grundfragen (Querschnittsprojekt), in: Lienhard, Andreas/ Kettiger, Daniel (Hrsg.): Justiz zwischen Management und Rechtsstaat. Ergebnisse aus dem Forschungsprojekt "Grundlagen guten Justizmanagements in der Schweiz". Schriftenreihe zur Justizforschung, Band 5, Bern: Stämpfli, 13-34.

- Bieri, Peter (2016): Law Clerks In Switzerland – A Solution To Cope With The Caseload?, in: International Journal for Court Administration (IJCA), Vol. 7, No. 2.
- Bucher Patrick M. (2015): Das Fachrichtervotum im Zivilprozessrecht und in der Verwaltungsrechtspflege. Eine Analyse der Gerichtspraxis unter besonderer Berücksichtigung der Wahrung des Anspruchs auf rechtliches Gehör, in: Justice – Justiz – Giustizia, 2015/4.
- De Santis, Lorenzo G. (2015): Une justice plus commerciale qu'industrielle? Comparaison des attentes d'une "bonne justice" en Suisse, in: Canadian Journal of Law and Society / Revue Canadienne Droit et Société, September 2015.
- De Santis, Lorenzo G./ Emery, Yves (2015). Court managers and judges about "good" justice: Their main expectations and how they fit with the perceptions of the Swiss population., in Emery, Yves/ De Santis, Lorenzo G./ Hertig, Vera (Eds.), Peut-on manager la justice? Bern: Stämpfli-Verlag.
- De Santis, Lorenzo G./ Emery, Yves (2016). La culture judiciaire suisse comme nouveau territoire du NPM: quelle(s) ouverture(s) des juges aux valeurs managériales? in: Pyun, Hae-Ok/ Edey Gamassou, Claire (Hrsg.) Réformes publiques: expériences et enseignements. Paris: L'Harmattan, 23-64.
- De Santis, Lorenzo G./ Emery, Yves (2016). Comparing Stakeholders' Expectations of "Good Justice" in Switzerland: Towards a "Hybrid" Judicial Culture, in: Justice System Journal, May 2016.
- De Santis, Lorenzo G./ Emery, Yves/ Egloff, Lorenzo (2016): Kultur (Teilprojekt 5), in: Lienhard, Andreas/ Kettiger, Daniel (Hrsg.): Justiz zwischen Management und Rechtsstaat. Ergebnisse aus dem Forschungsprojekt "Grundlagen guten Justizmanagements in der Schweiz". Schriftenreihe zur Justizforschung, Band 5, Bern: Stämpfli, 129-160.
- Eicher, Angela/ Rüefli, Anna/ Schedler, Kuno/ Schindler, Benjamin (2016): Organisation (Teilprojekt 4), in: Lienhard, Andreas/ Kettiger, Daniel (Hrsg.): Justiz zwischen Management und Rechtsstaat. Ergebnisse aus dem Forschungsprojekt "Grundlagen guten Justizmanagements in der Schweiz". Schriftenreihe zur Justizforschung, Band 5, Bern: Stämpfli, 103-128.
- Emery, Yves/ De Santis, Lorenzo G./ Hertig, Vera (2015). Peut-on manager la justice? Kann man die Justiz managen? Can we manage the judiciary? Schriftenreihe zur Justizforschung, Band 2, Bern: Stämpfli.
- Kettiger, Daniel/ Lienhard, Andreas (2016): The Position of the Public Prosecution Service in the New Swiss Criminal Justice Chain, in: Honddeghem, Annie/ Rousseaux, Xavier/ Schoenaers, Frédéric (Hrsg.), Modernization of the Criminal Justice Chain and the Judicial System. Cham: Springer.
- Lienhard, Andreas/ Kettiger, Daniel (Hrsg.) (2016): Justiz zwischen Management und Rechtsstaat. Ergebnisse aus dem Forschungsprojekt "Grundlagen guten Justizmanagements in der Schweiz". Schriftenreihe zur Justizforschung, Band 5, Bern: Stämpfli (the English and French version of the book will be published in June 2016).
- Lienhard, Andreas/ Kettiger, Daniel/ Winkler, Daniela/ Uster, Hanspeter (2015): Combining A Weighted Caseload Study With An Organizational Analysis In Courts: First Experiences With A New Methodological Approach In Switzerland, in: International Journal for Court Administration (IJCA), July 2015.
- Lienhard, Andreas/Kettiger, Daniel (2016): Grundlagen guten Justizmanagements in der Schweiz: Erkenntnisse aus dem Nationalfondsprojekt, in: Justice – Justiz – Giustizia, 2016/1.
- Marti, Arnold (2016): Schweizer Justizforschung - grosser Sprung nach vorn und neue Fragen, in: Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht (ZBI), 1/2016.
- Mosimann, Hans-Jakob (2016): Rezension: Peut-on manager la justice? Kann man die Justiz managen? Can we manage the Judiciary?, in: Justice – Justiz – Giustizia, 2016/1.
- Müller, Andreas (2016): Rechtlicher Rahmen für die Geschäftslastbewirtschaftung in der schweizerischen Justiz. Stand – Vergleich – Folgerungen. Bern: Stämpfli.
- Müller, Patrick M. (2016): Geschäftslastbewirtschaftung quo vadis?, in: Justice – Justiz – Giustizia, 2016/1.
- Reiter, Catherine (2015): Gerichtsinterne Organisation: Best Practices, Diss. Zürich: Schulthess Verlag.
- Schindler, Benjamin (2016): Richterliche Unabhängigkeit in kleinräumigen Verhältnissen, in: Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht (ZBI), 117/2016.

- Stadelmann, Thomas (2016): Rezension: Gerichtsinterne Organisation: Best Practices, in: Justice – Justiz – Giustizia, 2016/1.
- Taal, Sandra (2016): Working separately together. A quantitative study into the knowledge sharing behaviour of judges. Bern: Stämpfli.
- Taal, Sandra/ van der Velde, Mandy/ Langbroek, Philip (2016). Do Male and Female Judges Differ in the Influence of Social Capital on Knowledge Sharing? In: International Journal of Knowledge Management.
- Taal, Sandra/ Westenberg, Mirjam/ Langbroek, Philip/ van der Velde, Mandy (2016): Prozesse (Teilprojekt 3), in: Lienhard, Andreas/ Kettiger, Daniel (Hrsg.): Justiz zwischen Management und Rechtsstaat. Ergebnisse aus dem Forschungsprojekt "Grundlagen guten Justizmanagements in der Schweiz". Schriftenreihe zur Justizforschung, Band 5, Bern: Stämpfli, 77-101.
- Winkler, Daniela/ Müller, Andreas/ Lienhard, Andreas/ Kettiger, Daniel (2016): Ressourcen (Teilprojekt 2), in: Lienhard, Andreas/ Kettiger, Daniel (Hrsg.): Justiz zwischen Management und Rechtsstaat. Ergebnisse aus dem Forschungsprojekt "Grundlagen guten Justizmanagements in der Schweiz". Schriftenreihe zur Justizforschung, Band 5, Bern: Stämpfli, 57-76.

Media coverage

- Felber, Markus (2014): Alles, was Recht ist - Ein Röstigraben in der helvetischen Justiz. In: NZZ am Sonntag, 08.06.2014.
- Fischer, Sylvie (2015): Richter fordern besseres Management. In: Plädoyer, 02/2015, 30.03.2015.
- Hasler, Thomas (2016): Gerichte leisten eine gute Arbeit. In: Tagesanzeiger, 19.02.2016.
- Häuptli, Lukas (2014): Wo das Volk den Richtern misstraut. In: NZZ am Sonntag, 16.03.2014, p. 12.
- Parvex, Marie (2014): Les Valaisans ont peu confiance en leur justice. In: Le Temps, 04.08.2014.
- Rechsteiner, Rolf (2014): Gerichte geniessen hohes Vertrauen. In: Appenzeller Volksfreund, 20.03.2014.
- Studer, Guy (2016): Angekratztes Image der Obwaldner Justiz. In: Neue Luzerner Zeitung, 07.03.2016.