

Sinergia research project CRSII1_136243

Basic Research into Court Management in Switzerland

Scientific report of the first project year
1 May 2012 – 30 April 2013

10 June 2013

Content

1 Overall project overview.....	2
2 Subproject 1: Environment of Justice.....	3
3 Subproject 2: Resources of the Judiciary.....	4
4 Subproject 3: Processes inside Courts.....	5
5 Subproject 4: Court Organisation.....	6
6 Subproject 5: Cultural Aspects of the Judiciary.....	8
7 Cross-sectional project: Basic constitutional and political questions.....	9
8 Publications.....	10

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“ has started as planned on 1 May 2012 and has made good progress during the first project year. In total, despite the financial cuts 11 dissertations are currently being written and 2 studies are running within the project. The details regarding the status of the research work of the five sub-projects and the cross-sectional project as well as the relevant dissertations and studies will be described in chapters 2 to 7. First of all though, an overview of the development and the activities of the overall project and the project leaders is given.

During the first project year, two doctoral seminars of the research project have taken place in Bern (25 October 2012 and 25 April 2013). These workshops were essential in order to facilitate the coordination of the empirical research work among the researchers. Furthermore, they created a platform to benefit from the multidisciplinary of the project. They also provided an opportunity to present and discuss methodological issues as well as questions concerning theory and preliminary results of the empirical research. In parallel to the first PhD seminar, the subproject leaders together with the overall project management held a coordination workshop. The second doctoral seminar was attended by the subproject leaders as well as by several members of the academic board. This composition of the meeting proved to be highly valuable. In addition, at the beginning of the project the academic board and the project leaders met for a separate meeting in Bern (22 June 2012). For the second project year, two more thematic coordination workshops including everyone involved in the project are planned.

To get the research project underway, in May 2012 the Centre of Competence for Public Management (CCPM) of the University of Bern, as the project's leading house, conducted a survey of the cantonal appeal courts for criminal, civil and administrative matters as well as the federal courts on the status of court management. The aim of the study was to get an overview of the status of court management in Switzerland, based on selected elements of court management. The findings of the survey were presented at the European Group for Public Administration (EGPA) annual conference in September 2013 in Bergen, Norway, and have been published in the peer-reviewed special edition of the International Journal for Court Administration (IJCA).¹ The findings of the study will be subject of further research work within the project.

Several additional articles on court management have been published within the first project year (see publication list in chapter 8). Furthermore, the project leaders established a project website (see www.justizforschung.ch) which contains relevant and up-to-date information on the overall project as well as the subprojects. The website is linked to an intranet that can be accessed by everyone involved in the project. The intranet aims at facilitating the coordination of research and exchange of information amongst the PhD students.

As a result of the research project, the Permanent Study Group XVIII „Justice and Court Administration“ of the European Group for Public Administration (EGPA) has been established. In addition to connections to the European Commission for the Efficiency of Justice (CEPEJ), the international networking (coordination group for international networking and connections K2) is primarily guaranteed by this newly established study group. The study group is chaired

¹ 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.

by Prof. Dr. Andreas Lienhard, Daniel Kettiger, Prof. Dr. Philip Langbroek and Dr. Marco Fabri (IRSIG-CNR Bologna) and offers an international and multidisciplinary platform to discuss justice administration policies and justice administration projects related to the functioning of courts and public prosecution agencies, and to other organizations and institutions in the justice field. The aim is to explore common ground for cooperation and exchange in Europe in the justice field.²

The study group held its first meeting at the annual EGPA Conference in Bergen, Norway, from 5 to 7 September 2012. 18 papers on issues such as legal perspectives, justice administration, politics and society as well as the management of courts were presented at the conference. More than 30 participants from different European countries and Australia actively participated in the successful conference, amongst them practitioners as well as academics from different fields. Several persons involved in the research project also participated in the meeting. The second meeting of the study group is currently being organised and will take place at the annual EGPA conference in Edinburgh, Scotland, from 11-13 September 2013.

Moreover, within the framework of the research project, the project leaders participated in the fifth international conference of the International Association for Court Administration (IACA) which was held from 13 to 15 June in The Hague, The Netherlands. The program of the conference on "The Challenge of Developing and Maintaining Strong and Just Courts in an Era of Uncertainty" contained many insightful presentations on practice and experience from different countries around the world.

As to the knowledge transfer within Switzerland (coordination group for knowledge transfer K3), a conference is scheduled for June 2014 in collaboration with the Swiss Judge Academy of the University of Lucerne. In this regard, preliminary conceptual work has been done during the first project year.

2 Subproject 1: Environment of Justice

Prof. Dr. Michele Luminati / Dr. Stefan Rieder

University of Lucerne / Interface Politikstudien Forschung Beratung

In the historical part of subproject I, extensive research was carried out in the Swiss National Library and in various archives. This research allowed us to obtain useful information about the available source materials. To provide more detailed knowledge on the current state of research, we also did systematic research in academic literature (especially „Bibliographie der Schweizergeschichte BSG“ 1913-2012 and „Schweizerische Rechtsbibliographie SRB“ 1851-2012). Furthermore, we did some exploratory analysis, which made it possible to define the leading question and the methodological approach more precisely. As a result of that work, we can now better distinguish the following three ideal-typical levels of investigation: the description of the development of the cantonal court organisations in terms of an institutional history (a), an analysis of the reform debates in the cantons (b) and an analysis of the relations between the organisation of the justice with other systems (c). Resulting from the exploratory analysis we can furthermore say that the historical part of subproject I will be mainly based on Foucault's concept of discourse and dispositive. Due to financial cuts, the historical study cannot investigate all 26 Swiss cantons. Therefore the investigation will restrict the analysis of some cantons, which are different regarding their legal traditions and their structural conditions (especially urban-rural, size and language). Besides the mentioned

² For more information on the Study Group see http://www.ias-iisa.org/egpa/e/study_groups/justice/Pages/default.aspx.

criteria the current state of research as well as the available source material were important for the selection. For Lucerne – one of the selected cantons – we have already detailed results about the development of the court organisation in the 19th and 20th century. For this period of time we can also portray reform debates, which are negotiated in the juridical and in the public field.

Theoretical and empirical progress has been also made concerning the research on the public perception of judicial systems. On the theoretical base of neo-institutionalist approaches, we assume that institutional arrangements of the cantonal justice systems influence trust in the courts. In a first step, a model containing 5 independent variables on an institutional level has been developed with the aim to explain differences in public trust in courts in the Swiss cantons (the independent variables are: direct election of judges, importance of lay judges, centralisation of courts, importance of conciliation and development of court management). In a second step, a matrix of all 26 cantons was set up to classify the cantons according to those institutional differences. Easton's system-theoretic approaches are used as a basis to describe the concept of trust as a component of diffuse support and to operationalize the dependent variable (public trust into cantonal courts). With regard to the concept of the dependent variable and a set of individual independent variables (e.g. contact with courts, trust in other institutions, participation in an election of judges) a questionnaire was developed and used in an online-survey with 3'484 persons. To enable us to make comparisons between all 26 cantons, in each canton a minimum of 100 persons have been selected. The data of the survey is available since April 2013. First analysis indicate that institutional variables have at most a limited effect on public trust and that neither the participation in an election of judges, nor contacts with a court contribute to higher levels of public trust in the cantonal courts. For the EGPA conference in September 2013 a paper will be prepared that uses data from the survey and investigates public trust in alternative dispute resolution with a focus on the cantonal conciliation authorities.

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)*

Currently, two studies concerning the topic of workload and caseload management as the core theme of this subproject are being conducted. One of the studies is focusing on the general legal conditions regarding the establishment of caseload management in the judiciary. The second study deals with the methodology of workload studies. Due to financial cuts, the development of a court workload database will not directly be part of this project anymore. However, the subproject leaders intend to apply for funding from another institution in order to nevertheless be able to develop such a database.

To the thesis on the juridical framework regarding caseload management (Andreas Müller)

The dissertation has passed the stage of concept designing in December 2012. Currently, Andreas Müller develops the basic part of his thesis, in which he particularly considers the relevant legal norms in the Federal Constitution in the context of caseload management. Additionally, he is working out some definitions of terms. Target by the end of 2013 is furthermore to have a draft of the comparative part of the study.

To the study on methodological issues concerning caseload studies (Daniela Winkler)

Work on this study has started at the beginning of February 2013. Within the remaining three months of the first project year a detailed research design has been developed. The dissertation will focus on the identification or rather development of an ideal method in order to measure the workload of the judiciary in an empirically valid and objective way. Also, the effects of caseload studies on the daily work of judicial bodies will be explored. Currently, existing literature on caseload studies and their methodology is being analysed. A detailed description and categorisation of methodological approaches used so far is likely to be carried out by the end of 2013.

Within the framework of subproject 2, two additional dissertations with a direct link to the cross-sectional project on basic constitutional and political questions (see chapter 7) are being written. One dissertation deals with the supervision of the judiciary, the other with the data protection of judges.

To the thesis on supervision of justice (Mirjam Frey Haesler)

The first and second part of the dissertation on the terminology and the constitutional legal basis of the supervision of the judiciary are already written. Currently, the organization of the supervision of the judiciary on federal and on cantonal level is being analyzed. The aim of the thesis is an illustration of the different supervising and supervised authorities, of the instruments and objects of the supervision as well as of types of supervision at the federal and cantonal level in Switzerland. The main question of the PhD is, how far the supervision of the judiciary can and must go in order to be in accordance with the federal and cantonal law.

To the thesis on data protection of judges (Peter Bieri)

Based on an analysis of the jurisdiction, the 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 documents (newspaper articles or annual reports of courts) the detailed research plan of the dissertation has been realized in 2012. An empirical survey at the four federal and at all the higher cantonal courts has been carried out in June 2013. This study shall describe today's state of the utilisation of personal data in the Swiss judicial system.

4 Subproject 3: Processes inside Courts

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

Summary of first year progress

During the first part of the year the focus was on reviewing the relevant literature concerning the main topics of the thesis: coordination, consistency in judicial decision-making, quality management in the court and general court processes. In addition, attention has been given to the organization of the legal systems in the four selected countries: Austria, Germany (focus: North Rhine-Westphalia), the Netherlands and Switzerland. In this stage of reviewing the literature, the concept of knowledge sharing has become an important element in the research. Here, knowledge sharing is considered a means to stimulate coordinated action among judges to reduce arbitrary divergence in the application and interpretation of the law. As a result, a research model has been developed to see which factors are expected to influence the knowledge sharing between judges in the administrative court sector. Several

factors have been operationalized to be included in the questionnaire. The research model will soon be empirically tested in the selected countries using this questionnaire.

In order to be able to set out the questionnaire in the various countries, initial contacts have been made with persons at the administrative courts. In the Netherlands, a formal procedure to gain access to the courts is almost finished. In Switzerland, access to the courts will be part of a cooperative effort with other PhD candidates. In North Rhine-Westphalia and Austria, the management of the courts have been personally approached and have promised cooperation after the questionnaire has been transmitted.

Several interviews have been conducted in the Netherlands (1), Norway (1), Austria (1) and Switzerland (2) which have helped to gain more practical insights in how judges cooperate and coordinate their work. These interviews have served as an input for the research model and the questionnaire. Also, several presentations have been given to receive feedback from PhD candidates and other researchers in the field. The feedback has served as a method to fine-tune the aim of the research. In addition, an abstract has been handed in for the EGPA conference in Edinburgh from 11-13 September 2013 (study group: Justice and Court Administration). During this conference the eventual research model will be presented. Currently the questionnaire for judges of administrative courts in Austria, Germany, Switzerland and the Netherlands is being developed.

In so far the research is well on schedule.

For the next year we expect the questionnaire to be ready for use, and the data gathered by April 2014. After that the data will be analysed and the analysis will be the basis for the final report in 2015.

Other Utrecht projects in SNF Sinergia Court Management in Switzerland (subproject 'processes inside courts')

It has proven most difficult to find candidates for the other research subjects in Processes inside courts. From a scientific point of view we cannot report. However we have been in touch with a researcher (Mirjam Westenberg), who is interested in the subject of quality management in courts and who may be willing to write a report for us starting September 1, 2013. Much depends on agreement on her working conditions.

5 Subproject 4: Court Organisation

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

Scientific part of Prof. Dr. Kuno Schedler and Angela Eicher

During the first phase of our SNF subproject 4 *organisation and management* the main milestones have successfully been achieved. At the beginning we have conducted an extensive literature review, which aimed at giving a concise overview of the phenomenon under study (multiple rationalities within courts³). In addition, we sought to draw a nexus between the research fields of court management and New Institutionalism, since the latter provides important insights for the former. Even though some research already exists which implicitly points to the presence of multiple rationalities in courts, we found that it has not yet been an explicit research topic. Besides, almost all studies stem from the USA and are in general

³ For further information see: Eicher, A. & Schedler, K. (2012). Management Responses to Multiple Rationalities in Courts – A Review. *The International Journal for Court Administration, Special Issue*, 20-34.

rather outdated. Nevertheless, we identified two research streams which somehow pointed to this phenomenon. The first stream of research implicitly focuses on multirationality by analysing the perceptions, attitudes, and relationships of different court actors. Local legal culture is the second stream, which refers to the presence of competing values within courts.

To share both the insights from the literature review and the results of our conceptual work we have submitted a paper to the EGPA conference in Bergen in September 2012. In December our paper has then also been published in the peer reviewed International Journal for Court Administration.

Based on the literature review and our conceptual work, we further elaborated our research questions and developed a concrete research design. The research design consists of two empirical stages. In the first stage, which aims to derive hypothesis about the co-existence of multiple rationalities within courts, we plan to conduct an ethnographical field study. The goal of the second stage is to test these hypotheses with a survey.

Currently, we are finishing the preparation for starting our empirical investigations; i.e. a request has been sent to the district court of Zurich (Bezirksgericht Zürich). If everything works as expected, the first research stage will be finished around January 2014. At the beginning of 2014 we will start the second part of our empirical investigation. The final analysis of our empirical study is planned to be finished in summer 2014.

Scientific part of Prof. Dr. Benjamin Schindler and Anna Rüefli

Anna Rüefli joined the project at the beginning of August 2012 working on a part-time (50%) basis. During August and September 2012 the literature review was started and two informal interviews were held with the secretary generals of two Swiss courts (each respectively with Angela Eicher, UNISG). Due to the thematic coordination with the cross-sectional project on basic constitutional and political questions (especially with the team of the UZH), a thematic readjustment was necessary. The dissertation now envisaged will focus on an analysis of Swiss courts with (non-jurist) judges who provide knowledge of a science other than law and who have a specific expertise appropriate to the (specialist) court or tribunal concerned (so called "Fachgerichte"). Literature, federal and cantonal legislation and case law are being analysed and several example courts will be chosen in order to examine and outline specific case studies. For the second edition of the Richterzeitung (Justice – Justiz – Giustizia 2/2013, published in May 2013) an article on the phenomenon of judicial specialization in Switzerland was written ("Spezialisierung an Gerichten"). The article focused on the following questions: What is the landscape of judicial specialization in Switzerland? What forms of specialization of and within courts do exist? What is the rationale behind judicial specialization? What possible opportunities and risks are associated with judicial specialization? Given the priority of the different functions of the court system – depending on the position of a court in the stages of appeal, on its control power and the process law concerned – some general statements could be made with respect to the (non-)desirability of a (stronger) judicial specialization. Finally, there are good prospects that a law student will join the team in order to write her master thesis on a topic related to the TP 4

6 Subproject 5: Cultural Aspects of the Judiciary

Prof. Dr. Yves Emery

Swiss Graduate School of Public Administration (IDHEAP)

During the first phase of this research, based on an inductive methodology, the research team has conducted interviews with the main stakeholders of the judiciary in Switzerland, in order to analyse: (1) the main role expectations confronting judges and courts, (2) the characteristics that define “good justice” and “good judges”, (3) the extent to which a plurality of role expectations may or may not facilitate or impede justice, (4) the needs of judges and the quality of management that judges think will facilitate their work. Two doctoral theses are presently conducted: the first one is focused on the regional and cantonal level (1st and 2nd instances) in the French part of Switzerland, whereas the second one deals with the federal court (3rd instance).

To the first thesis (Lorenzo de Santis)

72 interviews in 7 cantons (VD, VS, NE, FR, JU, TI, LU⁴) in three national languages (French, Italian, German) have been conducted. The sample comprises: 25 professional judges, 2 non-professional judges, 11 judicial clerks, 9 court managers, 2 secretaries, 4 general attorneys, 7 politicians from 5 different political parties, 5 lawyers, 6 journalists and 1 university professor. The selected judges work in different types of courts (administrative, civil, and criminal) and different instances (1st and 2nd, in order to maximise the diversity of opinions) and have various degrees of responsibility in terms of the tribunal’s administration (ranging from 100% legal activity to 80% administrative duties). The collected data will be analysed according to the main objectives presented above.

To the second thesis (Lorenzo Egloff)

A document analysis (historical, legal, internal notes) has been realised in order to study the context and main modernisation initiatives implemented within the Swiss federal court. 9 interviews (6 judges, 2 court managers, 1 judicial clerk) in the three national languages and an in-depth analysis of the CV’s of federal judges have been carried out. An active participation in an internal seminar for court managers completed the set of recent activities. These data gave the opportunity to present a first scientific contribution to a doctoral seminar at IDHEAP.

Participation to a national survey by the Swiss citizen

The team could also participate in a national survey headed by TP1 (who studies the different cantonal justice systems from a historical and political point of view) and asked Swiss citizens to identify whether a set of proposed values were in line with their perception of justice and how they generally evaluate justice throughout the country.

The results of this study will be crosschecked with the first findings of the interviews and will be the base of first scientific contributions to be presented in various congresses and seminars.

The second phase of the research, based on a quantitative methodology, will give the opportunity to evaluate on a broader basis the main expectations directed to the Judiciary in Switzerland. This phase will start during the first semester of 2014.

⁴ Another canton is still to be selected in the German part of Switzerland.

7 Cross-sectional project: Basic constitutional and political questions

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

Nadine Küng – „Selection and qualification of judges“

Preface: The kick-off of the cross-sectional project „Basic constitutional and political questions“ as well as my research „Selection and qualification of judges“ in this field occurred slightly delayed. However, the main kick-off took place in May 2012 I started my research in October 2012. Between the two coordination meetings in Bern in May this year, I had the opportunity to participate in the International Meeting („Richterliche Unabhängigkeit und Leistungsbeurteilung“) of the Swiss Association of Judges in St. Gallen.

Current state of research: During the past few months, I was mainly involved in the literature review and analysed the case material with the aim of developing a detailed research plan. Moreover, I analysed the legal foundations of the selection and election of judges in the Swiss Cantons as well as on the federal level. The structure of my doctoral thesis is planned to be split in four parts:

- I. Assignment and status of judges
- II. Qualification of judges
- III. Selection and election of judges
- IV. Swiss system in a comparative law analysis.

Based on the fact that in many first instance courts lay judges are raised to the bench, the idea of expanding the research question on clerks came up. Often their participation plays an important role in the return of a verdict. How this subject will be introduced in my doctoral thesis is still to be decided. Furthermore, I have not definitively decided yet which countries will be considered for the comparative law analysis. So far, Germany, France, England, the Netherlands and the United States are taken into consideration.

Schedule: Adhering to timeline, I plan to finish my detailed research plan in June this year, in order to start with a first draft of doctoral thesis in July 2013.

Catherine Reiter – „Best practices of court internal organisation“

Preface: This sub-project was taken up on 1 September 2012 with a delay of a few months.

Current state of research: Therefore, the sub-project's prime focus in 2012 was to identify its exact scope and content. It will focus on the internal organization (structure and processes) of courts as entities rather than the judiciary as a whole. The applicable constitutional and international legal framework will provide the formal and material requirements for court organizations and thus the sub-project's basis (first part of the sub-project's research). The formal requirements relate to the distribution of competencies to enact laws and regulations on court organization etc., while the material requirements provide the boundaries for the content of such laws and regulations. The next part will concentrate on the requirements' relationships (complementary or contradictory). In a following step, best practice criteria for court organizations will be developed. Once these criteria are identified, certain practices will be evaluated (fourth part). Such practices will consist of laws (including customary laws) and regulations on court organization. Finally, it will be discussed whether defining best practice criteria really facilitates comparing the various practices of court organization. First findings of this research may only be published at a later stage, as the various practices will be evaluated towards the end of the sub-project's timeline.

Schedule: The sub-project leader currently works on identifying the formal and material requirements for court organizations. This part of her work will presumably be concluded by the end of 2013. It is planned that the thesis shall be finished in summer 2014.

8 Publications

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.

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/ Winkler, Daniela (2013): Stand des Justizmanagements in der Schweiz, in: "Justice - Justiz - Giustizia" 2013/1.

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 (2012): Forschungsprojekt "Grundlagen guten Justizmanagements in der Schweiz" gestartet, in: "Justice - Justiz - Giustizia" 2012/2.

Rüefli, 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.