Research Plan on „Basic constitutional and political questions“

Cross-sectional project Nr. 1 of the Project “Basic Research on Court Management in Switzerland”

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1. Current state of research in the field

Managerial models of court management concern the judiciary as the third power of the State, and thus relate to a core area of state activity. The management of courts, therefore, is subject to numerous regulatory standards and constraints. Court management must make allowance for the particular societal functions of the judiciary (protection of individual rights, maintenance of legal peace, implementation of decisions taken by the legislator (constitution-makers))[1], as well as for the specific working method[2] associated with the process of adjudication and the resultant formative influence, in professional terms, on the judiciary members[3]. In a constitutional democracy the management of the judiciary is incorporated into a dense normative structure: the constitutional and national policy framework is defined by the Federal Constitution (and, in federally organized states like Switzerland, by the constitutions of the respective constituent states). Minimal standards are prescribed by international law, notably the right of the litigating parties to a fair trial as provided for in Art. 6 para. 1 ECHR and Art. 14 para. 1 ICCPR. These normative standards are concretized by the procedural laws, which in part also set out broad outlines of the judicial organization[4]. At cantonal level one finds corresponding provisions in the procedural laws on administrative judicature[5], as well as in the laws on judicial organization[6].

1 See Rhinow et al. (2010), at 21-24.
2 Müller-Graff/Roth (2000); Weimar (1996).
3 Guarnieri/Pederzoli (2002).
4 For the Federation, cf. the Federal Acts on the Swiss Federal Supreme Court (BGG; SR 173.110), on the Federal Administrative Court (VGG; SR 173.32), on the Federal Criminal Court (SGG; SR 173.71), on the Federal Patent Court (PatGG; SR 173.41), as well as, since 1.11.2011 the Swiss Code of Civil Procedure (ZPO; SR 272) and the Swiss Code of Criminal Procedure (StPO; SR 312). See in these regards the commentaries of Niggli et al. (2008) and Donzallaz (2008); for the Federal Act on the Federal Administrative Court, see Moser/Beusch/Kneubühler (2008).
5 E.g M. Müller (2008); Griffel/Jaag (2010).
6 E.g. Court Constitution Act of the Canton of Zurich (GVG-ZH, LS 211.1).

Moreover, the upper federal and cantonal courts are to enact, at least in selective instances and within the limits of delegated legislative competence, rules on issues concerning judicial organization, which are binding for the court management[7].

Basic issues of constitutional and public international law with respect to aspects of judicial organization crucial for the management of courts have either not been explored at all, or not in sufficient depth. Concerning basic questions relating to the administration of courts[8], judicial functions[9] and the method of adjudication, as well as to the international legal standards of judicial independence[10], one may refer to relevant international legal research. This, however, is not the case with respect to the elaboration of basic principles of the Swiss judicial organization in the field of court management. The requisite research findings are directly related to specific Swiss characteristics of the democratic principle, which in the context of judicial organization involve a number of particularities that, in part, are unparalleled in international comparison. So far, Swiss academic research has dealt with those particularities only in general terms and without regard to the matter of court management[11]. As examples, one may mention the considerable leverage of political parties in connection with the selection and election of judges[12]; the low formal criteria of eligibility for judgeship[13]; the election of judges for a limited term and the subsequent requirement to stand for re-election; the important role of the federal and cantonal parliaments with respect to the election and dismissal of judges, as well as to the supervision; lastly, the special position of law clerks in the Swiss judicial system[14]. Also, court management entails new problems which have barely been scrutinized in academic writings. This is particularly the case regarding the problem of data protection for data collected in the context of court management. Where the judges´ or law clerks´ administration of office is at issue, this data is of particular relevance in terms of privacy, and they may only be processed in accordance with the rule of law[15].

The basic principles worked out in the cross-sectional project “Key Questions of Constitutional and National Policy” serve to fill this gap. Thematically, the project is closely related to various sub-projects (SP 1 – 5). The objective is to ascertain the normative framework of steps taken in the context of court management via selected research questions, and on that basis elaborate a “best practice” of court management.

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7 G. Müller (1986); Ursprung/Riedi Hunold (2008), Art. 13 and 15.
8 Haller (2010); Wittreck (2006); Maier (1999); Eichenberger (1986).
9 Guarnieri/Pederzoli (2002); Shetreet/Deschênes (1985); Hoppe/Krawietz/Schulte (1992); Tschentscher (2006); see also Biaggini (2001b), with further references.
10 Grabenwarter (2009), at 328-379; Nowak (2005), at 302-357.
11 Kälin/Rothmayr (2006), at 178 and at 186-192; Kiener (2001a), at 267-276.
12 Kälin/Rothmayr (2006), at 183-186.
13 Fischbacher (2006), at 272-276.
14 Uebersax (2008), Art. 24.
15 See Müller/Schefer (2008), at 164-182.

2. Current state of own research

Both applicants have a long-standing academic focus on constitutional and national policy questions concerning the judiciary. They have done research on the methodology of judicial law-application and law-making[16]; the guarantee of judicial independence[17]; the guarantee of a constitutional judge in the sense of Art. 30 para. 1 Federal Constitution[18]; the court constitution on cantonal level[19]; the supervision of the judiciary[20]; the election of judges[21]; the legitimacy of the judge[22]; constitutional jurisdiction and judicial norm control[23]; the differentiation of administrative jurisdiction[24]; judicial self-administration[25]; and on the dismissal, non-reelection and evaluation of judges[26]. The applicants have published on these subjects and, to this end, have drawn on insights from comparative law. They have concerned themselves thoroughly with issues of procedural law (incl. procedural guarantees)[27], and they are experienced with the supervision of doctoral and professorial theses in the field of the present project. Moreover, the applicants have worked as experts on issues of the law of court constitution at cantonal, national and international level.

3. Detailed research plan

3.1. Overall objectives and methodology

In the context of the research project, four doctoral theses will be written which deal with basic constitutional and international law issues associated with judicial organization and bearing a close relation to the matter of court management. There is considerable need for further research in the following fields: selection of judges and judicial staff (3.2); supervision of the judiciary (3.3); internal organizational structures of the judiciary (3.4); as well as data protection in the context of court management (3.5). The findings from these research projects will be drawn together in a synthesizing monograph and evaluated by the two applicants with a view to the underlying research questions of the main (sinergia-) project.

Methodology: the object of the doctoral theses is the analysis of those provisions of constitutional and international law which constitute the normative framework for acts of the court management, including the corresponding judgments and decisions of national and interna-

16 Biaggini (1991); Biaggini (2001a), Biaggini (2001b); Biaggini (2006b); Biaggini (2009a).
17 Kiener (2001a); Kiener (2010c); Kiener (2008a), Art. 6.
18 Kiener (2007).
19 Zimmerli/Kiener (1995).
20 Kiener (1997).
21 Kiener (2008a), Art. 6; Kiener (2002); Kiener, (2001b); Kiener/Grunder (2010); Kiener/Schaller (2008).
22 Biaggini/Bianchi (2002).
23 Biaggini (2006a); Biaggini (1991); Biaggini (in Vorbereitung).
24 Kiener (2004).
25 Uhlmann/Kiener (2010).
26 Kiener et al. (2008a); Kiener et al. (2008b); Kiener (2000).
27 Biaggini (2008a); Biaggini/Haag (2008), Art. 23; Biaggini (2007b), Art. 29-32; Biaggini (2007a); Kiener/Krüsi (2010), Kiener (2010a); Kiener (2010b), Kiener/Kuhn (2009); Kiener (2008b), Kiener/Kuhn (2006); Kiener (2005), Zimmerli/Kälin/Kiener (2004).

tional (quasi-)judicial bodies (Federal Supreme Court, ECtHR, UN Human Rights Committee) and the relevant literature. The body of norms and the relevant practice are analysed and reflected upon with a view to the research questions underlying the respective research projects. Depending on the research question, the projects may adopt a comparative law method. For example, organizational models such as Judicial Councils are to be examined for their suitability for a “best practice”. Judicial Councils are in place in Southern Europe, but also in the reform countries of Central and Eastern Europe[28]. In Switzerland, there is no judicial council at federal level and only a few cantons have established such bodies[29].

The Synthesis examines if, and to what extent, the introduction or increased usage of court management models signifies an impairment of the legal framework defined by constitutional and international law. To this end, the insights from the doctoral theses are analysed from the perspective of the actors engaged with court management (legislator; parliament; government / administration; judiciary). Based on the main results and analysis, we will be able to evaluate the legal framework of modernization strategies in the justice system (findings *de lege lata*) and to make propositions for modernization strategies that we consider as mandatory for legislators and other bodies involved in court management in order to fulfil their constitutional duties with regard to judicial independence (findings *de lege ferenda*).

3.2. Selection and Qualification of Judges

The quality of the judiciary correlates directly with the qualification of judges, which in turn, at least in part, is linked up with the specifics of the election procedure, the actors involved therein and the standards defined by them. In the Swiss judicial system, judges are elected by parliament or by popular vote, with candidates for the bench commonly endorsed by a political party[30]. There is no self-recruiting system for judges[31] and judicial councils only play a subordinate role. To complete the picture, the formal criteria of appointment for judges are modest, as democratic legitimacy is still considered more important than professionalism, at least by the formal requirements set up by the constituent power[32]. As a consequence, district courts may be composed entirely of non-professional lay judges, the court clerks being the only educated jurists taking part in the law-finding process[33]. There is no formal training required (or offered) for appointed judges before they take the bench[34]. Considering this background, the sub-project „selection and qualification of judges“ examines the question

28 See Tschirky (2010), with further references.
29 Coillard (2009); Peila (2009); Moritz (2009); Tuoni (2009); Zappelli (2009); Zappelli (2008), at 94-98.
30 See Kälin/Rothmayr (2006), at 183-186; Kiener (2001a), at 269; Biaggini (2007b), Art. 188 (13); Raselli (2006).
31 Zappelli (1999), at 332; Kiener (2001a), at 260.
32 Kiener (2010c), at 7-8; Kälin/Rothmayr (2006), at 178; Kiener (2001a), at 263-264; Kiener (2008a), Art. 5 (23); Zappelli (1999), at 329.
33 Kälin/Rothmayr (2006), at 178; as for lay judges see Ludewig-Kedmi/Angehrn (2008).
34 Kiener (2010c), at 10; European Commission for the Efficiency of (2008), at 181; Zappelli (2008), at 92.

which professional and personal qualifications constitutional and statute law stipulate for the members of the judiciary (*de lege lata*), or – with a view to a “best practice” of quality management – which requirements ought to be laid down in said law (*de lege ferenda*). The object of research are, *inter alia*, the actors involved in the selection procedure, the legal and factual preconditions with respect to the training of federal and cantonal judges as well as, in the context of the selection procedure, to “best practices” in procedural issues (e.g. public announcement of open seats), and, lastly, the continuing possibility in Switzerland to serve as judge extraofficially or in an honorary capacity. From a comparative legal perspective, one may think of examining the system of training at judicial academies, or the – in Switzerland yet unknown – election of judges on a probationary basis, as provided for by statute in Germany[35].

3.3. Supervision of courts and judges

Courts do not operate in a vacuum. In Switzerland, as a rule, the parliaments exercise superintendence (Oberaufsicht) over the judiciary[36], whereas the supervision over the courts of first instance is administrated either by higher courts[37] or by judicial councils, provided that such bodies exist[38]. Neither the legislative nor the executive branch has the power to overrule judicial decisions or to interfere with judicial proceedings, as superintendence is restricted to the formal administration of justice and clearly does not refer to adjudication as such[39]. However, the fact that judges in Switzerland are elected for a limited term of office after which they need to be re-elected poses a certain threat to judicial independence, and even more so if the election body is also vested with the power of supervision[40]. Given the need for the judges to stand for re-election, the political parties also play a role – albeit of a mere informal nature – in the context of the parliament’s supervisory function.

Accordingly, the particular focus of the research project lies on the tension between the supervision of the judiciary, on the one hand, and judicial independence, judicial self-administration and the separation of powers, on the other hand. Here, the way to proceed must also be to define first the constitutional and international legal framework. Subsequently, the guidelines of best practice for court management and court controlling are defined within said framework. A comparative legal analysis also commends itself in this con-

35 German Judiciary Act (BGBl. I S. 713) §§ 12 and 13.

36 For the federal courts see Article 169 section 1 BV; for an overview see Tobler (2002b), at 7690-7726; Béguelin/Hess/Schwab (2002), at 7625-7640. See also Mastronardi (2008), Art. 169; Tobler (2002a), at 13; Seiler (2000).

37 For the Federation see Article 15 section 1 subsection a BGG, Article 3 SGG (Federal Criminal Court), Article 3 VGG (Federal Administrative Court), and Aufsichtsreglement des Bundesgerichts vom 11. September 2006 (AufRBGer) (Federal Supreme Court Regulation on the Supervision of Courts of First Instance) 11 September 2006, SR 173.110.132.

38 Zappelli (2004), at 492.

39 Article 26 section 4 BG über die Bundesversammlung (Federal Act on the Federal Assembly) (ParlG; SR 171.10); see Kiener (2001a), at 299-300; Mastronardi (2008), Art. 169 (20).

40 Kiener (2001a), at 285-289 and at 257-258.

text, e.g. with the USA, from where corresponding methods originate[41]. In addition, the question of the suitability/appropriateness of Judicial Councils needs to be examined in regard to the issue of supervision of the judiciary.

3.4. Judicial Organization

A characteristic feature of the Swiss legal system is the very diverse, indeed heterogeneous judicial landscape with courts varying greatly in type and size. Besides small (local) district courts (*Amts-/Bezirksgerichte*) and special administrative courts – oftentimes staffed with a larger number of part-time judges – there are courts like the Federal Administrative Court (with 50 – 70 full-time judges), the Federal Supreme Court or the district court of Zurich. The Federal Court (Art. 13 ff. BGG) with its different organs and institutional bodies shall serve as an illustrative example: plenary court, sections, presidents of sections, presidential conference, administrative committee, full-time judges, part-time judges, adjudicative bodies of different sizes (often not identical with the sections), law clerks, general secretariat, administration. The organizational structure contributes to shaping the personal working environment of the people involved in a decisive way. Tensions between efficiency and the independence of adjudication may easily arise. Both the law on judicial organization and the court management models have to meet diverse, at times conflicting needs.

Under the perspective of constitutional and international law, various questions arise which thus far have not, or not sufficiently, been explored, particularly with regard to the establishment of court management models. Thus, as far as organizational aspects are concerned, the question arises as to the relation between statute law and regulations, with the enactment of the latter usually falling within the competence of the judicial authorities (distribution of organizational power in the area of the judiciary; latitude of the judiciary; control of this latitude)[42]. Likewise, the related question concerning the criteria for the assignment or delegation of organizational tasks and decision-making competences (incl. communication) within courts so far remains little examined. A further question emerges with regard to the framework conditions, in terms of constitutional and international law, which apply to management (among coequals) in the judicial field, particularly in consideration of the principle of judicial independence and Swiss particularities such as the large number of part-time judges. With larger courts, ensuring consistency in case-law is an ever-present challenge. Thus the question arises how, i.e. through which organizational arrangements, to ensure coherence and consistency of jurisprudence[43]. A further question that calls for scrutiny concerns the merits

41 Röhl (1993); Saari (1982).
42 See G. Müller (1986), at 19 et seq.
43 The only recent experiences with legal proceedings according to Art. 23 BGG are to be included (see also Art. 25 VGG and Art. 21 SGG).

and drawbacks (or the best “mixing ratio”) of monocratic and collegiate organs or management structures of the judiciary.

The research project will be about the critical examination and assessment of extant structures and of their implications, as well as about determining “best practices” with a view to the establishment of court management models.

3.5. The Members of the Judiciary’s Right to Privacy, and Data Protection

With respect to the distribution of the caseload[44], the allocation of resources – through the bodies wielding budgetary sovereignty – as well as to principles such as the principle of advancement (see esp. Art. 29 and 31 Federal Constitution; Art. 6 ECHR), the problem of the judges’ workload burden assumes significant practical importance. In the context of the latest judicial reform the Federal Assembly obliged the Federal Supreme Court to introduce a controlling procedure, which would serve the parliament as a basis for its exercise of high supervision over the judiciary as well as for the determination of the number of judges[45].

The collection of data about the working activity corresponds to a legitimate need, but it may also jeopardize judicial independence and impinge on the privacy rights of judicial personnel concerned (judges, law clerks, other staff)[46]. The emergence of controlling procedures gives rise to various questions of constitutional and international law, which to date have not received their due scholarly attention. Of central concern to the research project is the question who collects data on the basis of which criteria for which purposes (descriptive aspect), and which are the applicable conduct-guiding legal standards (normative aspect). The issue of data usage gains particular poignancy in the Swiss legal system, because the data concerned may also be of relevance in connection with the promotion or (non-)reelection of judges, with a possible dismissal procedure (as provided for, e.g., in Art. 10 VGG), or, somewhat less drastically, in the context of a decision on the approval of extraofficial activities. In addition, it remains to be clarified which consequences may be deduced from the data thus collected for the internal assignment of cases or the composition of adjudicating bodies, not least in view of the right to have one’s case heard by a legally constituted court. Moreover, it has not been sufficiently clarified how far the parliamentary information rights may reach in the context of the parliament’s supervisory function; a similar issue arises regarding the upper court’s right to information vis-à-vis the lower instance courts to be supervised by the former.

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44 See Lienhard/Kettiger (2009); Bandli (2009).

45 See Art. 2 of the Verordnung der Bundesversammlung vom 23. Juni 2006 über die Richterstellen am Bundesgericht (Ordinance of the Federal Assembly on the judgeships at the Federal Supreme Court) (SR 173.110.1).

46 For the protection of privacy under constitutional and statute law, see Müller/Schefer, at 39-44; Maurer/Vogt (2006); on the question of the State’s positive obligations to protect fundamental rights, cf. Biaggini (2004), at 81-84.

To sum up, the research project aims to shed light on the question how legitimate needs of information on the one hand and the protection of constitutional privacy rights (and accordingly data protection) on the other hand can be optimally dovetailed, both substantially and procedurally (de lege lata and de lege ferenda)

4. Schedule and milestones

The project is designed for a duration of 36 months, given the inter-disciplinary debate as well as the coordinative efforts at both the project level and the overall project level. Project researchers will be four research-assistants (PhD students), supervised by the two applicants. The results will be published in five monographs (four doctoral theses, and synthesis).

Time	**Action**
6 months	Literature review; analyzing existing case material (at federal and international level); Milestone: develop detailed research plans
18 months	First draft of doctoral theses Milestone: First elaborated draft of research papers (circa 200-250 pages each)
12 months	Analysis/evaluation of doctoral theses, editorial adjustments Consolidation of the findings; summary (PhD students) and synthesis (main applicants) Milestone: publication of doctoral theses; publication of synthesis

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