Swiss Courts Move toward an Outcome-Orientation

Paper submitted by

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1. Introduction

This paper address the topic of "Management and the Delivery of Justice“ from the perspective of current Swiss developments. It wants to outline rather the theoretical background of the development of Swiss courts toward an outcome-orientation, than specific cases of this development and focus to the question of whether the New Public Management (NPM) instruments developed for, and partially implemented in, public administration may also be used in court administration.

The paper in some way supplements the paper of Prof. Dr. Andreas Lienhard, which was submitted to the Study Group 6 at the 2003 EGPA Conference in Portugal (Lienhard 2003a). His paper focused on the question of whether and to what extent modern court management is compatible with the professional, personal, and institutional independence of the courts.

2. The Judiciary between Globalization and Individualization of the Law

As humanity moves into the 21st century, it is being subjected to a rapid change in the environment, society, economy, technology, and the state of world politics, a change that, with respect to its dynamic and permanent nature, as well as its transformation of basic concepts, standards, and norms, has never before taken place over such a short period of time (Schächter 2001: 15). This transformation does not leave the judiciary untouched (Hoffmann-Riem 2001: 11 ff; Berlit 1999: 60 ff). It should briefly be illustrated here using the concrete impacts of societal megatrends (OECD 2000: 18 ff; Opaschowski 2002):

- *Globalization:* Increasing globalization is leading to a rapid increase in international legal standards—and increasingly also supranational standards— connected to an increase in the influence of the adjudication of the European Court of Justice for Human Rights in Strasbourg and the European Court of Justice in Luxembourg (Spühler 2003: 441). At the same time, with the increasing number of cross-border private and societal relationships, the need to apply standards of international civil law is also increasing; and with the globalization of criminality, which follows in the wake of the globalization of the economy, there is also an increase in the number of cases requiring legal assistance (in criminal matters). In addition to this, the increase in mobility that is linked to globalization leads to an increasingly multicultural society (Opaschowski 2002: 55 ff).

- *Individualization/Pluralization:* The increasing fragmentation of traditonal structures (OECD 2000: 18 f) and the pluralization of values and dissolution of generally accepted values and standards of behavior associated herewith (Opaschowski 2002: 243 ff; Gross 1994) are leading to decreased acceptance of societal norms. The individulization that is occurring is simultaneously (Opaschowski 2002: 243 ff) resulting in an uncompromising assertion of individual demands. For the judiciary, this has paradoxical consequences: On the one hand, in dispute cases an "escape“ into legal procedures occurs (e.g., the instrumentalization of construction law procedures for disputes related to laws concerning the respective interests of neighbors). On the other hand, the level of acceptance of administrative decisions and judicial decisions is decreasing. The parties in the dispute—who in daily life are courted and spoiled by the commercial companies—

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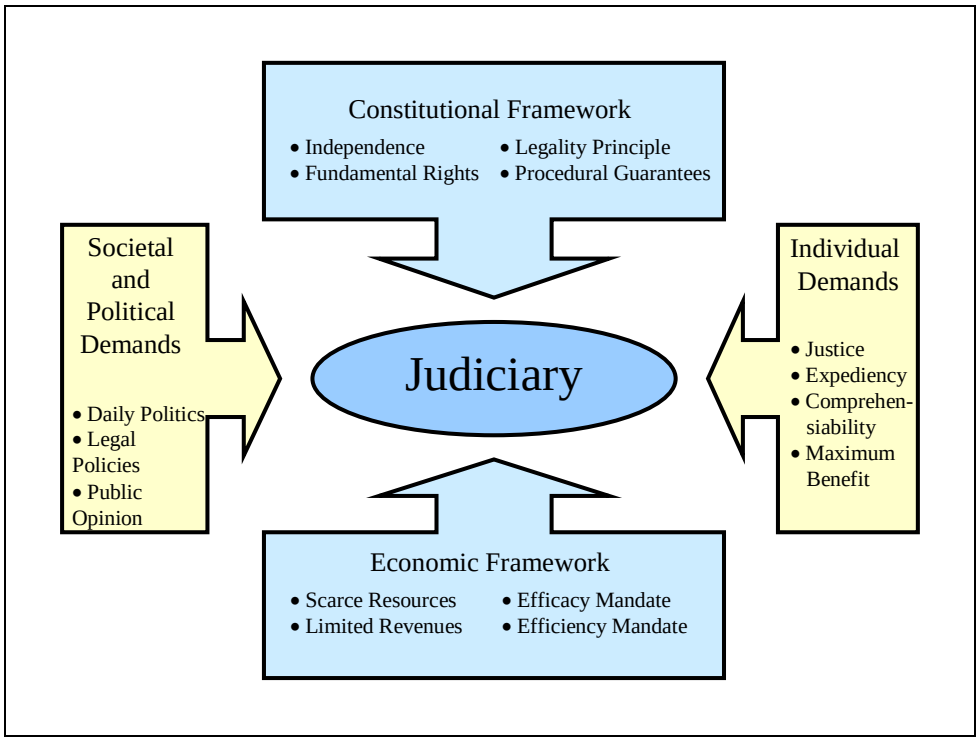
also feel increasingly like customers vis-á-vis the courts, and they expect corresponding treatment.

- *Pressures to Save and Economizing in Public Administration:* Of particular importance in the case at hand is the increasing economizing by the administration, which—together with the lack of money in public budgets—is actually triggering the call for more efficiency and management—also court management—and, tied with this, the development of outcome-oriented administration (see chapter 4). The courts are also not spared this pressure to save money and be more efficient (Hoffmann-Riem 2002: 213 ff, 280 ff.), which, to some degree, is being aggravated by a chronic overloading of the courts.

- *Mediatization of Society:* The development toward an information society, increased mediatization of society (Spindler 2002: 78), and—tied to this—the increasing power of the mass media also have considerable influence on the activities of the courts. Court proceedings that are important for the public become media events, and the pressure of public opinion on court activity is simultaneously increasing. The behavior of court officials is increasingly becoming the object of critical attention by journalists and others in the media. This goes so far that a Swiss magazine performs a benchmark on the quality of the courts.

Figure 1: The „social landscape“ of Judiciary



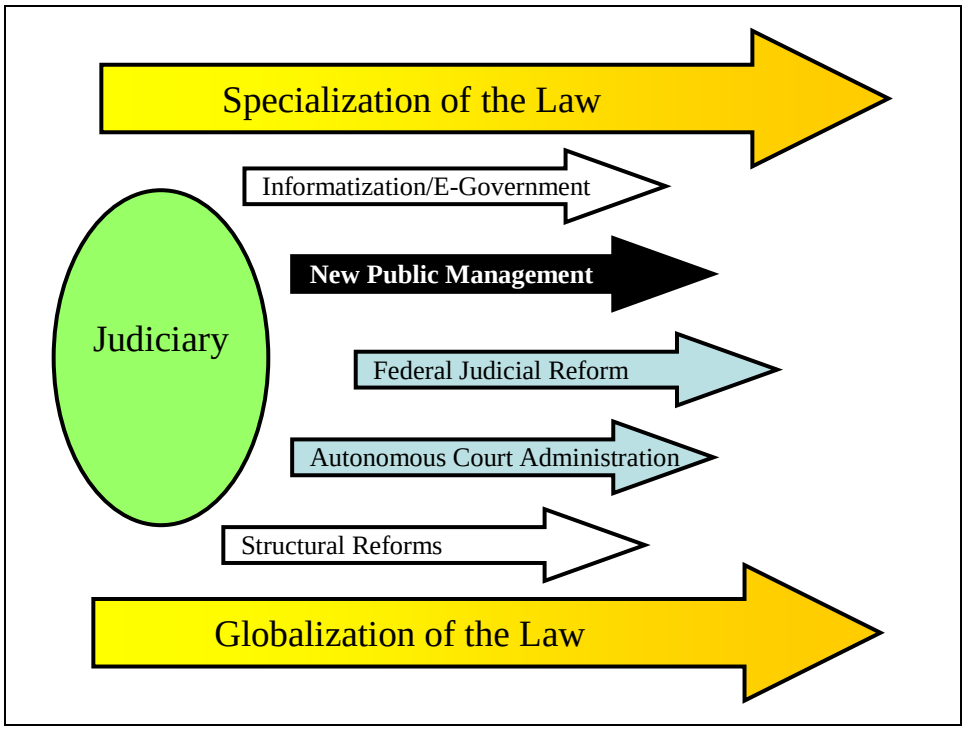
The atmosphere in which the judiciary operates today is characterized by an area of tension between societal and political demands and individual requirements, on the one hand, and the law and the economy, on the other (see Figure 1). In conjunction with the question of whether outcome-oriented administration should also be used for the judiciary, the second aspect is of primary interest: the tension between efficiency and due process.

3. Typology of Reforms of Justice in Switzerland

Due to this area of tension between globalization and the specialization of the law and due to the aforementioned societal developments, the judiciary—also in Switzerland—is currently under *great pressure to reform.* Thus, at the present time, the Swiss judiciary is subject to *numerous reforms* on both the federal and cantonal levels (see Figure 2). Generally, there are three types of reforms taking place:

- *Reforms in the context of the federal reform of the judiciary:* In 2000 the Swiss Federal Constitution was amended, declaring the Swiss Confederation competent to legislate in criminal and civil procedures (until this point, they had been ruled by 26 cantons and by federal legislation). The new, unified criminal and civil procedures will cause some changes to the organization of the courts of first and second instance (which are still the responsibility of the cantons).

Figure 2: Reforms between globalization and specialization



- In most Swiss cantons, the management of justice is centralized in an administrative unit of the Department of Justice, but not independent of general public administration. In some cantons, reforms will render the management of the judiciary—and court management in particular—more independent. The entire system of justice will receive its own administration and, at the same time, *complete administrative autonomy*.
- In some Swiss cantons, *New Public Management (NPM)*-type reforms are taking place. For this reason, discussions on judicial reforms have focused on NPM.

This paper deals only with the last type of judicial reform. The question is, whether the instruments of New Public Management (NPM), which have been developed for and partially implemented in public administration may also be used in court administration.

4. The Swiss Approach to New Public Management

Starting with some input from *Kuno Schedler* (Schedler 1995), Switzerland began to develop its own model of New Public Management some ten years ago. The goal of the reform is to achieve an outcome-oriented and output-oriented administration. Key to Swiss New Public Management is a performance measurement system based on products and global budgets. The Swiss approach views New Public Management (NPM) as a reform of the entire political-administrative system (including the parliament and, for example, the courts), not merely the public administration.

Today, the concept of outcome-oriented administration can encompass an approach to administrative reform that is characterized by the following features (Schedler 1995: 13 ff; Schedler/Proeller 2003: 57 ff):

- customer-oriented and citizen-oriented;
- lowering of costs and performance pressures (lean production, increased efficiency);
- output-oriented, instead of input-controlled;
- separation of strategic from operative decision-making competencies;
- separation of the functions of the financier, the buyer, the supplier and the recipients of government services;
- creation of company-like administrative structures, combined with decentralization;
- congruence of resource and professional competencies;
- commissionings of services affecting the public good;
- competition in internal markets (benchmarks), outsourcing and privatization;
- comprehensive output and due diligence audits (in terms of a control);
- incentive systems for employees.

NPM or outcome-oriented administration in Switzerland is particularly characterized by the fact that the management and control of administrative organizational units no longer takes place primarily via cost estimates, i.e., the input-oriented allocation of finances, but rather via a *global budget* (Schedler/Proeller 2003: 139 ff) tied to a *commissioning* (Schedler/Proeller 2003: 145 ff). Key to the commissioning is an *understanding of government services as products*, that is, the description of which services the administration relinquishes.

5. Why do we need the judiciary? — A Philosophical Approach to the Output of the Courts

The *supraordinate task of the judiciary* in a democratic state governed by the rule of law is—as is also the case with the other public authorities—the *promotion of public welfare*. Therefore, part of the function allocated to the judiciary is ensuring that as many people in the society as possible are doing well and that the society continues to develop in a way that benefits everyone.

Although the topic cannot be discussed here in detail, it can be assumed that the *extent of the public welfare* depends upon four elements: *continuity or stability, prosperity, trust, and satisfaction*. Continuity and stability provide human beings with a certain peacefulness, they create a platform for targeted action, and they make planning and an assessment of the consequences of actions possible. Prosperity (not understood merely as economic prosperity in terms of "affuence", but rather as the totality of all resources of the individual and society, especially those of knowledge and culture) enables the constant progress of human beings as individuals and in society (Hoffmann-Riem 2002: 246 ff). This represents an interaction between stability and prosperity—that only a guaranteed outcome, together with the corresponding resources, creates options for innovations. Or, conversely, that which exists can be secured only when sufficient resources are available. Trust is a "culturally evolved and individually determined disposition [...] without which social actions would not go smoothly, or perhaps would not be possible at all". Trust is therefore a cornerstone of the public welfare. Finally, satisfaction is an essential guarantee for the absence of tensions and unproductive conflicts.

According to *Gustav Radbruch*, the social services of the law include justice, expediency, and legal certainty (Radbruch 1993: 70 ff). Accordingly, the services of the judiciary system in society include assuring of law and order, the guaranteeing of effective legal protection, and the creation of legal certainties. According to this, the law, and thus the judiciary, can have a supportive and constructive effect on the public welfare in four areas or directions (see Figure 3):

- *Legal certainty* creates trust in the law and the institutions. At the same time, it creates stability and constancy, since what is now—in the legal sense—valid must not be redefined in each individual case. [1]

- *Effective legal protection* manifests itself in that the judiciary can take care of legal conflicts in a timely manner, in a just and expedient proceeding, and in a correct, just, and expedient way. Trust in a speedy and peaceful settlement of legal conflicts makes contractual law possible and reasonable at all (Schmittchen 1994: 154; Fikentscher 1994: 129; Luhmann 1995: 149), and it thus promotes the economic exchange among the members of society. The expectation of effective legal protection lowers the transaction costs within the framework of contractual negotiations (Feld/Voigt 2002: 3). An economically effective judiciary can also contribute to an increase in "the bundling of material goods and services, that is, to increasing the level of affluence—not in each individual case, but via the transmission of the decision as a rule for future conditions" (Stolz 2002: 109). Thus, on the one hand, effective legal protection promotes trust in the institutions and in society; and, on the other hand, it contributes directly to prosperity.

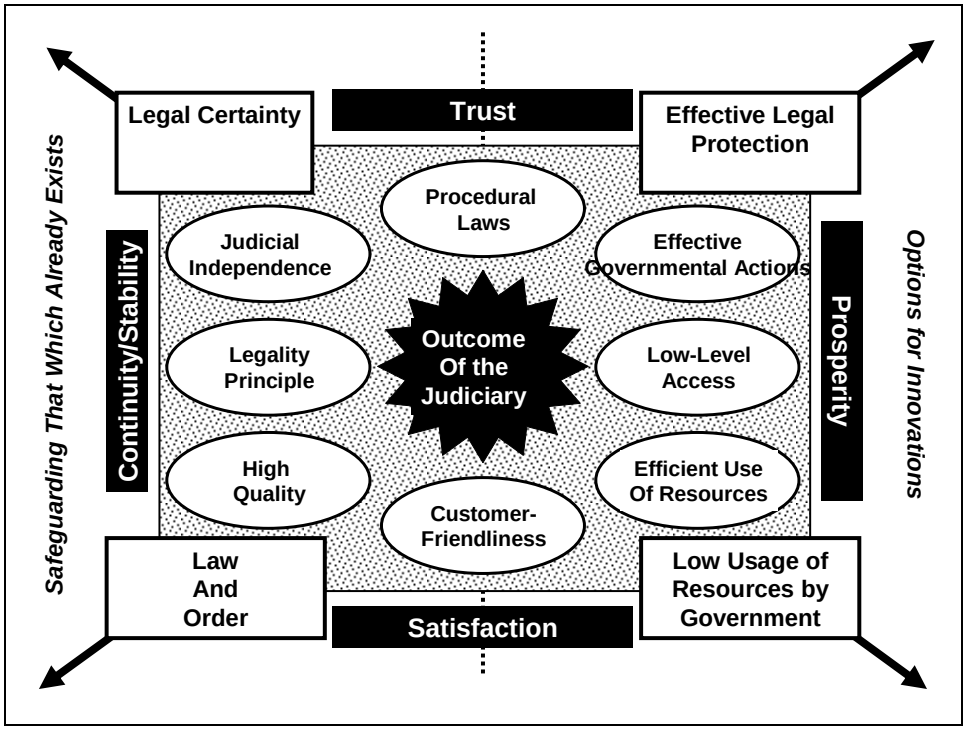
- *Law and Order:* Law and order creates a high degree of societal satisfaction, as well as security and constancy (Cuche 1928: 19). Law and order is to a great degree dependent upon the acceptance of the judiciary (Radbruch 1993: 78). The judiciary, in turn, is dependent upon whether participants in legal proceedings feel that they are being treated fairly (Trechsel 2000: 13; Richli 1997: 293 f;

[1] *Paul Cuche*, (Cuche 1928: 19) even attributes to legal certainty the power of peace-making: „La paix, la sécurité sont les premiers bienfaits que le Droit doit nous procurer"

Fosskuhle/Sydow 2002: 681) and whether the society trusts the judiciary to settle legal conflicts justly and expediently.

- *Lower Use of Resources By the Government:* A lower use of resources for sovereign governmental tasks contributes directly to prosperity, since more of the resources—which, after all, are always limited—are thus left over for the welfare of the individual and the further development of society. High taxes always create dissatisfaction; low taxes contribute to general satisfaction, namely, because no suspicion of an unjust distribution arises.

Figure 3: The Landscape of performance of the judiciary



The *highest degree of promoting public welfare* is achieved by the judiciary only when it succeeds in bringing about equal degrees of legal certainty, law and order, effective legal protection, and a low usage of resources by the government. The judiciary's achievement of an outcome that promotes public welfare is dependent upon a whole series of *parameters on the operational level*, especially upon compliance with procedural laws, effective government actions, low-level access, effective use of resources, good customer service, high quality, adherence to the legality principle, and judicial independence. These exert different influences, and different degrees of influence, on the individual aspects of the public welfare. Additionally, there is a direct, demonstrable connection between actual judicial independence and economic growth (as an aspect of prosperity) (Feld/Voigt 2002: 1, 25).

If the judiciary wishes to *optimize its promotion of the public welfare*, it requires a *steering and management system* that enables it to control the relevant parameters on the operational level, so that they will be oriented toward the outcome for the public welfare.

6. Theses on New Public Management as an Instrument of Court Management

In all Swiss cantons in which the control of the public administration was introduced using NPM instruments, it was examined whether this control tool can also be used for court management. Similar deliberations were also made in Germany, particularly in Hamburg (Schönfelder 2003). The discussion focused particularly on the question of whether and to what extent modern court management is compatible with the professional, personal, and institutional independence of the courts. These questions have been explored in depth particularly by *Andreas Lienhard* (Lienhard 2003a; Lienhard 2003b; Lienhard 2005; 260 ff). In answer to the question of whether the New Public Management (NPM) instruments developed for, and partially implemented in, public administration may also be used in court administration, based on experience and academic studies in Switzerland, the following theses can be made (Kettiger 2003a: 193). They represent, so to speak, *a summary of the findings* on this topic.

Thesis 1:
In the outcome-oriented administrative steering process, the parliament, government, and administration may not set any binding outcome or performance standards on the judicial authorities. The party to the agreement may be only an upper-level judicial authority.

These restrictions are derived from judicial independence and the separation of powers principle. Furthermore, the parliament should also not be permitted to set any outcome or performance standards for the administration (Lienhard 2003a: 6 ff). Wherever an upper-level judicial authority is lacking, (self)steering is possible with the performance statute.

An outcome control—in the sense of controlling the outcome of governmental actions—is also methodologically very difficult for the judiciary. Using an indicator system, the outcomes of judicial activity on society cannot be determined practically and the impacts on those affected by judicial activity can be assessed only in individual cases.

Thesis 2:
In the governmental steering process, outcome and performance standards and the associated controlling and benchmarking may relate basically only to organizational units (courts, panels) but not to judges. As an internal judicial management tool, as well as—limited to selected appropriate indicators—for selection within the framework of periodic reelections, the performance of individual judges may also be assessed and compared.

According to the prevailing school of thought (Lienhard 2003a; Lienhard 2003b; Maier 1999: 43, 357, 358; Berlit 1999: 58), applying NPM control instruments to individual judges greatly restricts judicial independence. It remains unclear whether an internal (i.e., accessible only to the responsible supervisors and the affected parties) performance comparison is permissible as a human resource management tool (Maier 1999: 294). A judiciary that is focused on an optimum guarantee of legal protection and on effective adjudication must also permit the performance assessment of individual judges and corresponding performance comparisons as an *internal management tool*. Within this framework, performance indicators can also be applied to individual judges, but only in the form of actual values within the framework of con-

trolling and accompanying and subsequent controls and not in the sense of binding performance standards. Furthermore, the performance assessment may basically not be applied to individual procedures. When these basic conditions are met, the core of judicial independence, the constitutionally immanent prohibition on interfering with an individual court decision (Kiener: 235 f), is not violated (Lienhard 2005: 465).

Thesis 3:
Performance standards are permissible

- *as (legally) binding planning values that pertain to the adjudication function of the judiciary only when they are specified in the constitution or by the law;*
- *as (legally non-binding) benchmarks that relate to the adjudication function;*
- *as (legally) binding planning values that relate exclusively to the administration of justice.*

It is indisputable that the parliamentary budgetary sovereignty also includes the courts (Lienhard 2003a: 6; Lienhard 2005: 469). If the *resource standards* are now *globalized* with NPM and the courts thereby receive greater latitude for action, then this is unproblematic from a judical constitutional point of view. Rather, the autonomy linked to global budgeting can even strengthen the independence of the judiciary. Performance and outcome standards in the sense of a *binding directive* of how general decisions, or even a decision in an individual case, should be made, are prohibited. From a constitutional point of view, certain *non-binding planning values* can certainly be permitted—even if they affect adjudication or exhibit a connection to adjudication. *Different indicators*—such as, completion coefficients, frequency of appeal, the constancy of decisions, or cost recovery ratios—can already even today be gleaned from the *statistical portions of annual court reports.* Admittedly, these are retrospectively ascertained values, but they are also given a *prospective creative power*, which up to now was hardly considered constitutionally problematic.

Thesis 4:
Cost recovery ratios are problematic as targets and are prohibited in conjunction with the revenues that the courts themselves determine (fines, costs of proceedings).

Cost recovery ratios are problematic as targets and are prohibited in conjunction with the revenues that the courts themselves determine (fines, costs of proceedings). This principle is even strengthened when it is coupled with a collective incentive system. Cost recovery ratios can furthermore entice one to dispense with necessary procedural steps (witness interrogation, judicial inspections, etc.) or to select more inexpensive procedures (e.g., circulation, individual judge instead of panels).

Cost recovery ratios are also methodologically problematic to some degree (calculation of the proceeding costs based on the disputed amount, proceedings that are free-of-charge, gratuitous litigation, etc.) (NEF und Gerichte: 35 f).

Thesis 5:
To a great extent, the legitimation of the judiciary relies on its acceptance; therefore, there is a general necessity for increased customer orientation. In this regard, outcome-oriented administration as a governmental and administrative steering model provides optimum possibilities.

The practical implementation of customer orientation requires a clear concept of the customer on both the performance and outcome levels.

Adjudication must be increasingly open to the needs of the customers, since its legitimation—as surveys show—is rooted not only in law, but also in its acceptance (Maier 1999: 171, 174 f). The customer survey that was performed by the Higher Court of the Canton of Bern in 2000 clearly shows how important the atmosphere in a proceeding is. This leads to the conclusion: "The tone, manner of relating, human qualities, and fairness in a judicial proceeding are just as important as the professional competence of the participants and the results." (BEJUBE 2001: 17). Thus, the examination confirms numerous older findings (Trechsel 2000: 13; Richli 1997: 293 f; Vosskuhle/Sydow 2002: 681) that the satisfaction of the parties to the proceeding, and thus the *acceptance of court decisions,* depends to a great extent upon whether the proceeding is conducted fairly. The underlying constitutional conditions—particularly the principle of equality before the law (= equal treatment)—however, form an absolute barrier to the inclusion of customer needs (Maier 1999: 356; Lienhard 2005: 35).

It is nevertheless absolutely necessary to proceed from a *clear customer concept,* so that customer orientation can be implemented within the framework of court management and quality management.

Thesis 6:
The quality of judicial work can and may be measured if judicial independence remains preserved, if appropriate goals and indicators are defined using different characteristics, and if appropriate tools are used. It must hereby be noted that a "good judiciary" cannot be paraphrased in just a few sentences, but, rather, it is dependent upon the degree to which it fulfills a broad range of diverse criteria.

The *quality orientation* belongs to the most complex and sensitive aspects of court management (Berlit 1999: 64 f). As a result of various attempts to reform the judiciary, this topic has very recently been repeatedly addressed in academic publications. The following can be recorded as the results of the discussion in Switzerland:

- A "good judiciary" cannot be paraphrased in just a few sentences, but, rather, it is dependent upon the degree to which it fulfills a *broad range of diverse criteria*.

- There are *important indicators* for the quality of judicial activity. These, however, are frequently not measurable, or are only indirectly measurable or assessable; and they can or may never relate only to a particular individual decision.

- The quality of judicial work can and may be measured within the framework of outcome-oriented administration if judicial independence is preserved, if appropriate goals and indicators are defined using different characteristics, and if appropriate tools are used.

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According to the Swiss interpretation of law and the Swiss image of judges, the following quality assurance measures are deemed to be permissible, suitable, and necessary for the judiciary:

- Preselection during elections and reelections
- Education and continuing education
- Quality (control) circle

Thesis 7:
Individual performance incentives (merit pay, performance bonuses) are not permissible for persons who function as adjudicator (Kiener 2001: 290 f; Maier 1999: 322 f).

For legal reasons, individual performance incentives (merit pay, performance bonuses)—an important element of NPM-steering—are not permissible for persons who function as adjudicators. Even from an economic standpoint, merit pay for judges appears to be undesirable or counterproductive (Frey 2003).

Conversely, individual performance incentives are also permitted in the courts for persons who perform only administrative duties or who do not exert direct influence on the material result of the adjudication (NEF und Gerichte: 41; Maier 1999: 323; Lienhard 2003a: 9).

Thesis 8:
Outcome-oriented administration or court management primarily serves to improve leadership within the judiciary and in the individual judicial authorities themselves. The benefits, however, can differ for the various forms of judicial authorities.

Due to increasingly higher performance and efficiency pressures, management has also become a topic for the courts. The majority of the newer judiciary reforms either have the goal of changing the management structures in the judiciary or they subsequently resulted in the creation of new management structures. The need for management in the judiciary will continue to increase. Management in the judiciary, however, stands in a latent tense relationship to judicial independence. The organizational inclusion of the judiciary in the political-administrative apparatus of the government requires, on the one hand, management and management structures also for the judiciary and in the courts. On the other hand, due to judicial independence, in the intra-organ relationship in the judiciary itself, the rule applies that each directive by a higher-ranking authority regarding how to decide in individual cases is not permissible unless it occurs in an official appeals proceeding (Lienhard 2003a: 6).

The benefits of judicial management—particularly of NPM—for the judiciary depends

- upon individual need and the possibilities for management,
- upon the organizational and management structures, and
- upon the number and type of proceedings.

Thesis 9:
Outcome-oriented administration triggers—even in the case of what is merely selective implementation of individual elements or the conceptional handing of the topic—in the judiciary an organizational development and learning process and can lead to structural adaptations.

The introduction of NPM requires that all management relationships in an organization be clarified; the literature supports these findings (Maier 1999: 368). In addition, the judiciary's handling of NPM represents a learning process. During this process, it can be observed that already the implementation of individual, isolated management tools in the everyday functions of the court or even the theoretical handling of questions dealing with leadership and management can change the culture in the courts. This was clearly shown, for example, in the supplement to a customer survey performed by the Supreme Court of the Canton of Bern.

7. Switzerland on the Way to Outcome-Orientated Courts

The realization of outcome-oriented and performance-oriented courts in Switzerland is at a different status on various levels:

- Over the past few years, in-depth *academic groundwork* has been performed. These works include basic academic studies, particularly on the question of the compatibility of NPM with judicial independence, and a conference of the Swiss Society of Administrative Sciences (SSAS) in 2003 (Kettiger 2003b).
- *Conceptional preliminary studies* with regard to a *possible implementation* of court management according to NPM principles were performed in every canton that has also introduced outcome-oriented administration into the public administration: Aargau, Bern, Lucerne, and Zurich. At the behest of the federal parliament, the parliamentary administrative control office clarified which possibilities NPM offers the federal courts and which limits should be heeded when implementing NPM in the courts.
- To date, an outcome-oriented court management *has been implemented completely* only in the Canton of Zurich. The new court management appears to be successful here (Klopfer 2005). The Social Security Court has undergone an interesting development here. Due to the needs of management, over the past few years this court has repeatedly implemented management tools and thus established court management step-by-step (Mosimann 2003). In the Canton of Lucerne, the parliament approved the implementation of a new court management in the spring of 2005 (outcome-oriented courts, OOC, in German "Leistungsorientierte Gerichte, LOG").

Overall, the initial experiences with the implementation show that NPM or outcome-oriented administration can also be implemented in the courts—without limiting judicial independence and without losing the effectiveness of the Third Power. The Start is well done, but there is still a long way to go.

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