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Panel "Court and politics – a changing relationship?"

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In the Neue Zürcher Zeitung of 24 April 2019, I came across an article with a lurid title: "Die Vorrangstellung der Justiz schadet der Demokratie"; in English "The primacy of justice harms democracy". The author, Michael Wolffsohn, is a historian and journalist, who taught at the Bundeswehr University in Munich from 1981 to 2012. Wolffsohn writes that Western democracies represent a mixed system of democracy and aristocracy, understood as the rule of the supposedly best. In his opinion it is not difficult to discover an aristocracy variant next to the first pillar, rule by the people – namely Plato's wishful thinking of philosopher domination disguised as rule by judges.

I'd like to talk to you about the subject of this newspaper article. I am therefore deliberately refraining from reporting on the current state of the attacks on justice in the various European countries: On the one hand, you are well aware of this due to the continuous information provided by the media or on the channels of EAJ and IAJ. On the other hand, this will once again be one of the central topics of the regular meeting tomorrow.

Why then do I mention a Swiss newspaper article on justice and democracy at a symposium entitled "Court and politics – a changing relationship?"?

There are several reasons for this:

- The article seems innocuous, regardless of it's lurid title:
    - It was published in Switzerland's most renowned daily newspaper, which advocates the idea of the rule of law. Moreover, in Switzerland the independence of the judiciary does not seem to be under pressure.
    - It was written by a German scientist. In Germany, too, the independence of the judiciary does not seem to be endangered.
    - The article does not seem to be attacking the independence of the judiciary; it seems to merely want to set some limits to the judicial power.
    - But, despite his apparent harmlessness, the article is questioning generally accepted principles; I will come back to that.

- Another reason for mentioning this article on democracy is, that we are discussing here among the members of the European Judges Association. The vast majority of us would probably say that they live and work in a more or less well-functioning constitutional democracy under the rule of law. So, when we talk about courts and politics and their relationship, we are basically talking about the role and interaction of the various actors in the democratic constitutional state.

- Last but not least Lene Sigvardt and Mikael Sjöberg asked me, if I could say something in general about the situation for the judicial systems in Europe as such and whether I see tendencies among European politicians or in European democracies to question the rule of law and what consequences this might have.

So what does this newspaper article say that is relevant in this respect?

First of all, the author is not a politician. What he writes, however, we can hear in a similar form throughout Europe, especially from politicians: the power of the judiciary must be limited.
And the way he justifies this thesis seems to me very significant. As I have already mentioned, the contribution is relatively harmless: only an alleged supremacy of the judiciary is to be restricted. But considered in light of day, it attacks the task of the judiciary, as we understand it today, and thus among other things also judicial independence, straight away.

Without saying it explicitly, the author seems to assume an understanding of the judicial tasks as formulated by Montesqieu. He quotes him as follows: "The "legislative body" which is directly determined by the people, only is entitled "to soften the law in favour of the law itself and to decide less strictly than the law". For Montesquieu, the judges were "only the mouth that speaks the wording of the law, beings without a soul, so to speak, who can temper neither the strength nor the severity of the law".

To put it frankly, this seems to be a strange understanding of the role and function of justice for present-day times, which I believed to be put behind for a long time now. Already Hamilton, which for this reason in the article is critiqued by Wolffsohn, wrote in Federalist Papers No. 78, in May 1788 the following:
“It is not […] to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”

So already in the 18th century it was clarified why the constitutional jurisdiction and thus the judiciary is needed as a control organ of the legislator. And mostly in the last centuries, administrative jurisdiction was developed in many places, which aims to ensure the control of the judiciary over administrative and executive actions.

I have deliberately said that this seems a strange understanding of the role and function of justice in this day and age. Obviously, the author is not alone in this understanding: How else, for example, are events in Poland to be interpreted? I am quoting here from a press release of the European Commission dated April 3, 2019, with the title “Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control”. The commission writes “Polish law allows to subject ordinary court judges to disciplinary investigations, procedures and ultimately sanctions, on account of the content of their judicial decisions.” Or, as another example, the cases in Turkey, where judges themselves were prosecuted for having ordered releases from detention. Or, to give a much more harmless example, the last re-elections of the judges of the Swiss Supreme Court in 2017, where the judges of my chamber received significantly fewer votes than the other judges to sanction them for a politically unpopular verdict.

Let me make a first statement:

For the aforementioned reasons it seems necessary that the role and function of the judiciary and it's importance for a constitutional democracy under the rule of law should be explained and made comprehensible anew.

The article "The primacy of justice harms democracy" sheds light on another, very topical problem: it contains the premise that the people who decide is to be equated with the majority of the voters. This in direct democracy. In indirect democracy, it goes even further: decisions are taken with the majority of the representatives elected by the voters for a certain period. One could call it a mere arithmetical understanding of Democracy. This arithmetical concept of democracy is gaining ground around the world; it seems particularly linked to the emergence of populism.

It therefore seems necessary that we should also begin to discuss the concept of democracy a new and in public.
For a long time, I have been of the opinion that we need to balance two concepts: Democracy as one, the rule of law as the other. In this sense Mastronardi, a Swiss scholar, writes: "The rule of law and democracy are interdependent. But they are independent principles of the organization of the state organization."

The situation in Switzerland, where we have no constitutional jurisdiction, but must apply federal laws even if they contradict the constitution, has led me to question this concept: if, for example, the majority of voters were to adopt a law prohibiting members of a certain religious community from acquiring real estate, would the Supreme Court not be able to intervene? Should it apply this law as long as it does not violate the European Convention on Human Rights?

If one follows the concept that democracy and rule of law are separated and should be brought into a certain balance, and particularly that Democracy is just a mere arithmetic concept, then it might be possible that the answer for this question would be: democracy takes priority, the law prohibiting the acquisition of real estate must be applied.

I came to the conclusion that this cannot be right. The example I gave is not chosen by chance, it is reminding of events in the last century, which must not be repeated. This leads me to realize that this picture of the two concepts, which are to be brought into balance, is apparently also inaccurate. I am of the opinion that only a few years ago, for example, the understanding of democracy in Switzerland implicitly followed a different approach: understood correctly, democracy means that the fundamental rights of individuals are respected and minority rights are protected; these are indispensable elements of the understanding of democracy itself. If this principle is violated, then we only are dealing with democracy in word, and in content it is command by the majority.

This concept of Democracy is not a new insight either. Some authors call it a pluralistic understanding of Democracy. Mastronardi, whom I have quoted, and who starts from two independent principles, also relativizes in this direction. On the principle of democracy, he says: "The majority principle is by no means the supreme democratic principle. It is only a technical rule which permits the practically necessary breaking off of the democratic discourse". Then he says: "The majority principle is only legitimate within the framework of a fair trial." And even more importantly: "Every majority decision must be based on decisions taken at a higher level, for example in the constitution. In particular, it must not violate fundamental rights. This also applies to the discourse at constitutional level. The democratic process loses an indispensable part of its legitimacy if it disregards constitutional principles".

My understanding of Democracy would go further: A process which disregards constitutional principles is not democratic.

In the sense of this understanding of Democracy, the preamble to the Swiss Federal Constitution explicitly states: “The Swiss People and the Cantons,
[…] in the knowledge […] that the strength of a people is measured by the well-being of its weakest members,
adopt the following Constitution”

And also internationally - at courts and in scientific literature - this topic is addressed when writing about “unconstitutional constitutional amendments”, «unamendable provisions in transitional constitutions» or about similar concepts.

Therefore my second statement:
Starting from the newspaper article and with these considerations in mind, I therefore state that it is probably necessary for us to begin again to recall and discuss publicly what democracy means and how we can keep it alive.

That said, I must take a look with you at the bylaws of IAJ.

Art. 3 letters a and b read as follows:
“1. The objects of the Association are as follows:
(a) to safeguard the independence of the judicial authority, as an essential requirement of the judicial function and guarantee of human rights and freedom.
(b) to safeguard the constitutional and moral standing of the judicial authority.”

Perhaps this objects are too narrowly formulated. Perhaps one should also explicitly mention the advocacy for democracy based on the rule of law.

We had this discussion a few years ago on the board of the Swiss Judges' Association. The trigger for this was a constitutional initiative which wanted to stipulate that residents which don't have Swiss citizenship have to leave the country imperatively, when having committed certain crimes, without their personal situation being taken into account by a judge in any way. We agreed that such a provision violates the rights of the individual and cannot be made consistent with the principle of proportionality. It was unclear, however, whether we could comment on this question, since it did not directly affect the independence of the judiciary or the position of the judiciary in the state. Therefore it seemed necessary to discuss our role and eventually we added a new goal to the bylaws of our association: One of our goals now explicitly is “advocating the rule of law”.

But perhaps this more far-reaching objective already corresponds to the understanding of the objectives as they are formulated today in the bylaws of IAJ?

Either way, we should broaden the issues we are working for: it is not only a matter of dealing with the position of the judiciary in society itself. So we must not only fight against limiting the role of the Judiciary or against attacks on the independence of judges. In my opinion, a central task of the judiciary is also to communicate the importance of the entire system to the citizens. In other words, to show better what exactly the function of the judiciary is in the constitutional State based on the rule of law. To demand again and again not only that the fundamental conditions which ensure the exercise of this function are observed, but in

addition, that all other elements which are essential for a democracy based on the rule of law are not touched and must be protected.

The members of the judiciary are the experts for these concerns. They do not represent class interests, but work for the preservation of the rule of law and the rights of individual citizens and minorities. They are the guarantors that democracy, which also respects the rights of the individual and protects minorities, is not eroded gradually.
But I'm not sure whether we actually convey this image to the public everywhere today. I am pretty sure that the perception in many places is different: The title of the newspaper article "The primacy of justice harms democracy" is telling.

So what to do?
I hope you will understand that I am now becoming very operational and concrete.
I don't think it will help us, nor the rule of law or democracy, if we simply describe the current desolate situation, and trust that at some point the political actors will understand the seriousness of the situation and take measures. Even if, fortunately, certain measures are taken in extreme cases now in the EU, too many political and economic considerations are decisive in politics. Although appeasement policy was not very successful in the last century, official policy continues to focus on maintaining the dialogue and is reluctant to use effective pressure measures consistently. A look at the handling of Turkey shows this in exemplary fashion: despite the desolate situation there, President Erdogan, for example, was received last year in Germany with all honors for a state visit. And the German opposition merely said that this was outrageous as long as German citizens were still in Turkish prisons. So not a word about the fact that the independence of the judiciary and the separation of powers no longer exist in this country, and that with freedom of expression and freedom of the press also other indispensable principles of the democratic state have been abolished.

I think that brings us back to operational considerations and to a topic that I have been advocating in this circles for a few years: We need to develop our communication. We should be much more proactive, try to establish ourselves as experts and make ourselves heard. We need to think more carefully about how we can publicize the fundamental issues that are important for our democratic society outside the daily news.

Judges are experts in law; they deal with the rule of law, know what judicial independence is needed for and what basic conditions are essential for the functioning of the state and the protection of individuals and minorities.
But there’s a catch: Because judges have to deal with all matters of life in their work, they tend to think that they understand and master all these issues. What judges are not, however, - at least in general - is public relations experts.
So perhaps we should start to professionalize our public relations – or maybe I should better call it “our public affairs” or our “public communication “. Maybe we should think about beginning to work with specialists. There are many issues for this: for example, we could discuss the question of how we can set topics outside the daily news and bring them to the media. Or how we can expand our communication via social media. Or how we can make better use of language, keyword here is the whole area of "political framing".

I’d like to give you an example:
We have begun to do this in Switzerland. We had a topic on which we were not sure whether and how we should become active in the media. A weekly magazine, which is close to the political party to be located at the right spectrum, started to attack judges of the Federal Administrative Court, which they considered to be too soft on Asylum cases. It attacked these

judges repeatedly by name and directly and accused them of bending the law. We were asked by these judges for support and asked ourselves how we could best respond. In this situation, we called in a PR specialist. What he told us was astounding at first, then completely evident: although we approached him with the question of how best to respond, he did not answer, but answered with a counter-question. He asked what the goal of our reaction should be. Should it be about putting the work of the court in perspective and correcting statements made in the weekly magazin? Or should it be about giving the attacked judges the satisfaction that they are not alone and about supporting them?
Then he said that if we were to pursue the second goal, a counterstatement in the weekly magazine would at best be a possibility. However, we would only "put new wood into the fire" and give the magazine the opportunity to continue to cultivate the topic. Apart from a short-term satisfaction for the attacked judges, we would not achieve much. If it would concern however the first mentioned goal, then a reaction to the attacks would be futile expenditure: the magazine moves in a limited circle of readers, which wants to hear exactly the truth spread by this magazine. There was hardly any interest in more in-depth discussion and people outside the limited circle of readers were hardly addressed.
So he advised against a direct reaction. On the other hand, he said it's obvious that we should be more proactive. In cooperation with the expert, we subsequently defined areas in which we wanted to make ourselves heard in public. We decided to produce standard texts regarding different topics in order to be able to react quickly to current events or discussions on the one hand, and to be able to set topics ourselves on appropriate occasions on the other.
An example for such a standard text is a document dealing with the topic "Kuscheljustiz". You could translate this as "cuddling justice" or "lax judiciary". It's a reproach that's made quite often in politics, claiming that the judiciary is following a too soft line on criminals.

We also noted that to be able to set topics ourselves, a systematic monitoring of the political processes and the media agenda is indispensable: Only if you know what is currently being discussed in public or in politics, you will have a chance to launch your own discussion points.
I would think that the new strategy is already having a visible effect: the Swiss Judges' Association has become a demanded dialogue partner for the media whenever justice issues are topical. In some cases, we can also bring in our own topics. In my opinion, there is still room for improvement in our positioning as experts in all questions of the rule of law. And one danger that must be avoided is the tendency to personalize established contacts. We must try to institutionalize networking with the media and multipliers in politics so that not every change of personnel necessitates a rebuilding.,

Of course, all this is not free of charge. But if we are aware that, as members of the judiciary, we also have a key role to play in improving the understanding of the rule of law, and that most other actors, who communicate professionally, pursue other goals, then improving our engagement should be worth something to us.

Let me summarize: The independence of the judiciary is under pressure, and with the populist tendencies increasing throughout Europe, this pressure will not diminish. Badmouthing the role of the judiciary is becoming more and more politically and socially acceptable.
However, it is not just a question of the role of the judiciary, but of the continued welfare of the democratic constitutional state.
The judiciary is the actor most likely to take corrective action. Of course, the judiciary cannot do this on its own, but is dependent on the help of politicians, the media and, ultimately, the public. Additional efforts are needed to get these players on board. It is worthwhile to approach this task as professionally as possible, even if it is not free of charge.

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