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Opening of the Judicial Year

Seminar

The Authority of the Judiciary

Counteracting Challenges to Judicial Authority

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Judicial authority faces a number of challenges. The media attack not only court decisions, but also judges on a personal level. Governments cut the budgets of the courts. Therefore, judicial authority needs several lines of defence, a Council for the Judiciary, the presidents of the courts, and the judges. This paper suggests that defending judicial independence needs the same three lines of defence like a medieval city.

- 1) The Council for the Judiciary protects the integrity of the judicial system as a whole. It is the first line of defence, the river floating around the city.
- 2) The presidents of the courts form your second line of defence, the outer wall. They do the job of a mayor, managing their courts and providing for appropriate funding.
- 3) The third line of defence is composed of the judges. Together, we form the inner wall. Our primary task is to guarantee our personal integrity and our impartiality.

1) Council for the Judiciary

Most European countries have a Council for the Judiciary. It follows the French example, le *Conseil Supérieur de la Magistrature*. There are many varieties of Councils. Despite those differences, we can distinguish two main tasks:

First, the Council makes sure that Parliament and government appoint judges in a fair way, and that judges keep their job provided they fulfil their duties correctly.

Second, the Council is responsible for the effective enforcement of judicial decisions.

a) Appointment and re-election procedures

The Council for the Judiciary guarantees fair and transparent appointment procedures. Those who chose candidates must be independent from government. And they must appoint on merits only.

Government or Parliament may have a say in appointments. Whoever appoint judges, it is the task of the Council to shield appointment procedures from political interference.

A Council for the Judiciary must also make sure that judges salaries are adequate. One will get the right people for the job if they are being paid accordingly. Opening a fair competition with a prospect for a good salary strengthens independence.

The Council must not only make sure that the right people get the job. It must also make sure that they remain there.

Dismissal comes in many forms and shapes. In 2011, the Hungarian government contemplated to [change the retirement age of judges from 70 to 62](#). In such a situation, the Council for the Judiciary has a preventive role. It must intervene *before* Parliament amends restrictive laws on court organisation and tenure.

The Council for the Judiciary has one advantage: It is the law that grants its powers. In 2011, the then Hungarian Council did not have enough powers. The President of the Supreme Court, András Baka, tried to fill the institutional deficit and criticised the legislative reforms affecting the judiciary. The [new law forced 274 judges and prosecutors to retire](#). The government dismissed him from his position. It took a [decision by the European Court of Justice in Luxembourg](#) to give them a [chance to return](#). And it took a further [decision by European Court of Human Rights](#) to make it clear that court presidents [cannot be dismissed simply because they fulfil their duties](#).

The Council of the Judiciary must also intervene during re-election procedures if needed. In some countries, judges must be re-elected after the expiry of their turn. One of them is Switzerland.

In practice, Swiss judges are always re-elected. That does not solve the problem though. Some of my colleagues at the Swiss Supreme Court had to decide whether singing racist songs in a hut was a public event or not. They said it was public. Therefore, those who would perform racist songs could be punished for inciting hatred.

Many Members of the Swiss Parliament did not like that decision. They said the event was a private matter. They also said that freedom of speech allows people to express racist opinions. They punished those judges who participated in the decision by denying them their votes in their re-election. At the end, my colleagues were re-elected, however with a bad result. From an outside perspective, one might claim that they were intimidated. One might even say that Parliament taught those re-elected a lesson. 'Look at your colleagues. This is what happens if your decisions are not in line with popular opinion.' Thus, the appearance of our independence is at stake. We must not only be independent, we must also be *seen* as independent.

Switzerland is not the only example. Many European countries [reported](#) that judges would not get reappointed or not get promoted. Turkey, Georgia and Slovakia are just a few examples. Their Council for the Judiciary has to make sure that only independent persons can make suggestions for re-elections. It also has to guarantee that re-elections are based on merit only.

b) Effective enforcement of judicial decisions

On 11 January 2018, the Constitutional Court of Turkey [held](#) that a journalist be released from prison. The criminal court simply refused to implement the decision. It said that the Constitutional Court had overstepped its jurisdiction. Many other member states of the Council of Europe [reported](#) enforcement issues. If our decisions are mere theory, this undermines our credibility and authority. Therefore, the Council for the Judiciary must make sure that our decisions are enforced.

How can a Council for the Judiciary counteract? The first step is the introduction of remedies for non-execution. If a judgement is not enforced, any claimant can seek judicial review. A second tool is the training of enforcement officers. Enforcement requires not only appropriate budget, but also expertise. As a third step, the Council for the Judiciary should ensure that enforcement offices have sufficient independence from politics.

Only a strong Council can make sure our judgements are enforced. Only a strong Council can safeguard judicial appointments from political pressure. A Council has a strong position if it is independent from the executive. The members of the Council should be judges only.

2) Court Presidents

The second line of defence are the presidents of the courts. They form the outer wall. They make sure we can work in peace and quiet. They also act as our coach and as mediators. Let us turn to those two tasks.

a) Court Management

The first task of the president is good court management. If a court is managed well, the government is less likely to interfere in its internal matters.

In order to manage the court well, the president needs a budget. For that, the president needs to explain Parliament what her court does. Many European countries face budget-cuts. With less financial means, we are not well equipped to deal with a backlog of cases. Also, we lack the resources to deal with complex cases appropriately.

The judiciary of Malta is chronically under-staffed. Our colleagues said that one Maltese judge has to do the work of two judges. Our Dutch colleagues [reported](#) that they do not have enough staff to deliver quality work. In 2015, the Belgian courts had to postpone cases scheduled for hearing because they did not have enough money.

Wherever there is insufficient funding, there is the risk of overemphasising 'productivity'. There are many who would say that 'productivity' means producing an enormous quantity of decisions. A productive court decides swiftly. A productive judge can hear ten cases an hour. Those who argue that way forget that some cases need more work than others. They also forget that decision-making is not just about swiftness, but also about quality.

Any President must be able to tell that story in simple words. Parliament might listen. The President can explain Parliament that we are natural allies. Parliament enacts laws that are not always observed. We make sure laws are properly interpreted. A good president will explain that role. Parliament will recognise that it is our natural ally. It will grant us proper funding if our President is able to explain what we do and why it is important.

b) Presidents as Coaches and Mediators

The second task of a president is coaching. We should be able to turn to our president for advice when facing challenges. Sometimes, our authority is challenged from outside, by the media, or the government. Sometimes, we face challenges from inside, from our colleagues. A good president can be both a good coach and a mediator.

Our president can only be our coach and mediator if she understands her role. She is the first among equals, not our boss. We are not her employees. A good president is conscious of that fact. By understanding her proper role, she is our strong outer wall.

3) Judges

Let us now turn to the last line of defence. The last line is us. Together, we form the inner wall around the city. Our task is to guarantee our impartiality. We must also uphold our personal integrity. In order to fulfil those tasks, we must become resilient against attacks. Let me give you a few examples.

a) Bending when laws are amended

The first example comes from our day-to-day business. We decide on housing, divorces, civil liability or criminal law. Our decisions affect the litigants, and perhaps some parts of the population. Sometimes, however, the context becomes political. In those circumstances, our decisions may not please everyone.

We may face protests from the government. The government would say that we interpreted the law the wrong way. Most of the time, the government would leave it at that. But sometimes, it changes the law.

By passing a new law, government and Parliament would say that we got it wrong. In those cases, we have two options. We can insist on what we decided before the law was changed. Or we give in.

Most of the time, it makes sense back down. The new Act of Parliament is often straightforward. We can only strike it down by using our most powerful weapon, judicial review of legislation. We should be careful not to use that weapon too often. There is no reason to use a sledgehammer to crack a nut. We just provoke a back and forth between Parliament and us, [arguing who would have the final say](#).

b) Turning to third parties when attacked by the media

There are other occasions where we should do nothing. Challenges do not only originate from government. The media challenge us too. The Daily Mirror attacked the judges who took part in the Brexit decision. The newspaper would say that our colleagues were 'out of touch'. The Daily Mirror [put them on the front page](#), calling them 'enemies of the people'.

When being attacked by the media on a personal level, in most cases it is of crucial importance to do nothing. As soon as we counteract by press conferences or other means, we only fuel an existing turmoil. It is not our job to get entangled in political manoeuvring.

We should instead turn to our network for help. Our President will help us to manage the situation. Our Council of the Judiciary will raise his voice for us. The Council is the river, further away from our city. The Council has the authority and the means to defend us. In the meantime, we should stay put and carry on with our work.

There are situations where we must do something though. Sometimes, our outer wall needs support. A few years ago, 700 Dutch judges [signed](#) a manifest to protest against budget cuts. Such actions can strengthen the position of our presidents and of our Judicial Councils. However, we should not turn to the media too often.

One might argue that we can rely on our freedom of speech. We can turn to the media whenever we want to. We have a special role though. We must protect not only our independence, but also our impartiality. Being impartial means not taking sides. It means to keep away from politics as good we as can.

c) Judges and the Concept of Resilience

To sum up, we must react in different ways. Sometimes we must act, and sometimes we must not do anything. We must react in a flexible way. Architects know that. When they build a wall, they provide doors to pass it and build it in a resilient way. Resilience is the ability to bend in challenging situations. When we remain stiff, we break. We can only address challenges when we are able to react in flexible way, bending slightly forward and backward. A resilient wall is like a resilient bridge. It adjusts slightly, so it does not break.

The concept of resilience contains a number of powerful tools. It can help us to accept challenges to our authority. It does not help to cling to the idea that our authority should be undisputed. We can only change what we first accept.

Once we accept that our authority is challenged, it is important to distinguish what we can change and what is beyond our sphere of influence. When facing challenges, we would often feel helpless. We would think that the situation is beyond control. In fact, it is rare that we cannot control anything. More often than we think, there are small if not major things we can influence. Turning to our professional or private network is one. Staying put is another.

Sometimes we simply must focus on our main task, the deciding of disputes. This is what successful athletes do. They zoom in on their role. They focus on what they control and forget the rest. They build on their resilience, focussing on their long-term goals.

As judges, we are used to deal with difficult situations alone in our office. We study the file; we dwell on the arguments of the parties. Much of our work consists of reflecting and deciding. When our authority is challenged, we must focus on our [mental toughness](#). The US Army introduced [resilience training](#). Perhaps, it is time for the courts to do the same.

4) Conclusion

According to [Groucho Marx](#), *'politics is the art of looking for trouble, finding it everywhere, diagnosing it wrongly, and finding unsuitable remedies.'* Many governments find troubles in the court. This is not surprising. It is our job to insist on the rule of law. That is not always convenient for the government.

Some governments diagnose the problem not quite correctly. Most of the time, it is not the judiciary that causes the problem. We try to do a good job, delivering quantity *and* quality. Governments may overlook that. Their remedy is to cut down on our budget, dismiss progressive colleagues from the bench or make sure our decisions are not enforced. A Council for the Judiciary can explain why these remedies are not the right ones. Together with the presidents, he safeguards our independence by sheltering appointment and re-election procedures from political interference and defending our budget. We form the inner and last wall. Those three lines of defence are the art of keeping trouble away by making a correct diagnosis and applying the right remedies.

This paper summarises a panel submission for a seminar on the [authority of the judiciary](#) at the [European Court for Human Rights](#). The authors would like to thank the organisers for the invitation. All the views expressed herein are personal and do not bind the [Swiss Federal Administrative Court](#) in any way.

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