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NEWSLETTER

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Switzerland's judicial system: insufficient and in urgent need of reform

Dear Sir or Madam,

We praise Switzerland as a constitutional state, believe that our courts are independent, gloat about the injustices of other nations and praise the work done by Amnesty International. However, analysis of the Swiss judicial system highlights deficiencies and the need of reform.

The administration
The power of the authorities is immense. As long as you do not have any business with them all is fine. However, once you are in the clutches of the administration it can get uncomfortable. What came to light recently with KESB (child and adult protection authority) is ever-present; the only thing lacking is information. Fact is: if it comes to confrontation the citizen always gets the short stick – not because he or she is at fault, but because all legal authorities operate in favour of the state.

We can take it for granted that 80 to 90% of all procedures are handled correctly; it is an altogether different matter with the remaining 10 to 20% as they are not judged independently and objectively. Nobody within this administrative system is keen on criticising a work colleague during internal administrative proceedings. It would need a significantly serious case of wrong-doing before corrective steps are taken. Anything wrong or incorrect but not reaching the levels of a serious case of injustice remains in situ.

Courts
The basic problem of our judicial system is that judges are elected, and apart from re-election in four year's time and retirement, they are not subject to any internal controls.

What is lacking:
- quality control
- quality assurance system
- monitored further education
- exchange of information and experiences with other courts
- second opinion, in the sense of a quality control (peer review)
- supervision that deserves the name

Thus it is perfectly possible that, for example in criminal proceedings, judges can hand down verdicts to defendants, whilst it is not documented:

- whether they have read the files
- whether they have understood the issue
- whether judges as ruling panel have come jointly to a verdict
- whether they have assessed the issue, and when and for how long
- whether they drew their own conclusions or whether they just agreed with the presiding judge's verdict
- whether there was a minority opinion
- whether they are prejudiced
- and so on

These deficiencies are considerable, but they are accepted as is. As a consequence, if a case is taken to the next highest level there will be no check whether the original verdict was reached lawfully – for two reasons. First, the decision-finding process of the previous court is a priori presumed to have been correct, and second, if the court at the higher level ever had any doubts about that, it would be unable to actually check the decision-finding process as it is not documented. About the only things that are documented are the verdict and the reasons for it by the presiding judge and the law clerk.

As a consequence of a lack of obligation to document, the parties involved in litigation may not be able to find out and check whether the judge was aware of the issue and understood it, and to what extent. Due to the lack of adversarial proceedings this will get lost. The parties involved in litigation are not even allowed to ask a judge whether he was aware or understood the various issues at hand.

Disparity between economic performance and judicial system

Each certified company documents its processes more than our courts. We are proud to have one of the highest GDP per capita, but our judicial system is eons away from this. Thus it is understandable that any kind of private arbitration in Switzerland has been successful, whereas any experienced economic leader will seek to avoid the ordinary courts of law in Switzerland.

The current legislation has its roots in the fifties, and the requirements of a modern constitutional decision-making process are not a political issue. The courts make judgements about statutory requirements regarding duties of documentation in professions and industries, about compulsory training in supervised jobs and so on, but there is no self-critical analysis demanding the same of the judicial system.

Court districts too small

The canton as a court district is too small to establish a professional judicial system. The size of most cantons does not allow the setting-up of a judicial body that is both capable to make judgements in complex cases and creating a redundancy in knowledge leading to a coherent jurisdiction. Neither supervision nor secondary opinions can be established.

Particularly in the most critical area, in criminal law, this can lead to trials at the expense of appropriate verdicts. Prosecutors, judges and defence counsels know each other well, are often on first-name terms and often meet in social or professional environment. They know each other. How can this allow an independent verdict? Defence counsels avoid challenging the impartiality of judges as during the next case,

maybe even during the same week, defence counsel and judge are facing each other again. The same goes for prosecutors. Criminal judges and prosecutors meet regularly. The prosecution delivers the cases for the criminal court. Thus in any form of criticism there is implicitly a natural reluctance. The required anonymity for an independent judgement is completely absent. The same applies for the various stages of appeal. The judges of the first court and those at the appeal court are professional colleagues. This prevents the legally required judicial control.

Decree appeal

The new Court Organisation Act of the canton of Basel-Stadt is to come into effect on 1/1/2016. This writer has lodged a decree appeal with the Federal Supreme Court, with the aim to have the new legislation's proportionality reviewed. With this appeal the act will be reprimanded as an unconstitutional law. With this new act there will be no more plans for court distributions. As a consequence any entitlement to an impartial, independent and unprejudiced judge, without extraneous circumstances having any effect, is not met, and in the field of criminal law it is also incompatible with the European Convention on Human Rights (ECHR). Case allocation by judges to themselves will still be possible. All European courts now have such distribution plans, but not Basel-Stadt. The non-transparent appointment of judges is also unlawful. The appointment of a judge comes without a detailed explanation; it just so happens in Basel. Anywhere in Europe and under common law a formal announcement is required by law. Additionally the new Court Organisation Act is reprimanded for a lack of compulsory training for judges which is the consequence of the entitlement to fair proceedings. In any job requiring high qualifications, further training is the norm but not in the judicial system. Should the appeal be successful, then it will be an utter disaster for Basel's judiciary, with the courts unable to act.

Proposals for legislative improvements

Via a concordat, three court districts for German-speaking, French-speaking and Italian-speaking Switzerland should be created. The judicial system needs to be professionalised. Further training and international comparisons are necessary.
A documentation duty needs to be established, to make the decision-finding process of the court transparent. In criminal law the principal of immediacy needs to be introduced (as is the case in Germany, UK, USA, etc.). This would mean that facts relevant to the decision-making process would immediately need to enter the trial and the verdict by the court.

We also should think about general ideas regarding the issue of the judicial system. Instead of a huge number of elected judges, a supreme body should be elected, just like the election of a government. This body would then be responsible for the organisation of a judicial body. An overall budget would then enable it to fulfil the mission of "judicial system, dispensation of justice." This would also lead to judges regarding themselves as a member of a court and not as federal employees.

Kind regards
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