

Thomas Stadelmann (Editor)

Democracy falling apart

Role and Function of Judicial
Independence, Separation of Powers
and the Rule of Law in a
Constitutional Democracy

Supported by



EAJ



The Turkish Judiciary in 2018

This book explains the role and function of the basic principles necessary for a democratic state of European character: an independent judiciary, a consistent separation of powers and a commitment to the Rule of Law. It presents the relevant binding international laws as well as the generally recognised international standards.

Eventually, by depicting the current developments in Turkey, it shows how rapidly a democracy can collapse if these foundations are not protected.

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Separation of Powers and the Rule of Law in a
Constitutional Democracy – The Turkish
Judiciary in 2018**



Stämpfli Verlag

This book is supported by the European Association of Judges (EAJ), a regional Group of IAJ, the International Association of Judges. Today it has 44 national associations as members. For further Information: <http://www.iaj-uim.org/regional-groups/>



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*“The truth is like a lion;
you don’t have to defend it.
Let it loose; it will defend itself.”*

Attr.: Augustine of Hippo

1. Introduction/Introduction/Einleitung/Giriş

Introduction

The European Association of Judges (EAJ) has been dealing with the situation of justice and the rule of law in Europe for years. It notes with great concern that the independence of justice, the separation of powers and the rule of law can no longer be taken for granted: the commitment to these essential foundations for the democratic rule of law is therefore becoming increasingly important.

An example of this negative evolution - unique in these proportions in the current century - is the radical change of Turkey's democracy. The conditions in this country have been worrying the EAJ for a long time. Not only has the independence of justice been virtually eliminated, but there is no longer any question of the separation of powers.

The independence of justice has indeed been under pressure for some time and since the coup attempt of July 15, 2016, the situation is only getting worse. Thus, the foundations of a democracy have been largely suspended.

This book aims to reiterate, once again, the essential elements for the maintenance of a democracy based on the rule of law and to show how quickly a democracy can collapse if these foundations are not protected.

The contributions of this book come from two different types of authors. Firstly, from judges from all over Europe who have been operating within the EAJ and other European organizations for many years for the preservation of the rule of law, the separation of powers and an independent judiciary. Secondly, from jurists from Turkey who report first-hand the development of the situation in their country. The Turkish writers each write under a pseudonym since they can not risk, under present conditions, to openly criticize what has become of the rule of law. This fact in itself is already highly significant in the context of the topic.

The contributions are addressed to lawyers, politicians, but also to all other readers interested in the rule of law, democracy based on the separation of powers and the independence of the judiciary. This book is multilingual, the contributions are written in English, German or French. They each contain a short summary in English, German, French and Turkish. The Turkish laws were available to the Turkish authors, the other authors used the English translations.

Thomas Stadelmann, editor

Introduction

L'Association Européenne des Magistrats (AEM) s'occupe depuis des années de la situation de la justice et de l'Etat de droit en Europe. Elle note avec une grande préoccupation que l'indépendance de la justice, la séparation des pouvoirs et l'Etat de droit ne sont plus considérés comme allant de soi: l'engagement pour ces fondements indispensables à l'Etat de droit démocratique devient donc de plus en plus important.

Un exemple de cette évolution négative - unique dans ces proportions au cours de ce siècle - sont les événements survenus en Turquie. Les conditions dans ce pays inquiètent l'AEM depuis longtemps.

En effet, l'indépendance de la justice y est sous pression depuis un certain temps et, à la suite de la tentative de coup d'État du 15 juillet 2016, la situation ne cesse de s'aggraver. Non seulement l'indépendance de la justice a été pratiquement éliminée, mais en plus il n'y est plus question de séparation des pouvoirs. Ainsi, les fondements d'une démocratie ont été largement suspendus.

Ce livre a pour objectif de rappeler, une fois de plus, les éléments indispensables au maintien d'une démocratie fondée sur l'Etat de droit et de montrer à quelle vitesse une démocratie peut s'effondrer si ces fondements ne sont pas protégés.

Les contributions de cet ouvrage proviennent de juges de toute l'Europe oeuvrant au sein de l'AEM et d'autres organisations européennes depuis de nombreuses années pour la primauté du droit, la séparation des pouvoirs et une justice indépendante ainsi que de juristes de Turquie qui rapportent de première main le développement de la situation dans leur pays. Les auteurs turcs écrivent chacun sous un pseudonyme puisque dans les conditions actuelles, ils ne peuvent se permettre de critiquer ouvertement ce qui est advenu de l'Etat de droit. Ce fait en soi est déjà hautement significatif dans le contexte du sujet traité.

Les contributions s'adressent aux juristes, aux politiciens, mais aussi à tous les autres lecteurs intéressés par de l'État de droit, la démocratie fondée sur la séparation des pouvoirs et l'indépendance de la justice. Ce livre est multilingue, les contributions sont en anglais, en allemand ou en français. Chacune est précédée d'un bref résumé en anglais, en français, en allemand et en turc.

Les lois turques étaient à la disposition des auteurs turcs, les autres auteurs se sont basés sur les traductions anglaises.

Thomas Stadelmann, éditeur

Einleitung

Die Europäische Richtervereinigung – EAJ – beschäftigt sich seit Jahren mit der Situation der Justiz und des Rechtsstaates in Europa. Sie stellt mit grosser Sorge fest, dass die Unabhängigkeit der Justiz, die Gewaltenteilung und die Rule of Law in vielen Ländern keine Selbstverständlichkeit mehr sind: Der Einsatz für diese unverzichtbaren Grundlagen des demokratischen Rechtsstaates wird deshalb immer wichtiger.

Ein Beispiel für diese negative Entwicklung – in ihrem Ausmass in diesem Jahrhundert einmalig – sind die Geschehnisse in der Türkei. Mit den dortigen Verhältnissen befasst sich die EAJ schon länger: Seit geraumer Zeit ist die Unabhängigkeit der Justiz unter Druck und nach dem Putschversuch vom 15. Juli 2016 spitzte sich die Situation fortlaufend zu. Nicht nur die Richterliche Unabhängigkeit wurde praktisch beseitigt, auch von Gewaltenteilung kann nicht mehr die Rede sein. Damit wurden die Grundlagen einer rechtsstaatlichen Demokratie weitgehend ausser Kraft gesetzt.

Vor diesem Hintergrund wurde dieses Buch geschrieben: Es soll – einmal mehr – daran erinnern, was es für die Aufrechterhaltung eines demokratischen Rechtsstaates braucht, und wie schnell eine Demokratie untergehen kann, wenn diese Grundlagen nicht geschützt werden.

Die Beiträge im Buch stammen von Richterinnen und Richtern aus ganz Europa, welche sich innerhalb der EAJ und in weiteren Europäischen Gremien seit vielen Jahren für den Rechtsstaat, Gewaltenteilung und eine unabhängige Justiz einsetzen, und von Juristinnen und Juristen aus der Türkei, welche über die Entwicklung in ihrem Land aus erster Hand berichten. Die Autoren aus der Türkei schreiben jeweils unter einem Pseudonym: Unter den heutigen Bedingungen können sie es nicht wagen, unter ihrem Namen offen Kritik an der rechtsstaatlichen Situation zu äussern. Bereits dieser Umstand alleine ist eine wichtige Aussage im Kontext des behandelten Themas.

Die Beiträge wenden sich an Juristinnen und Juristen, Politikerinnen und Politiker, aber auch an alle anderen an Rechtsstaatlichkeit, gewaltenteiliger Demokratie und unabhängiger Justiz interessierte Leserinnen und Leser. Das Buch ist vielsprachig: Die Beiträge sind auf Englisch, Deutsch oder Französisch geschrieben; sie enthalten je eine Kurzzusammenfassung in Englisch, Französisch, Deutsch und Türkisch. Die türkischen Gesetze standen den türkischen Autoren zur Verfügung, die übrigen Autoren stützen sich auf die englischen Übersetzungen ab.

Thomas Stadelmann, Herausgeber

Giriş

Avrupa Yargıçlar Birliği (EAJ) yıllardır Avrupa'daki yargı ve hukukun üstünlüğü kavramları üzerine çalışmaktadır. Bu bağlamda yargının bağımsızlığı, kuvvetler ayrılığı ve hukukun üstünlüğü kavramlarının artık olması gereken seviyede olmadığı büyük bir kaygıyla vurgulanmaktadır. Dolayısıyla demokratik bir hukuk devletinin olmazsa olmaz şartlarından olan bu prensiplere bağlılık günden güne daha da önemli hale gelmektedir.

Bu kötü yöndeki gidişatın bir örneği olarak da Türkiye'de yaşanan olaylar gösterilebilir. Türkiye'nin içinde bulunduğu durum EAJ'yi uzun zamandır endişelendirmektedir. Aslında yargı bağımsızlığı ilkesini zedeleyecek bir baskının bir süredir mevcut olduğu bu ülkede özellikle 15 Temmuz 2016'daki darbe girişiminden sonra durum daha da kötüleşmiştir. Sadece yargı bağımsızlığı değil aynı zamanda kuvvetler ayrılığı ilkesi de uygulamada ortadan kaldırılmıştır. Böylece, demokrasinin temel ilkeleri büyük ölçüde askıya alınmıştır.

Bu kitapla, hukukun üstünlüğüne dayalı bir demokrasinin kurulması ve sürdürülebilmesi için gerekli olan unsurları bir kez daha hatırlatmak ve bu temel ilkelerin korunmadığı durumlarda demokrasinin ne kadar hızlı bir biçimde çökebileceğini göstermek amaçlanmıştır.

Kitabın bölümlerini oluşturan yazılar; hukukun üstünlüğü, kuvvetler ayrılığı ve yargı bağımsızlığı prensipleri üzerine gerek Avrupa Yargıçlar Birliği'nin gerekse diğer uluslararası organizasyonların bünyesinde senelerdir çalışan Avrupa'nın farklı ülkelerindeki hakimler tarafından ve ülkelerindeki durumun gelişimini ilk elden haber veren Türk hukukçular tarafından kaleme alınmıştır. Türk yazarların hepsi birer takma isim kullanmıştır çünkü ülkelerindeki mevcut şartlar, hukukun üstünlüğü kavramının ne ölçüde zarar gördüğünü istedikleri bir biçimde eleştirebilmelerine izin vermemektedir. Bu durum bile kitabın konusu bağlamında çok önemli bir gösterge niteliği taşımaktadır.

Bu yazılarla; avukatlara, politikacılara ve aynı zamanda gerek Avrupa'daki-Türkiye de dahil olmak üzere – gerekse diğer kıtalardaki hukukun üstünlüğüne, kuvvetler ayrılığını içeren bir demokrasiye ve yargı bağımsızlığına inanan tüm diğer okurlara seslenilmiştir. Kitap, çok dilli olarak hazırlanmıştır. Yazılar İngilizce, Almanca veya Fransızca olarak yazılmıştır ve her bir yazının İngilizce, Almanca, Fransızca ve Türkçe olmak üzere kısa bir özeti bulunmaktadır. Türk yazarlar kendi ülkelerinin kanunlarından yararlanırken yabancı yazarlar ise ilgili metinlerin İngilizce çevirilerinden yararlanmışlardır.

Thomas Stadelmann, Editör

2. Judicial Independence, Separation of Powers and the Rule of Law – Function and Role in a Constitutional Democracy

AUTHOR: NILS ENGSTAD

Summary

Charles Louis de Secondat, Baron de Montesquieu, developed the theory of separation of powers in his groundbreaking work *The Spirits of the Laws* (1748). “Every man invested with power is apt to abuse it”.¹ Montesquieu based this fact on “constant experience”, and it applies to continued experience. Montesquieu found great inspiration in the English constitution, but he also addressed the lack of separation of powers in Turkey where he found all powers “united in the sultan’s person” and where “the subjects groan under the most dreadful oppression”. This observation corresponds to a concern that was present two millennia ago in the works of ancient Greek philosophers, notably the potential for tyranny in a populist democracy. To prevent the abuse of power Montesquieu found it necessary, from the very nature of things, that “power should be a check to power”. The mechanisms described in the classic origins of the theories of the rule of law and separation of powers have relevance even today. In several constitutional democracies, judicial independence is under attack by political forces attempting to weaken checks and balances. Authoritarian regimes could become the new normal in parts of the world where democracy once prevailed.

Résumé

Dans son œuvre avant-gardiste « *De l’esprit des lois* » (1748), Charles Louis de Secondat, Baron de Montesquieu, a développé la théorie de la séparation des pouvoirs. « Tout homme qui a du pouvoir est porté à en abuser ».² Montesquieu a fondé ce constat sur « l’expérience éternelle », et l’expérience actuelle continue à le démontrer. Si Montesquieu a été très inspiré par la constitution anglaise, il a également relevé le manque de séparation des pouvoirs en Turquie où, selon lui, tous les pouvoirs étaient

¹ All quotes of Montesquieu are from *The Complete Works of M. de Montesquieu* translated from the French, in four volumes, Volume the first, Book XI, chapter 4 and chapter 6, London, 1777.

² Toutes les citations de Montesquieu sont tirées de « *Œuvres complètes de Montesquieu* », Tome premier, Bâle, 1799.

« réunis sur la tête du sultan » et où « règne un affreux despotisme ». L'absence de séparation des pouvoirs reflète un problème soulevé il y a deux millénaires déjà par les philosophes de la Grèce antique, à savoir le danger de tyrannie que renferme la démocratie populiste. Afin de prévenir l'abus de pouvoir, il est nécessaire, selon Montesquieu, que « par la disposition des choses, le pouvoir arrête le pouvoir ». Les mécanismes décrits dans les théories classiques sur l'Etat de droit et la séparation des pouvoirs sont toujours d'actualité. Dans plusieurs démocraties constitutionnelles, l'indépendance de la justice est remise en question par des forces politiques qui tentent d'affaiblir le contrôle et l'équilibre entre les pouvoirs. Les régimes autoritaires pourraient devenir la nouvelle norme dans certaines parties du monde où régnait jadis la démocratie.

Zusammenfassung

In seinem wegweisenden Werk „Vom Geist der Gesetze“ (1748) hat Charles Louis de Secondat, Baron de Montesquieu, die Theorie der Gewaltenteilung entwickelt. „Jeder Mensch, der Macht hat, ist dazu geneigt, diese zu missbrauchen“. ³ Montesquieu berief sich dabei auf die «ewige Erfahrung», und diese Erfahrung bestätigt sich weiterhin. Montesquieu hat in der englischen Verfassung grosse Inspiration gefunden. Kritisiert hat er dagegen den Mangel an Gewaltentrennung in der Türkei, wo „der Sultan alle drei Gewalten in sich vereinigt“ und „ein unerträglicher Despotismus herrscht“. Diese Feststellung greift ein Problem auf, das schon vor zwei Tausend Jahren in den Arbeiten der altgriechischen Philosophen behandelt wurde, das Tyrannepotenzial populistischer Demokratien. Damit die Macht nicht missbraucht werden kann, ist es laut Montesquieu nötig, „die Dinge so anzuordnen, dass die Macht der Macht Einhalt gebietet“. Die in den klassischen Theorien zum Rechtsstaat und zur Gewaltenteilung beschriebenen Mechanismen sind nach wie vor aktuell. In mehreren demokratischen Verfassungsstaaten wird die Unabhängigkeit der Justiz von politischen Kräften angegriffen, die versuchen, das System von „checks and balances“ auszuhöhlen. In manchen Teilen der Welt, wo einst Demokratien herrschten, könnten autoritäre Regimes bald zur Norm gehören.

³ Übersetzung der Zitate von Montesquieu in Anlehnung an „Der Geist der Gesetze“, Übersetzung von A.W. Hauswald, Band 1, Görlitz, 1804.

Özet

Charles de Louis de Secondat, Baron de Montesquieu, *Kanunların Ruhu* (1748) adlı çığır açan eserinde kuvvetler ayrılığı teorisini ortaya attı. “Güç sahibi herkes onu kötüye kullanmaya meyleder”. Montesquieu, bu gerçeği “ezeli bir tecrübe” ye dayandırdı ve bu gerçek günümüzde de hala geçerli. Montesquieu, aslında İngiliz anayasasından büyük bir ilham almıştı, fakat aynı zamanda, güçleri “Sultan’ın şahsında birleşik” bulduğu ve “bireylerin korkunç bir baskının altında yer aldığı” Türkiye’yi de değerlendirmiş ve kuvvetler ayrılığının bulunmadığını belirtmişti. Bu gözlem, antik Yunan filozoflarının çalışmalarında iki bin yıl önce ortaya çıkan, özellikle de popülist bir demokrasideki tiranlık ihtimaline duyulan kaygıyla aynıdır. Montesquieu, güçlerin kötüye kullanılmasını önlemek için doğası gereği “Güç, gücü kontrol etmelidir.” prensibini gerekli görmüştür. Hukukun üstünlüğü ve kuvvetler ayrılığı teorilerinin tanımladıkları klasik orijinal mekanizmalar günümüzde bile hala geçerlidir. Bununla birlikte, bazı anayasal demokrasilerde yargı bağımsızlığı, kuvvetler ayrılığını zayıflatmaya çalışan siyasi güçlerin saldırısına maruz kalıyor. Otoriter rejimler, demokrasinin bir zamanlar hüküm sürdüğü dünyanın bazı bölümlerinde yeni kabul gören sistemler haline gelebilirler.

Constitutional democracy and the rule of law

Some basic freedoms are required to establish and maintain a constitutional democracy, including freedom of expression and freedom of association. By these freedoms, which normally would be protected by the constitution, written or unwritten, the government can be held accountable. They allow for diversity in the public discourse and for a variety of political parties running for seats in the parliament and other democratic institutions in elections. These elections must not only be free, they must also be fair.

In a constitutional democracy, power of a government is limited by laws and by the constitution. Checks and balances are mechanisms separating state powers typically between the legislative, the executive and the judicial branches in order to avoid one single person or single body having absolute power.

A constitutional democracy is based on the rule of law. The rule of law implies legal certainty and prohibition of arbitrariness. It entails respect for human rights, non-discrimination and equality before the law. The rule of law also demands legality; the law must be accessible and so far as possible intelligible, clear and predictable. Laws must conform to human rights. They must be compatible with the rule of law. Furthermore, there must be access to jus-

tice before independent and impartial courts. This is a core requirement of the rule of law.

The requirement of an independent judiciary

An independent judiciary was crucial to Montesquieu's concept. "There is no liberty if the judiciary power be not separated from the legislative and the executive", a maxim of Book XI, chapter VI, possibly the most famous chapter in the book. According to Montesquieu, the liberty of the subject would be exposed to arbitrariness and oppression if the judiciary were joined with the other two powers of state.

In a constitutional democracy, independent judges are there to protect fundamental freedoms and human rights. Even accessible, clear and predictable laws adopted by democratic procedures could be misused or be contrary to human rights. Therefore, laws as well as actions taken by the government must be subject to the scrutiny of independent courts upholding the rule of law. The judiciary is the ultimate guarantor of the rule of law and human rights in a constitutional democracy. Judges must decide whether the executive has exercised its powers within the limits of the law and in accordance with human rights instruments. Furthermore, it is common in constitutional democracies that the courts exercise constitutional review, meaning that the courts assess and decide on whether the other powers of state have exercised their powers in accordance with the constitution. In some constitutional democracies, ordinary courts have the competence to conduct constitutional review with a supreme court having the final say, while in other states the review is ultimately exercised by a constitutional court.

From constitutional democracy to constitutional autocracy?

As Montesquieu observed in *The Spirits of the Laws*, of the three powers, "the judiciary is, in some measures, next to nothing". This notable phrase made an impression on Alexander Hamilton who 30 years later reiterated it in *The Federalist Papers* No. 78 (1788), and which, by its content, is still true. The judge merely has his or her judgments, as Hamilton pointed out. The other branches of state hold vast powers at their disposal, and they could effectively subjugate the judiciary under certain circumstances, which is currently the exact situation in too many states. Judicial independence is presently under attack by political forces attempting to weaken checks and balances. We see democracy and the rule of law backsliding. By adopting a new constitution or by amending or even ignoring the existing one, and with seemingly

democratic means, authoritarians and autocrats have dismantled democracies. They have disabled checks and balances, undermined the rule of law, terminated judicial independence, changed the election system for the benefit of their own party, intimidated opposition media and silenced critics in civil society. Basic freedoms required to maintain a healthy democracy have been heavily restricted.

A number of constitutional democracies drift toward constitutional autocracies with a new or amended constitution consolidating new ways for the distribution of powers, usually by merging all powers under the control of one singular party, the ruling party. In parts of the world where democracy once prevailed, authoritarian regimes are taking a foothold and becoming the 'new normal'. We should not let that happen. We should not let consolidated authoritarian regimes be the new normal. Returning to Montesquieu: "There would be an end of everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

