

THE PROFILE OF THE JUDGE IN THE EUROPEAN TRADITION

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Abstract. The paper discusses the changing profile of the “judge” as a centre of nearly every legal culture in history. In the pre-modern eras the identity or distances between kings, priests and judges are decisive as indicators of the political model. Since the late 18th century the judge in European countries gets more and more a profile as an independent third function in the modern constitutional model. Today constitutional courts in many states and the European courts in Luxemburg and Strasburg are controlling the “normal judges” on every stage, but also the legislators. They do it although the interaction of national and international, European and private-produced law is more complex than ever.

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I.

The “judge” is an archetypal figure of European history. Most of the great religions draw out a profile of a judge sitting in judgement on men’s actions when they enter the realm of the dead. He balances good and evil actions against one another and decides upon punishment or reward. The judge is the last resort everything is oriented by. It is that way in ancient Babylon and also in ancient Egypt and in ancient Jewry – but not in Greece. In the apostolic Creed, we Christians speak about Jesus Christ, at the end of time sitting in judgment as “judge of the worlds” on “the living and the dead”. Our collective historic consciousness saves the ideal profiles of this judge: He is seated enhanced, in an upright posture; his symbols are a pair of scales and the punishing sword. He sees everything and decides fair. His sentence is irrevocable. He is the “last resort”.

It seems that the imagination of this profile of a judge is a universal of human existence. In conflicts as they occur inevitably (only in utopias, societies without conflicts are created), we seek an instance, a person or an institution provided with

ultimate authority, standing “above the parties” and being able to settle the dispute by wisdom and legal studies. This suggests a continuous tradition from Osiris, the judge upon the dead, or from Jesus Christ, “judge of the worlds”, to the judges of the highest European Courts in Luxembourg or Strasbourg, to the international judges in Den Hague or to the constitutional judges of the European states. They are also seated enhanced, they wear ceremonial, neutralizing robes, they decide most sovereign and finally, at least on this Earth.

However, on closer inspection, the proposition of a super-transcending continuousness of the “judge” cannot be maintained. For historians, history is more a kaleidoscope of changing pictures, among which there are related elements but with modifying constellations. Still, there are relicts of archaic civilizations, without judges but with a community acting subsequent to time-consuming “palaver” and by ritual acts (Wesel 2001:29ff). Still, there are examples of the so-called segmental, settled societies without a state. There, the law of vendetta is applied; a kind of arbitration exists as well as a complex process of making compromises. Some of it seems to recur in the non-statal or *acephale* judicial networks of globalization. Without a state or an organized community there is no judge.

In the historic order of events, societies known to us gradually move towards a formation of “public” structures. This means that agrarian societies consider it to be more useful to transfer disputes away from the clan through to “public concerns”, thus to neutralize them and to make them controllable. Out of the family’s protective cover, the individual slowly emerges. Vis-à-vis, there is a judge, being independent of the clans, be it a “chief” or a king, now taking over the function of regulating for the major ethnic associations.

Going an extra mile to the early urban advanced civilization we discover a developed judiciary immediately. The ruler of the town or a pharaoh, a high council or a priest provided with judicial rights is the ruler of the courts. This is relevant in ancient Mesopotamia, in Egypt and ancient Israel.

However, I am not going to tell a history of judiciary and the profile of judges of ancient Babylon, Egypt, Greece and Rome up to the European states of the present. That would not only exhaust my expertise but also your patience. With these introductory remarks I intended to foreshadow the genesis of an archetype of the “judge”, developed by all these civilizations, if certain conditions are fulfilled.

As such conditions have to be named: The formation of organisations distanced enough from the clans and being able to be called “state”. There needs to be a particular division of functions, the formation of a type of human being, dedicating himself to “public affairs”. Moreover, this includes the (albeit possibly rudimental) implementation of a self-contained system “law”, be it stipulated orally or in writing, be it by convention, by custom or by a legendary act of legislation by Hammurapi, Moses, Solon or founded by Decemviri. Within this law, an organisation of courts is typically formed, beginning with local issues, argued in front of the judge of the village, and ending with the highest judge, be he priest,

king, a “high council” (Areopag) or – as in case of Athens – an assembly of citizens entitled to vote.

Mostly everywhere this organisation is centred on the “judge”. Leaving aside the details, for instance the Roman division of labour between the praetor and the appointed judges, or the medieval division of labour between the “decision-makers” and the “judge” proclaiming the sentence, we have – to plagiarize Max Weber – an ideal-type course of events from the family or the clan to the state, from vengeance and self-help to distanced and neutral proceedings, from speech to writing, from a religiously or magically defined moral law to the differentiation of a system “law”, from a ruling *uno actu* in situ to multi-level proceedings with the option to appellate, in other words: to the formation of normative hierarchies.

If and when these base lines take course that way in deed, then the profile of judges changes as well. Firstly, he is the highest-ranking among equals, thus, mostly a wise old man (occasionally a woman or female priest) within the clan, gradually he gains distance and becomes a “functionary” with an exogenous legitimation. By now, his authority as judge is derived from other sources, for instance from God (as priest-judge), from a ruler of the town – often also appearing as God, from the king or the pharaoh – he was a god as well, from the Roman emperor, but as well from the moot, for instance in Athens, in Germanic people and later in the Empire of the Franks.

This judge relies on an external authority. He judges in the name of another and higher power. In the late Middle Ages and in early modern times, i.e. from the 15th to the 18th century, God and the *ius divinum* are named as such authorities, later it is the Roman law, be it in the aura of the “emperor’s law” in the antiquity, be it as law of reason, as natural justice or *ratio scripta*. The more the modern states become a state of legislation, the more God and reason or nature are replaced by the text of written and printed law, so the legislator’s intention. Since Jean Bodin explained sovereignty as its holder’s right to give orders to each individual and to all together, so to legislate, the modern state became a state of legislation. In the next century Thomas Hobbes intensified that by providing the theoretical basis of the mutual covenant of all individuals and giving all power to the monarch.

Thereby, the role and the profile of the judge changed fundamentally. The more absolutism prevailed, at first theoretically, but later in practice as well, the more the judge lost his central position. He was no longer the predominant figure, being able to settle all conflicts as it was provided with highest authority. The judge of the early modern times was now reduced to an executer of the sovereign intent.

As long as the medieval king was the country’s highest judge, he had to preserve the peace, to settle disputes, to reward the good ones and to penalize the evil ones, as long the mere judge, getting his power from the king, was a “royal” judge. As soon as the monarch defined itself mainly as legislator, he will ensure that the judges follow his legitimate orders. Thus, the judge is part of the executive. He becomes *bouche de la loi* (Montesquieu), so a depending, state

functionary of the judicature. Therefore, it seems to be a matter of course, that the absolute monarch reverses the sentence by “dictum of power” (*Machtspruch*), that he may pardon or sharpen a sentence.

Certainly, these are rough simplifications. However, they shall emphasize the principle. In the political reality of Europe in the 16th to 18th century, there are multiple modifications, as we all know. Pure absolutism existed only in Russia, Denmark and in a restricted form in France. In England the parliament’s intent prevailed as source of law. In Germany, there is only a weak legislator on the level of the empire, so the judges still adjudicate according to *ius commune* and the particular *ius patrium (territorii)*. In all other countries having received the Roman Law, judges or judge-councils form a self-conscious profession with academic education, with reputation growing from the fact that the state supplied a particular state function with special authority, namely to decide finally. This authority is derived from the office itself, but primarily from the exposure of academic law. As long as there were no own codifications in these countries, the monarch could not enforce his own intent as “law”. In fact, the judge justified his sentence by the academic law, the content of which could not be influenced by the monarch.

Though, despite the simplifications it seems to be basically correct to say that from the end of the Middle Ages to the French Revolution, so until the end of the *Ancien Régime*, the judge’s role was a more modest one. He is part of the Executive, but no longer the symbolic tip of the state like in the Middle Ages. There is now a monarch of legislation and warfare, but not a fair judge.

II

This changed fundamentally with the French Revolution. The more we move away from it, the more definite becomes the deep break it set. The classical division into nobility, clergy and bourgeoisie was replaced by the uniform nation. The “holy” ruler “by grace of God” was replaced by sovereignty of the people. The former *leges fundamentales* changed into a “constitution”. The constitution is now the nation’s holy and most authoritative document, to which both, king and the people’s representation, were bound.

All this entails consequences. I will only emphasize those referring to the judge. The judge supposedly adheres to the law. But what is the law now? It is no longer the order of an omnipotent sovereign, as described by Bodin, but in the early 19th century it is a compromise between the parliament, i.e. the people’s intent, and the monarch. This compromise corresponds to the political situation, as the new parliaments coming into existence all over Europe are weak at first and have to face a powerful monarchy founded on aristocracy, church and the military. Parliaments are able to discuss and adopt resolutions but the application of the law depends on the monarch’s signature.

When the judge is supposed to comply with the “law”, his position changes as well. Subsequent to the Congress of Vienna in 1815, on the one side the judge still serves the monarchy. The judicial power is seen as part of the monarchic power. Concurrently, the judge as interpreter and decision-maker shall comply with the parliamentary law as product of this political compromise. To make the judge’s difficult position tolerable, there is an alternative: Indeed he shall remain part of the monarchic power, however, he is given independence in person and factually.

This means that in the 19th century the monarch is no longer allowed to revoke a judgement by “dictum of power”. The monarch retreats from everything and begins to accept the judge as a separate “Third Power”. To underline the distance between judge and politics, it is alleged that the judge’s function is non-political by nature; it is a matter of “calculating with concepts”, a one-to-one realization of the legal intent in the sentence.

In this note the profile of the judge changes in the 19th century. He detaches himself from the monarch’s sphere and gradually becomes an independent actor of the “Third Power”. Invigorated by constitutional guarantees, justice becomes a domain of the liberal bourgeoisie. In the mid 19th century it is closer to the liberal movement to create nation states and constitutions, the parliaments and the reformers in the administration than to the old powers and monarchs.

This is confirmed by watching the changes in proceedings and the institutional context of the judge in the 19th century. Proceedings are detached from the *Ancien Régime*’s old, non-public proceedings based on documents and become “public”. Trials are held in public now. The public opinion in the shape of the press and other critical commentators intervene. This is also reflected by the architecture of court buildings: Courtrooms are constructed according to the new codes of procedure, the audience receives seats in the courtroom and trials are announced publicly. Sentences are published in newspapers for the first time and they are commented and provided with argumentations. The judge has to explain to the public in writing why the case was decided that way and no other.

In the 19th century laymen on the bench are new as well. They symbolize the transfer of justice from the monarchic power to the people’s hands. The people provide “jurors” or “lay judges”, honourable persons with “common sense”. They are supposed to guarantee that jurists do not move too far from the people’s sense of justice. This contains democratic pretensions on the one hand and romantic reversions to the Middle Ages on the other hand, when layman were judges and their sentences were perceived as “natural”, “not miss-educated” and “directly derived from the national character”. So, the movement of lay judges connects progressive and conservative-romantic concepts in a particular way.

It is of exceptional importance, that the public proceedings are not only public between court and audience, but it is as well an interaction of three actors. Now, for the first time advocates appear in court publicly, they are learned jurists living on their profession as middle-class notabilities. In the 19th century they typically take active part in politics, most of them being liberal and progressive, some being

socialist. It is distinctive as well, that the Jews' emancipation beginning in the 18th century affects jurists in a way that most of them become lawyers. They could not act as judges and professors, at least in Germany, until 1900.

Opposite the small "court-theatre" there are the prosecutors. They become common in Europe in the 19th century modelled on the French concept. They represent the interest of the state, primarily in criminal law, later on also in trials before administrative courts.

This interaction is reflected by the architecture of the courtrooms. The professional judge is seated above the parties, flanked by lay judges. He is the controlling figure, dressed ceremonially, leads the trial, may impose sanctions spontaneously in case of "contempt of court", he has to pronounce his sentence "in the name of the law" (later in the name of the people) and to draw up an argumentation. The "dignity of the court" is based on the judge's personality. Traditionally, the Christian crucifix hangs above him, and to this oaths are sworn and judgements are pronounced.

One level below the bench the advocate and the prosecutor are seated right and left, both on the same level – as opponents. And one more level below, the accused is standing. He looks up to the judge – just like a believer in the church looking up to Jesus Christ. The judge holds the code of law – the profane bible – he interprets it and addresses the public – like a priest in the cassock – to substantiate his sentence. During the French Revolution the judge was given a bar bearing an "eye of the law". This eye represented the vigilance of law, so the parliament, as well as the eye of God was realized as never-sleeping watchmen over the human beings.

Summarizing these studies, one may say: Subsequent to the French Revolution, political and constitutional parameters according to which the judges worked, gradually changed all over Europe. The judge becomes an independent representative of the "Third Power"; he is abided by the law made by the people or rather by the members of parliament representing it. In some proceedings the judge is surrounded by laymen, actually not interfering with his position. In front of him, there are lawyers and prosecutors, representing the parties respectively the state. Most notably, he acts in public now, in buildings openly accessible to the audience. He has to substantiate his sentences publicly. More important sentences including the argumentation are printed and also commented and criticised by the scholarship. In sum, this judge is completely different from the one in the *Ancien Régime*.

The European movement through to constitutions, democracy and most notably to the "constitutional state" changed the profile of the judge fundamentally. The judge is no longer part of an absolutist regime. He is a prominent member of the middle-class and mediates between state and society. His guideline is the law passed by parliament. Needless to say, he is still paid by the state. Justice is a state-run institution. The state still holds in its hands all instruments for the judges' domestication – and uses them as well. However, the state as a "constitutional state" can no longer do what it would like to do. Direct interventions of the executive are no longer allowed. Dismissals of judges are prohibited as well as

special courts alongside the “ordinary courts”. All over, the remaining elements of “despotism” are being eliminated from judiciary. In states where the people may only participate minimally in political issues, for instance in Germany subsequent to 1848, the “constitutional state” becomes a kind of compensation for the lack of civil politics. Under these conditions the “constitutional state” gathers an intensive aura. An architectural expression of this homage to the “constitutional state” are the pretentious buildings, the “palaces of justice” built all over Europe (Brussels, Milan, Paris, Rome, Munich, Liège, Antwerp, Vienna, Palermo, Lisbon, Monsaraz, Santarem and in other locations). One might say the monarch was leaving the “palace” while justice and the judges moved in.

III

As well as the “long 19th century” beginning in 1789, the “short 20th century” beginning in the fateful year of 1914 and ending in the collapse of the Soviet Union in 1989, created newly-made conditions for state and law, and therefore also for the judges. Accompanied by the establishment of parliamentary democracy, legislation was firmly pushed forward. The state, in the 19th century clearly separated from society, now becomes a “state of interventions”. It intervenes into social processes by legislation, wherever there is a problem: It attempts to resolve the “Social Question” by legislation, it begins to resolve vast economic fusions by anti-trust law, it regulates labour law, “intellectual property” especially by patent law, it controls human supply with water, energy and other basic supply by local legislation, it protects from the risks of nuclear powers, of climate changes, of smoking or of fast food.

This state of intervening legislation, continuously having to make new rules to keep the balance with social processes, destabilizes the entire law. While in the 19th century one was convinced that law was durable, this changed drastically during the economic crises of the early 20th century. Now, the forces of self-regulation all over Europe looked upon with suspicion, and everywhere one hoped for a “strong state”. All over, there sounded voices of contempt for the liberalism of the 19th century, and authoritative models were recommended instead. In Italy Mussolini came out on top, in Poland it was Pilsudski, in Spain it were Primo de Rivera (1923–1930) and Francisco Franco (1939–1975), in Portugal generals Gomes da Costa and António Carmona since 1926 and Salazar since 1932. In Austria the alienation of the republic began in 1929 and converted into “Austro-fashism” in 1934, in Greece Metaxas’ dictatorship was established in 1936. In the crises-ridden German state, the tribune of the people, Hitler, emerged in 1933. The consequences are only too well known.

In the atmosphere in which dictatorships appeared, an independent judge orienting oneself by law and constitution was no longer wanted. Dictatorships require judges who enforce the leadership’s will, be it with or without law. Wherever judges perturb, for instance in control of public acting by courts of

administration or constitutional courts, they are eliminated. Wherever they insist on their independence, they are discharged. More and more, judges in dictatorships become criminal judges. Whatever civil suits there are, they become less important. The system of labour courts is mostly eliminated as there are no more independent labour unions. The system of administrative courts vanishes or is marginalized since the state does not allow actions against itself. Finally, there is the hanging judge as instrument of execution in criminal law.

What I briefly portrayed above, is a tragedy of European judicial culture. During the years between the two world wars, we find an active, partly parliamentary, partly authoritative state of highly extensive legislation: we have inflation, economic crises and social stress, not solvable by means of justice. The “judge” as an ideal figure almost appeared to be anachronistic. He was a type of peaceful and well-balanced period of time, when relatively small conflicts could be resolved by means of law and its competent interpretation. However, when economic and social crises compounded, when civil war challenged all systems, even the judge was not able to help. The hour of the executive and the military arrived. The constitutional states turned into a rule of injustice. The only remains of “normality” were left to the judge. Hitler, but also his entourage, held judges in contempt. In 1942, in an outburst of fury he eliminated the judges’ independence, as far as it was in force and appointed himself as “ruler of the courts”.

IV

After the end of the Second World War, which was accompanied by the end of dictatorships and military regimes in numerous countries, justice and with it the profile of the judge rose like a phoenix. The law of war was inapplicable; states intended to go back to normal. However, most of all, they wanted a constitutional state, separation of powers, an independent judge. Especially in West Germany the Third Power was quickly re-established and completed by constitutional jurisdiction having been discussed for long. The Federal Constitutional Court in Karlsruhe has now existed for more than 50 years and became the ultimate juristic authority of the state. Its judges, working in two senates, enjoy high respect. The constitutional complaint against the violation of fundamental rights is the remedy best known to people. There are about 5000 complaints per year.

The only amazing aspect of this success story is that the German judges’ intense collaboration with the national-socialist regime in the civil field and in the army was repressed successfully as well. Numerous judges were members of the NSDAP, a fact that obviously was no obstacle for careers after 1949. In the former GDR all judges being members of the NSDAP and finally all middle-class judges were removed at the same time and replaced by rapidly educated “judges of the people”. During the next 40 years the judiciary was directed closely to the state’s party (SED / Socialist Unity Party of Germany) and became part of the East-

German dictatorship. Not until 1990 was there a discharge of socialist female and male judges and a reversion to the western “constitutional state”.

Even if we consider that it took much longer for Spain and Portugal than most European states to end Franco’s and Salazar’s regimes, we could say in a generalizing way: After the end of the Second World War and intensified again after the end of the Cold War, Europe returned to the foundations of the constitutional state as they had established in the 19th century. That is to say, in all states being a member of the Council of Europe there are particular basic rules concerning the judges’ position, the organisation of courts and the proceedings. Likewise there are common basic principles for the defence of fundamental rights being guaranteed in the European Charta of Fundamental Rights. Judges are independent in person and factually. There are several levels of jurisdiction for legal protection. In addition to civil jurisdiction and penal jurisdiction, special courts for administrative disputes, social law and financial law exist. In most states there is a constitutional jurisdiction by which statutes and court decisions can be reviewed on their constitutionality. All in all this sounds positive and optimistic. However, we all are aware of substantial theoretical and practical problems. I will briefly examine several theoretical dilemmas.

Reflecting the modern judge’s position, it is clear from the outset that both imaginable extreme points of view are no longer adopted. Neither is the judge a mathematician of terms nor does he adjudicate only from a sense of justice as “judicial king”. No one assumes any longer that the law contains all solutions possible and that the judge could simply be *bouche de la loi*. Just as well no one wants a judge’s rulings without abidance to the law. Therefore, there must be interventional solutions: The abidance to the law is approved as well as a certain freedom of the judge to select one solution out of several possible ones. What is decided that way is the “correct” and legitimate solution in the proceedings. The judgement is not challenged concerning the fact if it is “just”, but only if it was brought about in the correct proceedings and if it stays within the semantic range of the law.

Nevertheless numerous texts of “upper ranking” (constitution, declarations of human rights) require material ethics. There is talk of human dignity, fair compensation, solidarity and subsidiarity, of equality and freedom. The pathos of these formulas lingers and impacts on the judges as well, though they have to consider that modern societies lack actually convincing theoretical parameters to define these words in an exact manner. So, the modern judge is a split character. One part is stuck in the metaphysics of values represented by him or at least his society, the other part is a secularized agnostic simply seeking a socially accepted and lawful decision.

Even bigger are the modern judges’ practical problems. The old phrase *iura novit curia* is no longer valid. Contemporary law is extremely complex. You could take any case governed by European or international law. A child’s toy produced in China, imported into Europe by a US-American importer and purchased and resold on several international levels contains harmful materials. What is the legal

situation, if an actual damage could not yet be detected? Or: Danish butter subsidized by Brussels is transported to Algeria via Bavaria and Italy to be re-imported into the European circular flow as oil. This is subsidy fraud, but under which law? A third example: There are human beings contracting a marriage more than once in their life, having children of several relations in several states. In times of globalization a more and more complex family law and law of succession belongs to everyday life even in smaller courts.

In other words: At the same time the modern judge is a specialized practitioner and a generalist having to work with enormous uncertainties. He does not usually think about his theoretical fundamentals, but about acquisition of information and information processing, about the hierarchical levels of particular rules and about limits in his jurisdiction. The judge needs to know a lot more than in former times, a simple “glance into the statute book” is not enough, he needs to be familiar with foreign languages and he needs to have basic knowledge about the state where his “case” is actually set. The picture of the judge in the 21st century Europe no longer corresponds to the idyll of the judge on the countryside or of traditionally domestic cases being solvable by *ius patrium*.

One more and last aspect appears. During the past decades a new class of highest judges emerged parallel to the process of the formation of the European Union. They are seated at the European Court of Justice in Luxembourg, the European Court of Human Rights in Strasbourg, the International Criminal Court in Den Hague or Rwanda- or Yugoslavia-Tribunals, but they are also seated at national constitutional courts. These female and male judges, the European jurists’ elite, know each other; they compare different types of jurisdiction and conform to each other. Mostly, they communicate in English or French. Taking them all together, one may say that a juristic community is established for the first time in European history. These judges no longer adjudicate “in the name of God”, they do not (yet) have a European constitution which they might refer to. They do not adjudicate in the name of the people since there is no European people as such. They do adjudicate in the name of “law”, but this “law” (in the sense of a completed text) is a construct of numerous different texts. The future European judge will only find legitimation of his sentences by the acceptance of those seeking justice in court. This “acceptance without metaphysics” increases the more the judge is rooted in historic traditions of European judiciary cultures. This is why we should permanently assure ourselves of these traditions.

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