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The authority of lawyers

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Abstract

The public standing of lawyers has always been somewhat ambivalent. On the one hand, they have been taken for a conceited technocratic elite with their own incomprehensible language. On the other hand, they have been cherished as the number one trouble-shooter and peace-maker. Today, the traditional monopoly of lawyers has come under pressure. Rivaling professions such as mediators want to have their share of the conflict resolution market. Still, lawyers are likely to retain the greater bulk.

The author identifies and discusses the following reasons for this predominance:

- the affinity of lawyers with the state and public authority;
- the reflex of the authority of law;
- the complex nature of legal systems and the ensuing need for professionalisation;
- a particular training in rhetorical, linguistic, communicative and social skills;
- the function of lawyers as ‘high priests’ of the judicial ritual;
- the real or supposed competence of lawyers to master each and every challenge irrespective of its nature and background;
- homogeneity of the group;
- the ability of lawyers to embrace and ‘swallow’ other disciplines.

The topic is part of the general discourse on the role of professional actors.

Key words

Lawyers and the power; the power of lawyers; the role of professionalism in conflict resolution.

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1. Introduction

Architects build houses, surgeons perform operations, lawyers settle (legal) conflicts. This allocation seems to be beyond question in the world of today with its division of labour which has developed over the centuries. Actually, the law itself attributes a privileged position to lawyers, since a court-based system of rendering justice provides work for a whole set of professional actors.

Over the last decades lawyers have as a profession come under pressure. Overcoming the barriers between those who administer the law and those who are being administered (Bankowski, Mungham 1981, p. 85), informal justice (Matthews 1988), lay and community involvement (Nelken 1985, p. 239) are only some of the slogans of movements which converge in their desire to deconstruct the formalised justice system and to (re)construct alternative conflict resolutions, even to give the conflict back to the people (Christie 1977, p. 1). What started as a participatory movement soon ended in another professionalisation. Rivals to jurists appeared on the scene. They soon offered their own social technology: mediation. In a way, competition was opened on the social peace market. This development has sensitised us once again for the question of the place of law and jurists in this market (Zauberman 1990, p. 301, 306 et s). This question is of course not altogether new. The role of lawyers has always been contested. Throughout the history of justice systems, it has been a matter of debate in whom we should trust when it comes to the adjudication of conflicts: professionals or lay people. Throughout the history of justice systems, the judicial system has been discredited as a world of its own. Throughout the history of justice systems, the legal rites and the legal language have been criticised for their alienating effects.

Yet, on the other hand, jurists in particular judges have time and again been cherished as the number one trouble-shooter, the ultimate defender of citizen's rights and the banner-holders of freedom. Only recently, in a fierce labour law conflict between Lufthansa and the pilots' trade union, the Frankfurt labour court judge Silke Kohlschitter was hailed for her courageous and successful go at bringing the parties together again.¹ The French Conseil Supérieur de la Magistrature has captured the certain ambivalence of public opinion with regard to the justice system in the formula: "La France a mal de sa justice, mais les Français lui sont profondément attachés comme garantie essentielle de leurs libertés."²

Therefore, in a debate about alternatives to judicial decision-making, we should not only address the alternatives and their operational philosophy (Jung 1998, p. 913). We should also try to reassess the role of lawyers. This is of course no easy task. I do not pretend to exhaust the topic, nor to present ready-made answers. Rather, I would like to raise some questions and issues which deserve closer scrutiny.

2. Historical insights

Actually, lawyers, in particular judges, had a good start:³ Traditionally, judges derived their authority from the King. Yet, since every power was derived from God, the judges managed to cultivate a standing of their own. Kojève calls them an archetype of authority (Kojève 2004, p. 25). Judges resembled priests. Already Ulpian spoke of "sacerdotes iustitiae".⁴ Still, Rome has already seen many upheavals of the plebs against the optimates who cultivated their monopoly of juridical knowledge.⁵ Judicial independence received additional backing from the

¹ Süddeutsche Zeitung of February 24, 2010.

² This statement figures on the back cover of the publication Conseil Supérieur de la Magistrature, Les Français et leur justice, Paris 2008.

³ For an albeit brief rehearsal of the history of judges (Jung 2006, p. 17 et s.)

⁴ D.1.1.1 pr. up to 1: „Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. Est autem a iustitia appellatum: nam, ut eleganter Celsus definit, ius est ars boni et aequi. Cuius merito quis nos sacerdotes appellet ...“.

⁵ An observation made by Carbonnier (1996, p. 67), when dealing with "la classe juridique".

professionalisation during the late Middle Ages, ending up in “a self-contained” or closed system, a “science”. It should not be overlooked though that this professionalisation did not draw criticism right away, since it helped overcome the somewhat arbitrary justice administered by lay people.

Yet, in particular advocates have fallen into dismay time and again. The anonymous French “Farce de Maître Pierre Pathelin” which conquered the French market places in the middle of the 15th century conveyed the message that common sense will carry the day, since the simple shepherd does in the end beat the “maître” with his own weapons. The maître had instructed his client, the shepherd, not to answer any question at court but to simply respond by saying “baaa”. In the end, when asked to pay the “maître”, the shepherd used the same strategy, just saying “baaa”.

Montaigne (Jung 2008, p. 437) served the perhaps most devastating blow ever against the whole profession in his “Essays”. His polemic starts out with a sceptical assessment of the flood of laws, so to speak a different statute for each and every situation. He continues by suggesting: Why not just ask any stranger to settle conflicts, or elect somebody on the market place or entrust judging to a wise man? Furthermore: King Fernando, when sending settlers to the West-Indies, was right in ordering that no jurist should accompany them, since jurists only produce quarrels. And finally: law is, as a science, liable to produce trouble.

He closes his philippic with a critical appraisal of the legal language and the business of making distinctions and of toying with authorities instead of looking at the text itself. Thus Montaigne expresses an ever so modern longing for simplicity,⁶ for fewer laws, for laws that are self-explanatory, for explanation instead of obfuscation. He doubts that truth can be found by multiplying interpretations though he has to concede that hardly ever two people will be exactly of the same opinion.

Montaigne can be read as a prelude to the contemporary “Justizkritik”. Apparently, the “nostalgia for a pastoral society, with the mythic figure of the justice of the peace; the good, peace-making judge living in harmony with his fellow citizens and successfully reconciling warring-parties.” that Zauberman (1990, p. 307) refers to, permeates history.

On the other hand, in particular the judges, have emerged over the times as an indispensable control power in the emerging system of checks and balances. This is well illustrated by the message which circulated in the aftermath of the famous “Müller Arnold” case in 18th century Prussia: “Il y a des juges à Berlin” (Schmidt 1947, p. 11, 26 et s.). Interestingly enough, at the same time, in France, the decline of the *parlements* was captured in the formula “Dieu nous préserve de l'équité des parlements”. The tricky advocate Azzecagarbugli, a character in Manzoni's “I Promessi Sposi”, alludes to a certain divide within the legal profession in the sense that advocates take most of the blame. This may not be universalisable, since, for example in France, advocates are in a fairly high esteem. What seems to be universalisable, however, is the impression that, in the terms of Simenon's famous *commissaire de police* Maigret, the world of jurists is an island separated from the real world (Jung 2010, p. 885). Extrapolated onto philosophical heights we can sense a certain dichotomy between democratic values and those of professionalisation. In other words, the question of authority is also the question of legitimacy.⁷

⁶ For a modern echo cf. Conseil National de la Magistrature (note 2), p. 15 : “Les citoyens souffrent aussi de la complexité du jargon judiciaire, de ce style et de ces formules entretenues depuis des siècles ...”

⁷ See Hörnle's account with regard to lay justice (2006, p. 135).

3. The lawyers and the power

Lawyers have always been close to the gravitational centres of power. Let it be kings, or parliaments, governments, administrations, not to speak of the judiciary itself: jurists will sit at the "levers". Governance through law puts lawyers in a privileged position. Lawyers' grasp of power reflects the intimate relationship between politics and law. Also, since law is the language of democracy⁸ we are in need of (professional) interpreters. Talking about the authority of lawyers inevitably raises the wider issue of the authority of law as such. Perhaps even more important, it leads us to the aggregate status of law. Law is not self-explanatory. At least we need a certain technique to arrive at a full understanding even if everybody should be able to grasp the basic message.

The affinity between jurists and the state also shows at the level of legal education. Lawyers are trained to understand, if not to run, a state organisation. Moreover, in some countries, like Germany, the decrees in law are still being conferred in the name of the state. In France, the state has a firm grip on the training of the administrative elite, by way of the *École Nationale d'Administration* though its scope goes beyond the law. In Germany, more than one fifth of the members of the Bundestag are jurists.

Despite some French reservations with regard to the terminology ("pouvoir vs. autorité"), the courts have their share of the power in the state irrespective of the question whether we see the courts within or outwith the state structure. The French preference for the term "autorité judiciaire" is, however, not without interest in our context since it may allude to the fact that the power of the courts is not primarily based upon force but upon respect for their decisions. Thus we end up with the authority of law itself. In the Kelsenian tradition, authority is too weak a word, since law is about force (Kelsen 1960, p. 35). On this background, lawyers would, as a functional elite, be part of an apparatus which, in last instance, would rely on force. But even if we take authority in the sense of authoritative, lawyers will be the main spokespersons when it comes making the law bind by authoritative reasoning. Again, jurists belong to the power personal, not by democratic choice but by professional standing. However, this standing seems to be reserved to a limited number - the in-group so to speak. Most lawyers will never enter as Carbonnier has put it "... ce cercle lumineux d'élite étroite où se distribuent honnêtement les avantages du pouvoir" (Carbonnier 1996, p. 66).

4. The power of lawyers

As a professional elite lawyers acquire in the course of their socialisation a certain "savoir faire". This socialisation process forges a certain unity of the profession and a certain corporatism of the mind (Carbonnier 1996, p. 67). This "savoir faire" should not be limited to knowing the text of the law and to be able to cite paragraphs and definitions. Paraphrasing the title of Honorés Festschrift "The Legal Mind" (MacCormick, Birks 1986) it should go beyond. Fact-finding procedures, an analytical approach to cases, a specific argumentative tradition in combination with a particular juridical rhetoric and, not to forget a training in "audiatur et altera pars" will add up to a professional repertoire which is not easy to copy.

Of course, we all know of the potential detriments of such a socialisation process. Throughout history, lawyers have been scoffed at for their ceremoniality, for their artificial language, for their schematic approach, for their distance from real life, or to put it differently, for the lack of a human touch. There has been an ongoing debate for decades on how to install more of that human touch into legal proceedings. The certain dissatisfaction with the delivery by lawyers helped to promote alternative modes of conflict resolution. Yet, we should not underestimate the potential for reform that the legal profession has shown time and again. Their

⁸ Extrapolated from Habermas (1996, p. 293, 301).

opening towards the social sciences has paved the way for a critical rehearsal of the traditional standards and working habits. In Germany for example, special emphasis has been put on the training of the so-called key competences thus (re)introducing communicative, psychological and social skills into legal education (Jung 2003, p. 1048). Mediation has also been integrated as a special unit into the syllabus. This deserves applause. Yet, it also shows that some of the power of lawyers has to do with the fact that they are able to embrace and "swallow" other disciplines. The clientele and the legal discipline should profit from that. At the same time, there is a risk that the protagonists of the new operational philosophy will lose their identity and, in consequence, their potential if they are integrated without further ado into the legal context. In a way, mediation will always operate in the shadow of the Leviathan.⁹ I doubt, however, whether mediation will survive as an autonomous concept once it has been introduced into the court system in form of e.g. the "gerichtsnahe Mediation".

As you can see, the lawyers have mobilised and have taken mediation on board. An increasing number of German lawyers seek an additional qualification as a mediator. Excellent! Yet we should not forget the fate of the historical French *juge de paix* who soon ended up within the regular court system. Lawyers, despite their openness for new developments, have a tendency to close the ranks in due course.

Lawyers are "allrounders": Tell them that they are supposed to run a bank, a publishing house, a newspaper or whatever - they'll do it. They operate in areas which transgress the strictly legal domain. A legal education is presumed to provide a set of social and managerial skills which enable lawyers to operate in many fields. It may well be, however, that this belief of longstanding does no longer hold true in reality. At least it seems to me that lawyers are no longer regarded as "functional monopolists", but that they have rather lost ground to specialists or to other generalists such as sociologists, political scientists and economists.

5. Conclusion

Looking at our topic from a more principled perspective we come across familiar dichotomies such as:

1. participation vs. professionalism
2. monopoly vs. competition
3. tradition vs. change
4. overall competences vs. specialisation.

ad1 Lawyers and the law represent the professional element in state construction. The normative aspirations of societies tend to call for lawyers to implement a program that guarantees the peace of the land. Yet, in modern societies, this program is in a constant productive conflict with participatory elements and the search for a democratic backdrop.

ad2 In many areas of conflict resolution lawyers still have the monopoly. Monopolists will tend to become complacent and resistant to renovation and change. Competition will help avoid a stand-still.

ad3 Lawyers have a traditional prerogative in conflict resolution. We should bear in mind that judges existed before the (written) law. Of course, continuity and tradition alone cannot legitimize an institution and its actors. So far the major changes have rather taken place within and not outwith the legal system. New paradigms of conflict resolution tend to relate to certain insufficiencies and failures of the legal process and will therefore have difficulties to maintain and develop their ideological and structural

⁹ More detailed as to the relationship between the justice system and its alternatives Jung (1998, p. 920 et s.).

identity in view of a justice system which is prepared to respond to criticism and to take on board new ideas.

ad4 The field of conflict resolution is also governed by a continued specialisation. Such specialisation may give birth to new actors. However, a system that is orientated towards the last say of the courts will privilege lawyers. Of course many people are dissatisfied with law and the lawyers. Yet, at the same time, we see an increasing "proceduralisation" (Jung 2006, p. 30). Each and every conflict is brought to court. This will keep lawyers in bread.

The debate about the law and the lawyers will never draw to a close. It is beyond question though that the authority of law and the authority of lawyers are inextricably linked. Lawyers derive much of their authority from the authority of law. Conversely, the authority of law is to a certain extent dependent on the authority of lawyers. We should therefore keep a close watch on them.

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