CHANGING CHARACTER OF REQUIREMENTS TOWARDS JUDGES[1]

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I. Introduction

The general point of the present paper is that judges nowadays should know much more than before, pure legal expertise is not enough for a good decision any more. The social environment of judicial activities became complex and challenging: judicial decisions concerning facts often require extra-legal knowledge, which usually determines the final judgment. There is a growing tension between the judicial responsibility and the limited ability of the judiciary to receive and understand scientific results. Judicial accountability became one of the most widely common expectations, for which judicial competencies must be ensured. Competencies, worldview and role set of judges are shaped by institutional, historical and political factors, but altering them intentionally is almost hopeless. Professional skills and professional mentality tend to fall behind institutional changes and social needs.

II. Challenges of judicial profession

It is widely known that judges of our days face new challenges, forcing them to learn continuously. Life-long learning became a general requirement for several professions, but practicing lawyers have to be informed not only in legal issues, since some cases require social, psychological, economic, and other kinds of knowledge connected to the social environment. Spontaneously accumulated experience or human wisdom seems inadequate.

New scientific results and trends have changed the traditional picture on human behaviour, free will, and even responsibility. In the last decades for example neuroscience has overwritten our knowledge on human behaviour, decision-making, the limits of consciousness, and provided new results on brain processes governing interactions, emotions and their regulation. Through these developments social sciences re-evaluate the concepts of antisocial behaviour, causes of deviance, the border between normal and abnormal, and the causation of human behaviour. So far there is no clear answer as to the demarcation of normal and abnormal and it is shaped by cultural factors, as human acts are also complex, influenced by genetic and environmental effects. These are far from being pure theoretical issues, since questions related to truth telling, lie-detection, brain modifications, effects of drugs or pharmacological treatments may emerge during a court procedure. And we can also follow

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the line of different scientific fields, such as psychology, several subfields of sociology, etiology, etc., which provided serious shifts in understanding human behaviour and worked out usable techniques for measurement.

From this perspective it is quite clear that there are growing gaps in the knowledge of legal professionals. Legal practitioners could not learn about these scientific questions institutionally, and they are socialized in a completely different paradigm, in a much slower social environment. As a response, a scientific movement emerged from the field dealing with the function of the brain in order to fill the widest knowledge gaps and construct a web of relevant information for legal professions. The *"Neurolaw movement" and "The Law and Neuroscience Project"* are examples of successful attempts of cooperation between different fields, aimed at building a bridge of understanding.[2] At the same time, these developments need huge extra work from judges and other legal practitioners. These activities cannot be imagined without institutionalization. For the time being the best solution for teaching judges is organized education, like universities and judicial academies where further institutionalized training is ensured. Teaching programs and course materials can open judicial minds for the new results on the prediction of human behaviour, which can be highly relevant when a judge tries to value the likelihood of recidivism or the risks of probation and these are inevitable tools for understanding the techniques used by experts in legal processes.

In the culture of continental positivism there is little space for a dialogue between legal practitioners and social scientists, though in the light of the swiftness of the accumulation of new scientific developments, it should be necessary to reach a mutual understanding. Some of these developments could overturn traditional legal concepts and force lawyers to distance themselves from the not so bright ivory tower. It seems highly complicated to diverge from the dominant legal worldview. The weakness of socio-legal studies, the sporadic nature and narrow scope of scientific criticism aiming at legal practice make the acceptance of scientific novelties cumbersome.

Scientific method of fact-finding and evaluation differs from the judicial process; the rationalities of the two spheres cannot be interchanged. What is obviously important from these differences is the nature of causality. There is no possibility here to explicate this difference, but one can understand the relevance and tragedy of the biased process of judicial evaluation of evidences and facts from Carlo Ginzburg's excellent book on the miscarriages of justice.[3] "The Judge and the Historian" demonstrates the diverging nature of the historical (scientific) and judicial role in reconstructing past events. Ginzburg's story draws attention to the importance of self-reflection by those who shall decide on the life and freedom of others. Judges should be aware of the nature and different methods of fact-finding.

All of us know that neglected details can completely change the evaluation of the facts of a case and may overturn legal responsibility. Sometimes these details can be recognized or analyzed with the help of experts. What I should stress here is somehow provocative in the eyes of concerned lawyers: judges must not be laic as to the evaluation of the facts in a case,

[2] http://www.lawandneuroscienceproject.org, http://www.lawneuro.org
[3] Carlo GINZBURG: *The Judge and the Historian,* Verso, London, 1999.

so they should possess the relevant scientific knowledge. The most challenging development of the last decades for the legal practice is the growing dependence of final decisions on expert testimonies reached by scientific methods. Judges can only manage this cognitive dependence if there is a drive to learn. The *Bendectin-case* in the first half of the 1990's was a symbolic instance, since it became clear that judges must evaluate critically the process by which experts gather data and connect them to the conclusion in a testimony.[4] Medical cases like this one or cases where psychology is in the centre show the relative nature of scientific knowledge. Science often rejects clear-cut, black or white answers to questions highly relevant in a judicial process. Thus judges, being able to really evaluate the expert statement from a legal point of view, should be aware of the limits of expert knowledge and the nature of scientific rationality. This is something new in the realm of legal practice, a new phenomenon, which rewrites the relation between lawyers and sciences, and as a consequence forces legal education to change.

The goals, rationality and everyday working of science and law differ completely; lawyers and scientists use different language, have different training, divergent values. Despite the detailed regulation of their cooperation, the translation process between expert and judicial knowledge depends on the mutual cognitive openness. Without openness, frustration is inevitable: lawyers cannot understand the limited practical usefulness of an expert opinion and scientists cannot accept the narrow focus and the dichotomized claims of judges. Translation process presupposes the acceptance of the differences between the two cognitive starting points, otherwise judges continuously complain for the contradictions of expert opinions.

Another factor should also be taken into consideration: the growing importance and power of judiciary, public scrutiny and openness became the natural environment of judicial decision-making. Any failures of the translation process between judges and experts, any contradictions between the evaluations made by judges and experts draw the attention of the public. Public awareness has serious normative consequences for both legal and expert stakeholders. Sometimes this mutual understanding or translation must be explained to a wider audience. The real laic shows up, therefore the judge cannot afford to be laic. During the last decade there were some disputed judicial cases in Hungary where the role of experts was also questioned. In a criminal process against an organized crime group leader the psychologist expert claimed a high level of encephalopathy, which questioned the culpability of the accused, while another expert evaluated the medical status differently. In another scandalous case of a girl who was supposedly sexually abused by policemen, medical experts openly contradicted each other as to the possibility of rape. In these and some other cases the reliability and objectivity of expert knowledge was openly questioned, although this kind of conflict is only the top of the iceberg.

A study of Hungarian judicial practice in family law stated that experts in child custody disputes rarely follow the scientific protocol of the expert testimony; and judges even do not

[4] Kenneth R. FOSTER, Peter W. HUBER: *Judging Science. Scientific Knowledge and the Federal Courts,* The MIT Press, Cambridge, London, 1997.

know it.[5] An official methodological letter issued by the Hungarian Forensic Institute drew up the minimal requirements of making psychological expert opinions.[6] According to the empirical research, experts often ignore the most important normative requirements; there are a lot of superficial opinions, which cannot be controlled by the judges, because they also neglect the professional rules of psychological expert testimony. Despite the problematic quality of expert testimonies in child custody cases, the expert opinion is usually decisive for the judicial decision. In other words: judges rely heavily on the statements of another profession without controlling its quality in spite of the existence of a normative guideline for experts as well as for judges.

Another research concerning experts in criminal procedure stated that judges order almost exclusively the psychological examination of the accused and use the information provided in the course of the psychological examination. Thus the expert is purely a device for gaining incriminating evidence or confession.[7] Moreover, there are two serious paradoxes concerning criminal adjudication: judges are reluctant to use experts of human behaviour other than psychologists and they limit the use of experts to establishing the psychological status of the accused, but at the same time judges themselves reject to become acquainted with social sciences: the set of judicial knowledge remained closed, in accordance with the narrowly positivistic judicial culture. The other contradiction of adjudication is related to the overemphasized role of witness testimony: the dependence on witness testimony is not neutralized or controlled by expert knowledge. Judges traditionally take their erudition in human sciences at face value, without any motivation to learn or institutionalization of learning. The following strong belief dominates the thinking of the judiciary: the judge is in possession of all the relevant information necessary for decision-making. This belief is in contradiction with the growing complexity of the social environment and the growing responsibility of the judiciary.

The stability and objectivity of expert opinions prepared by scientists of human behaviour is lower due to the nature of human sciences, but there are also some judicial causes of low reliability. It might be a too simple explanation to say that a general overburden hinders judges in controlling expert opinions. There is also a cultural factor: experts in the continental adjudication are the tools of the authority in forming a decision, not the devices of parties; judges and experts are somehow the different parts of the same corpus of authority. Thus there is no need for control; objectivity and expertise are given qualities. This is why courts are inclined to refuse sending expert testimonies to the parties, which method seriously hinders the effective defence of the adversely affected party. It is widely accepted that more experts are invited during the procedure, and judges shall evaluate the probably contradictory expert opinions. However, expert dialogue conducted before the judge, in which both parties have their own experts and the judge should evaluate all details of the expert opinions in order to measure the arguments, is foreign to the role perception of judges. A new role would

[5] András GRÁD, Lilla MEDE, Gyöngyvér JÁNOSKÚTI, András KŐRÖS: Az igazságügyi pszichológus szakvélemény szerepe a gyermekelhelyezési perekben, *Családi Jog,* 2010 (VIII.)/1. pp. 13-22.
[6] http://www.igaz.sote.hu/
[7] Balázs ELEK: *A vallomás befolyásolása a büntető eljárásban,* Tóth Könyvkereskedés és Kiadó, Debrecen, é.n.

presuppose some knowledge from nonlegal fields and the skill of evaluating scientific arguments.

The paradoxical consequences of judicial ignorance as to social and human sciences are clearly demonstrated by a disputed judicial decision. In a final decision the Pécs Court of Appeal obliged two families to pay compensation of four million forints to the parents of a brutally murdered student. The murder occurred on May 21 1998: two 14-year old boys brutally assaulted their classmate; the only motive was that he irritated them. The judge, former member of the Hungarian Constitutional Court, now the president of the Court of Appeal, stated in the reasoning that the responsibility of the parents is based on the bad socialization of their children. The verdict stated that the circumstances of the murder demonstrated a total lack of respect for life and the young murderers' lack of mercy, compassion, pity and goodness; and since the parents have not taught the boys to honour life, they must pay compensation to the family of the victim. The decision ruled this way despite the fact that there were no signs of negligent socialization except the brutal murder itself: everybody around the family (teachers, neighbours, schoolmates) knew the boys and their family as being polite, nice and respectful. According to György Csepeli, a well-known social psychologist, the verdict is absurd and is based on naive psychology and prejudices. The causal connections in the process of socialization are much more complex.[8] As a general conclusion, the social psychologist criticized the professional education: „As long as professionals dealing with human actors are not trained in human and social sciences, the fair and equitable process is accidental." The bad and poor education is one of the most serious shortcomings of the judicial profession.

III. Professionalization, professional values

The social process of professionalization and its historical variants may reveal some of the causes of these tensions, paradoxes and shortcomings. The sociological concept of professionalization refers to the social and symbolic construction of professional duties and status, regulation, distribution of resources, values and strategies. Institutionalization of a profession as a social process creates superiority over lay perceptions, demands trust and high prestige, which is based on formalized procedures, rituals and a special *habitus* of the so-called professionals. In the course of the social project of professionalization different ways of self-control and regulation determined the relation to state authority. Dependence or autonomy and various combinations of them laid down the basic relations not only between state and professions, but also relations between different professional groups.

In the continental European tradition bureaucratization and state-dependence gave central position to state-appointed professionals and civil servants, like the judiciary. Through this historical peculiarity we can understand the relation of state officials to any other free professions or semi-professions. Holders of public offices took up a position with higher importance, closer to common good. Despite the battle for autonomy this unbalanced

[8] Rossz nevelés? Élet helyett ítélet, Népszabadság, 17 October 2010.

relationship remained in the course of the process of professionalization. There are considerable differences within the continental legal tradition: process of democratization, modes of regulating the market and results of fighting for autonomy were part of a wider historical modernization project. The social and cultural varieties across Europe, the German, French and East-Central European patterns of professionalization are depicted and analyzed by an extremely interesting web of literature.[9]

What may be particularly important regarding the issue of judge-expert relations are the assumable similarities between the pattern of the relationship between state and legal professions and the pattern of the relationship between lawyers and experts. In a legal culture where the emancipation of legal professions remained limited or broken, judges and other state officials created a similar, distorted relation to experts. Their knowledge and their role in the judicial process suffer from disdain and irrelevance. The hierarchical relations between the most important actors of adjudication - state, judge, citizen and expert - survived the political and legal changes. Judges are inclined to perceive expert activity as a pure service, as parties of a case are rather subjects than citizens.

Sociologically the relations between legal and other professions and semi-professions are not competitive; moreover, salary differences are traditionally limited in post-communist states. But judges and experts work on a different basis of legitimacy, and this disparity affects the prestige of these professions. Legal professions, as widely known, lack scientific validation, while expert knowledge used in a case is based on scientific methods and proofs. Despite their aversion against scientific logic, judges shall evaluate expert opinions according to scientific criteria. But this is also a power relation: without questioning the monopoly of judges as to the final decision, experts bring alternative, non-authoritative elements into the process of decision-making. A judge, who mechanically accepts the expert testimonies without profound control over their validity, reliability and objectivity, lets the power out of his hand. Scientific objectivity at this point affects judicial independence.

From the perspective of historical institutionalism, relations between the state, legal institutions, civil society groups, professions and professional identities are maintained through and changed by institutional structures as corporate bodies, universities and informal groups. Professional corporate bodies in Central Europe suffered from dependence for a long time; legal education has a strong positivistic tradition. State goals were directly incorporated into the legal text, and professional institutions are doomed to protect these aims and interests with limited autonomy. The organizations, regulations and formal institutions can be changed swiftly, but cultural elements, such as power relations between legal actors, acceptance of criticism and transparency, the style of education and methods of informal regulations within the organizations are much more resistant. On the surface of the post-communist legal systems lawyers' organizations played a central role in creating a constitutional state in place of a dictatorship. Legal transformation and building the rule of law was in the centre of democratization, thus lawyers played a revolutionary role. But it seems more fruitful to widen the historical perspective searching the solid and durable characteristics of legal professions.

[9] For example: Konrad H. JARAUSCH: *The Unfree Professions: the German Lawyers, Teachers and Engineers*, 1900-1950, Oxford University Press, 1990.

The profile of the judge, its historical dynamic is essential in understanding the relation between judges and experts.

At the dawn of modern European nation states judges have continuously lost their subservient role and turned into the servant of the text from the servant of the emperor.[10] Legal text took up a central role all over the continent, with a great variety, depending on the political constellation and power relations. But the ideology of *"la bouche de la loi"* started to dominate the picture of judges only after the French Revolution, when the intent of the sovereign gained its primary political importance. This intent was not monolith any more, but the result of compromises, disputes and interpretation, thus a neutral third power was entitled to non-political interpretation. As Michael Stolleis said on the judge: *"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."*[11] Judges in the role of a neutral third power turned into a progressive force, which could foster the constitutional state and mediate between state and society. This is also the epoch when publicity was slowly incorporated into the legal process, partly as a possibility of control over power, partly as a channel of socialization of the public by explicating and explaining verdicts. The doors of trials opened up, publication of verdicts gained ground, and commenting and criticizing judicial activity became also common. I have intentionally missed out here the short but essential years of aggressive laicization, during which period the role of the judge was suspended (sometimes by judges themselves).

Before we turn to the second large modification in the judicial role-set, it would be substantial to shed some light to the historical variations which came about according to historical regions. The autonomy of the judiciary, the judicial organization has never reached the same level in East-Central Europe as in the West; backwardness of constitutional development in the case of courts meant that a subservient role retained its strength, and public scrutiny remained diminished. The judiciary could not feel the pride of being in a central position in fighting for freedom, and they managed to preserve their position near the political estate. Among these circumstances judicial practice was much more hidden, the public could not access relevant information on the composition of courts and values of judges, and there were no channels of criticism. Thus there was no chance for a judicial claim aimed at elucidating the non-legal elements of the decision, even in those cases where expert opinions had central role; judges were not inclined to make clear the basis of their decisions for the laic public. The limited independence and the combination of political openness and social isolation obstructed the possibility of a balanced relation between judges and experts, based on judicial responsibility.

The first half of the 20th century brought some considerable modifications in relation to judicial roles. Dictatorships, authoritarian systems and the myth of the omnipotent state questioned the autonomy necessary for judicial work; judges became sheer executors of the will of the centre. Judicial interpretation of legal texts was bound by the political ideology; fact-finding and thus expert activity also served the political aims of the state. Expertise,

[10] Michael STOLLEIS : The profile of the judge in the European tradition, *Trames*, 2008, 2.
[11] Ibid, p. 208.

expert knowledge got to a subservient position, similar to legal professionalism; the final historical truth as the ideological basis of power preceded any other knowledge or skill.

In the second half of the Hungarian communist regime a slow progress began towards professional values; both the system of selection and the basis of judicial decisions adopted a non-political, technical or professional logic.[12] This shift created an opportunity for a limited emancipation of expert knowledge in judicial processes, although court organization and expert institutions remained under state control. However, relegation of ideology and overt politics from the field of legal practice gave ground to professional argumentation. Nevertheless, two opposing factors remained significant: the distorted judicial selection due to the low prestige ofjudicial work and the belief in objective truth. Undereducated lawyers mechanically use expert opinions as a firm scientific basis for decisions and there is no drive for controlling the information. Simply this is the consequence of these two factors, and it seems lasting, much more durable than the political regime.

Objective truth remained in the place of citizens' rights, but in the meantime contradictory scientific results and relativity of knowledge put judges under constant pressure. Furthermore, the globalized world and the complex social environment also confront traditional judicial role in the daily practice. Here I quote Michael Stolleis again: "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 partium."[13]

The return to the constitutional state and the rule of law somehow shocked judges, while huge parts of their knowledge and worldview became obsolete at once. Even the textual body of the law became more complex, being supplemented by the decisions of the Constitutional Court and international judicial forums. Besides textual transformations, every other aspects of judicial work have also intensely altered, which made the task of acquiring and processing information highly relevant and lively. What kind of channels can judges use for gathering information on new scientific results that could be essential for their decisions? What are the sources of knowledge about social tensions, which evaporate also to the courtrooms? I conclude that the relation between judges and experts is only a fraction of a wider problem of particularism and cultural isolation of post-communist judiciary.

IV. "Judgecraft"

The new concept of *judgecraft* reflects something from the web of new challenges concerning judicial work.[14] This notion refers to the skills, techniques and knowledge creating the ability to deviate from routine norm-application and bureaucracy. Judicial skills, such as reasoning,

[12] Zoltán FLECK: Jogszolgáltató mechanizmusok az államszocializmusban, *Nap-világ*, 2001.
[13] Michael STOLLEIS, ibid p. 213.
[14] Herbert M. KRITZER: Toward a theorization of craft, *Social and Legal Studies*, 2007 (Vol. 16) 3. pp. 321-340.

ability to weight the burden of decision, problem-solving capacity and communicative skilfulness are different than that of a profession based on sheer technical rationality. Practical legal professions do not have a legitimating force based on scientific knowledge; their social acceptance and prestige are built on constitutional values, such as independence, neutrality, fairness and objectivity, although human qualities and special skills have growing importance, since mechanical, bureaucratic application does not dominate modern judiciary any more. The discretion of the judge, which presupposes different skills than that of mechanical rule application, became accepted or even required.[15] Capabilities of being a craftsperson, skills and techniques of how to form a good judgment are mainly non-reflected; it is a kind of "doing without knowing", although there are some elements of this set of skills that have emerged as primarily important in the social process of judicial decision-making. Now I will display only one, which has close connections to social scientific knowledge or experiences.

It is widely accepted that judges play a critical role in guaranteeing and defining equal treatment and anti-discrimination law. Judicial decisions enhance social trust and disseminate trust and respect among different communities. The letter of the law without judicial activity remains dead, but it is also very common that legal professions need special openness and sensibility to be able to absorb this function. Geoffrey Kamil, a circuit judge at Bradford Combined Court urged his colleagues to leave the ivory tower and seek connections with relevant social groups and minorities.[16] To bridge the gap between state officials like judges and social groups, court staff shall take part in intensive practical training on methods of communication and mode of handling cultural differences; and social sciences dealing with these kinds of problems shall also be on the curriculum.

This step out of the protected castle of law assumes a sensible and equipped professional; legal expertise and even long judicial practice may be unsatisfactory. Where it is possible, social scientists (sociologists, social psychologists, cultural anthropologists or linguists) should be applied to help mutual understanding. This idea is very close to the original role of the judge, who mediates between the members of a community, although this community has transformed into a multicultural mass. To put it shortly: judges should learn more social sciences and must use social science experts also to dissolve the information blocks between the majority and different minority groups. Both soft and hard methods of using expertise would complete the tool of diversification of the judiciary.[17]

Judgecraft as described above obviously provokes professional identities and tries to overwrite some of the traditional elements ofjudgeship. However, some other changes of this identity already took place over the last decades. For example the new requirements of accountability and efficiency strengthened the managerial aspects of judging. Public- service mentality, urging judges to work within reasonable time and control mechanisms over the

[15] Cyrus TATA: Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process, *Social and Legal Studies*, 2007 (Vol. 16) 3. pp. 425-447.
[16] Geoffrey KAMIL: *The role of the judge in a diverse community*, ERA Forum 2009, published online: 19 March 2009 ERA Springer (http://www.springerlink.com/content/b4hw73275m054053).
[17] Kate MALLESON: *The New Judiciary: The Effects of Expansion and Activism*, Ashgate, 1999.

daily activities of judges are all in contradiction with the traditional profile of the judge.[18] But I guess that the harshest administrative tool aimed at efficiency is much more acceptable to a bureaucratic judicial mind than any mandatory learning process.

After more than a century the figure of Magnaud, "Le bon juge" came into view again with a slightly modernized content: as a professional who detects the moral and social implications of the community, and is open for social needs and consequences of decisions.[19] We know for sure from different aspects that post-communist judges preserved some traditional elements of the socialist epoch, like narrow normativism and textualism.[20] The necessary shift towards a new judicial ethos open for moral and societal aspects is hardly an easy project with this background. Here I would like to emphasize again the importance of a new, broader and deeper relationship between judges and expertise. However, legal textualism originated in the continental tradition, strengthened by the socialist ideology and preserved by contemporary institutional deficiencies stands in the way of this development.

V. Judicial and expert knowledge

The relation between legal and scientific knowledge is problematic even in legal systems not disturbed by detrimental remnants and backwardness. Experts, whose knowledge may be used in the course of the legal process, construct a different social world depending on the nature of the science. Experts' and judicial constructions of reality are different; in most of the cases judges can only use a strongly reduced set of information from expert testimonies. With its ethical and methodological rules science gives legitimacy to these testimonies, but scientific results highly depend on the actual, dominant paradigm of the field. For example some psychological schools give individualist explanations for human behaviour, while others take interpersonal or social factors into consideration. In case of using an expert opinion the judge should know something about the scientific methods and rules and also about the paradigms and its alternatives, otherwise he or she would take scientific neutrality and objectivity as face value and given. This carelessness is in contradiction with judicial neutrality and responsibility. Judges simply cannot afford to disregard the characteristics of scientific fields expert opinions stem from. For example a criminal judge of juveniles must have some psychological and pedagogical expertise to be able to control expert testimonies.

Communication between experts and judges has power and ideological aspects.[21] Experts create a unique, theory-dependent picture about reality, sometimes distorted by organizational failures or personal weakness. (Sometimes a short look at the sociology of science disenchants those who accept any result stamped by scientific organizations.) The judge

[18] Cécile VIGOUR: Professional identities and legitimacy challenged by a managerial approach: the Belgian judicial system, *Sociologie du Travail,* 51S 2009, pp. 136-154.

[19] JAKAB András: Ki a jó jogász, avagy tényleg jó bíró volt-e Magnaud? *Jogesetek Magyarázata,* 2010/1. pp. 83-93.

[20] Zdenek KÜHN: Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement, *American Journal of Comparative Law,* 531, 2004, pp. 531-568. and Marcin MATZAK, Bencze MÁTYÁS, Zdenek KÜHN: Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland, *Journal of Public Policy,* 30. I. 2010. pp. 81-99.

[21] Michael KING, Antoine GARAPON: Judges and experts in England and Wales and in France: developing a comparative socio-legal analysis, *Journal of Law and Society,* vol. 14, 1987, pp. 459-473.

chooses from different versions of realities and this act is a decision of power. Behind the judicial decision there is a judicial ideology on legal values, justice, the aim of the punishment, and theories of human behaviour. It is highly feasible that legal and social scientific theories on the causes and patterns of human behaviour are different. This way a judicial verdict is a decision not only on the level of culpability of a real person, but also on the plausibility of a theory on human behaviour. Judges have theories or ideologies on individual rights; sometimes these ideologies are consistent with the constitutional regulation of the state, but it is a question of interpretation. Although it is highly possible that the judicial interpretation will determine the relation to forms of punishment, including alternative forms.

Judicial ideology can be combined with non-legal, scientific worldviews, with the primacy of constitutional values. I claim that modern social sciences can facilitate that some of the important constitutional values prevail. Criminology and sociology for example consequently argue against punitive populism with social scientific arguments, which largely correspond to constitutional rights. Expertise in the weakest sense of the word means judicial awareness of scientific arguments on social issues, like moral panic, punitiveness, intolerance, etc., otherwise they remain vulnerable to political insularity. This is a rather neglected aspect of growing judicial power. Due to the socialist ideological heritage, many lawyers are hostile towards social sciences; this rejection is parallel with the prevailing textualism and slow, state-centred professionalism.

In a remarkable study Jean-Paul Brodeur used the term "weak expertise" to draw the attention to the phenomenon that courts use scientific information only in technical, limited, reduced and decontextualized sense on a routine basis.[22] With a short reference to the legal relevance, judges also free themselves from the uncertainty and complexity of a social or psychological issue. I am aware that the growing importance of expert (professional) knowledge is in contradiction with the depressing weakness of self-regulation of scientific communities and lack of any relation to the public. This fragility is a part of a broader contradiction between growing knowledge and growing uncertainty in late modernity.[23] Modern court systems and judiciary partly recognized the dangers stemming from this constellation and try to give greater importance to expert knowledge by scientifically based sentencing guidelines, organized and compulsory education and systematic analysis of judicial practice. In the beginning, this valuable tendency has to face serious obstruction.

There is for example a strong belief that every case is unique and judges cannot pay attention either to individual specialties, nor general tendencies. New institutions, like sentencing commissions, are foreign to the traditional continental judicial culture; it is unacceptable that sentencing expertise is bigger than judicial experience. Guidelines, normative implications and recommendations are political pressure in the eyes of the judiciary. The ideology of independence as isolation mixed up political neutrality and anti-politics. This latter is a pretence for looking away from the serious social problems, even when these have stepped into the courtroom.

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[22] Jean-Paul BRODEUR: *Expertise Not Wanted: The Case of the Criminal Law,* in: Elke KURZ-MILCKE, Gerd GIGERENZER (eds.): Experts in Science and Society, Kluwer, New York, London, 2004.

[23] Nico STEHR: *The Fragility of Modern Societies,* Sage, London, 2000.

VI. Summary and conclusions

Traditionally, there is a negative attitude in European legal practitioners' mind towards scientific knowledge. Science as a legitimate source of judicial work is accepted only in the case of constitutional judges.[24] In Central Europe judicial verdicts almost never use any scientific arguments, even supranational judicial practice or decisions of constitutional courts appear only as a formality or sheer ornament.[25] According to the distinguished legal historian Raoul van Caenegem the control over the content of the law depends on the political situation and power relations. In some situations legislators dominate the process of defining the real essence of the written law, sometimes it is the judicial practice, and in some particular cases legal doctrine made by professors influences the legal system. This latter constellation is really special, as van Caenegem said: *"Weak state, lack ofprestigious legislator creates a vacuum that is filled by jurists, legal doctrine and professors of law."*

Our time can be depicted as a multiple vacuum caused by the serious weakness of legislative measures, the vulnerability of parliaments by populist drives and governmental dominance; and the incompatibility of traditional legal doctrines for answering the challenges of a complex society. When we seek the nature of the relation between judges and experts, it is increasingly clear that the knowledge of judges itself should be modified and supplemented by scientific information on human and social behaviour. This modification requires considerable changes also in the judicial roles. By these modifications judges can take up their prominent status and answer the huge challenges of social transformations.

Finally, I shortly summarize some tools and examples by which judicial openness and social sensibility of judges can be strengthened. Firstly, one can rationally suppose that formal judicial education is the simplest and the most effective, while institutionalization of compulsory non-legal courses could change the knowledge-basis of the staff. On the other hand, individual examples could also exert considerable effect on judicial mentality. Geoffrey Kamil, a circuit judge at Bradford Combined Court urged mutual understanding between state officials and social communities and minorities, saying that judges must step out of the ivory towers and make some steps toward understanding the social tensions and diminishing the mutual fear between minority groups and state officials by links with local communities.[26]

Another individual attempt to change judicial ideology is the tragic case of Kirsten He- isig, who tried to handle empathically the juveniles stemming from immigrant families. During the last decade different forms of professional and civil control emerged as an institutionalized answer to the challenges concerning growing judicial power. Sentencing advisory councils - with lawyers, scientists and civil members - regularly analyze judicial practice, study social phenomena and advise the judiciary in complex issues, such as ethnic hatred, discrimination, sentences concerning children, etc.[27] A similar, less formal activity may be the civil monitoring of judicial practice. At last, individual suing strategies could also have forming

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[24] Neil DUXBURRY: *Jurists and Judges: An Essay on Influence*, Hart Publishing, Oxford, 2001.

[25] Mátyás BENCZE: *A magyar felsőbírósági gyakorlat jellemző problémái,* in: FLECK Zoltán (ed.) Bíróságok Mérlegen *II.*, Pallas Kiadó, 2008, pp. 185-277.

[26] http://business.timesonline.co.uk/tol/business/law/article1982625.ece

[27] Advisory councils are operating for example in Canada, Australia and New Zeeland.

effects on the judiciary, and private actors, with suitable professional help, can stimulate the judiciary by forcing judges to answer individual claims.[28]

SUMMARY

Changing Character of Requirements towards Judges

ZOLTÁN FLECK

These days, judges face several challenges that change the characteristics of judicial work considerably. In most of the really important cases judges cannot rely on external help, since even the best experts are not capable of replacing the social, psychological and other knowledge of judges who therefore should take whole responsibility for their decisions. Judges should not become experts in different fields, but judicial competencies are not limited to sheer legal knowledge any more. Judicial integrity contains new qualities of judicial organizations and judges. The old-fashioned relationship between decision-making and expertise has changed; judges - despite the strong specialization should be able to adopt non-legal knowledge. The traditional impersonality of continental judicial personnel - due to the changed social, political and legal environment has faded away, and fields of legal practice earlier covered by the ideology of objectivity and professionalism are now subject to public scrutiny. Post-communist legal systems have to cope with two cultural remnants, which are backed by institutional rules: narrow textualism of judicial interpretation and lack of accountability. Even legal education is stuck in a formalistic methodology, thus there is not any incentive for a cultural turn. These circumstances create an unfavourable environment for the necessary changes towards a more complex web ofjudicial competences. The present paper emphasizes the importance of a cultural turn and highlights some detrimental consequences of not making use of scientific achievements in the course of the judicial work.

[28] Daniel KELEMEN: *The EU Rights Revolution: Adversarial Legalism and European Integration,* in: Börzel, CICHOWSKI (eds.): *The State of the European Union: Law, Politics, and Society,* Oxford University Press, 2003.

RESÜMEE

Veränderungen betreffend Anforderungen gegenüber dem Fachwissen von Richtern

ZOLTÁN FLECK

Richter begegnen heutzutage zahlreiche Herausforderungen, die die Natur ihrer Arbeit in bedeutendem Maße verändern. In der Mehrheit der wirklich wichtigen Angelegenheiten können sie auf keine Hilfe von Außen vertrauen, da auch die am besten vorbereiteten Experten das richterliche Wissen, das sich auf die Gesellschaft, Psychologie und auf sonstige Fachgebiete bezieht, nicht ersetzen können. Gerade deshalb muss der Richter für seine Urteile vollkommene Verantwortung übernehmen. Es ist von einem Richter nicht zu erwarten, dass er sich auf jedem Fachgebiet zu einem Fachmann bildet, wir können aber auch nicht sagen, dass sich die richterliche Kompetenz lediglich auf juristische Kenntnisse im engen Sinne beschränkt. Die Unanfechtbarkeit des Richterkollegiums und einzelner Richter wird von der Gesellschaft auf Grund neuer Aspekte bewertet. Das früher zwischen Entscheidungsfindung und Fachwissen bestehende Verhältnis gilt heute als überholt. Trotz der bedeutenden Spezialisierung ist es gegenüber den Richtern eine allgemeine Erwartung, dass sich ihr Fachwissen nicht aufjuristische Kenntnisse beschränkt. Da sich das gesellschaftliche, politische und juristische Umfeld verändert hat, gehört die traditionelle Unpersönlichkeit der Richter, an die wir uns in Europa gewöhnt haben, bereits der Vergangenheit an. Heutzutage beäugt die Gesellschaft die Rechtspraxis auch auf solchen Gebieten kritisch, die früher hinter der Devise der Objektivität und des Fachwissens verborgen waren. In den postsozialistischen Ländern wird das Rechtssystem durch zwei, aus dem früheren System geerbten institutionellen Charakteristika belastet: in der Rechtsauslegung das engstirnige Beharren auf dem Rechtstext, sowie der Mangel dessen, dass die Richter über ihre Entscheidungen Rechenschaft ablegen müssen. Auch in der Ausbildung der Juristen kann der methodologische Formalismus als charakteristisch bezeichnet werden, als Folge dessen die Juristen der Zukunft keine entsprechende Ermunterung zur Auffrischung der Rechtskultur erhalten. Infolge dieser Umstände ist das Umfeld nicht dazu geeignet, dass sich das Fachwissen der Richter in die entsprechende Richtung verändert. Die Studie betont, dass auf diesem Gebiet eine umfassende Veränderung notwendig ist, und sie unterstreicht: Es hat schädliche Konsequenzen, dass die verschiedenen wissenschaftlichen Ergebnisse von den Richtern in ihrer Urteilspraxis nicht in entsprechendem Maße angewandt werden.