Images of judges – an intercultural comparison

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1. Introduction

Judges have always attracted popular and academic interest. Still, we might want to know why we are presently flooded with judge-oriented literature.[1] I can only hint at some of the reasons, not knowing whether my account will be shared by others. First of all, the courts have become the number one trouble shooter for all sorts of conflicts, let them be personal, social or political. Litigation has become the panacea for everything. This development, interesting in itself, has of course put the courts, their power as well as their responsibility or, should I say, accountability, into the lime-light. Regular recourse to the constitutional courts has added a new component in the interaction between the legislature and the courts fuelling the ever-lasting discussion on the political role of the courts. A recently published German dissertation on "Der Europäische Gerichtshof als Gericht"[2] stands for the

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1 Including my own publication: Richterbilder - ein interkultureller Vergleich, Nomos, Baden-Baden 2006.

2 *Mähner*, Der Europäische Gerichtshof als Gericht, Duncker & Humblot, Berlin 2005.

mounting debate on European Courts, their activity, their status and the reconstruction of their methods,[3] a debate which has a sizeable overspill into the general discourse on judges. Moreover, judges are part of the overall apparatus of the state. As such, the judiciary has been invaded by the general evaluation campaign which, in times of decreasing resources, holds a firm grip on every state activity notwithstanding its own inefficiency to really do justice to any more sophisticated public task.

The "accountability" issue and a widely-spread feeling that the concept of judicial independence allowed judges to escape every control may be at the origin of moves throughout the world to arrive at codes of conduct for judges and to rehearse ethical issues relating to the role of the judge.[4]

Our topic does not lend itself to an encyclopaedic presentation. However, it does invite to a transgression of borders. By that I do not mean the inevitable comparative outlook, with – true to our particular Saarbrücken tradition – a special emphasis on France. Rather, I allude to the fact that my presentation will not stick to the classical compartmentalizing "private law, public law, criminal law", but will rather adopt a transcategorial perspective, since the crucial questions are in most instances questions of law and not just of private, public or criminal law.

2. Judicial authority and its legitimation

Judges are archetypes of authority. Judges have existed before we had written laws. We can't stop here. In contemporary society we can no longer hold recourse to tradition nor can we deduce judicial authority from God or other forms of sacred sources. Likewise in our societies the model of the wise men who can settle all types of conflicts will no longer work at least not on a large scale routine basis.

If we leave aside the concept of a "situational justice"[5] and the several types of judges or mediators who stand for it the question of authority and legitimation of judges leads us inevitably and primarily to the dichotomy of democracy and

3 Cf. *Bengoetxea/Jung*, Towards a European criminal jurisprudence: The justification of criminal law by the Strasbourg court, in: Legal Studies 1991, p. 239; *Bengoetxea*, The Legal Reasoning of the European Court of Justice, Clarendon Press, Oxford 1993; *Toma*, La réalité judiciaire de la Cour européenne des droits de l'homme, Nomos, Baden-Baden 2003.

4 Cf. recently the reflections by the President of the French Cour de cassation *Canivet* on the occasion of the "audience solennelle" on January 6, 2006: "*Nous rendons justice les mains tremblantes*", Le Monde of January 7, 2006, p. 21.

5 Cf. *Nader*, The Direction of Law and the Development of Extra-Judicial Processes in Nation State Societies, Essays in Memory of Max Gluckman, Brill, Leiden 1978, pp. 78, 86.

Rechtsstaat. The intensity of the present-day discussion about judges in France does not come as a surprise.[6] In the light of the triad "Montesquieu, Rousseau and Jacobinism", judge-made law, dynamic interpretation and such are scare-words.

Noll's dictum that Switzerland is not a *Rechtsstaat* but a democracy reminds us of a remaining tension between these two poles. Since I consider law as the medium of canalizing the discourse in a democratic society I am convinced that these positions can be reconciled. Moreover, human rights and minority rights are a *conditio sine qua non* of a working democracy. Since any system of rights is at least as a pragmatic model closely linked to enforcement mechanism we cannot do without courts. This abbreviated legitimation discourse[7] may not give an all conclusive answer, nor will it produce any clear solution for the many questions related to the status of judges. The democratic backing remains an issue. The weaker it becomes the more we will have to rely on additional anchor points such as the quality of argument, professionalism and almost anti-cyclical to that, the judicial ritual. Judicial independence may also pass as a necessary safeguard for judges who have to adjudicate, i.e. who cannot refuse to hand down a judgement.[8]

3. Methodological consequences

I am not the first to discover judicial reasoning as an indicator for the determination of the status of judges. This has been the underlying theme of *Ogorek's* habilitation thesis on "Richterkönig oder Subsumtionsautomat?";[9] this link can also be noticed in *Koch/Rüßmann's* "Juristische Begründungslehre".[10] An intercultural comparison will produce surprising results. English and Scottish judges, clad in royal garment and often considered to be kings, are on second sight less powerful and more obedient to the legislator than, for example, their German counterparts. Strict interpretation has until recently been considered the maxim for the

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6 Cf. inter alia *Garapon*, Le gardien des promesses, Odile Jacob, Paris 1996; *Carbasse/Dépambour-Tarride* (dir.), La conscience du juge dans la tradition juridique européenne, Presses universitaires de France, Paris 1999; *Salas*, Le tiers pouvoir, Hachettes Littératures, Paris 1998; *Truche*, Juger, être jugé, Fayard, Paris 2001; Brondel et al. (dir.), Gouvernement des juges et démocratie, Publications de la Sorbonne, Paris 2001, p. 63.

7 Developed in more detail by *Habermas*, Über den inneren Zusammenhang zwischen Rechtsstaat und Demokratie, in: Habermas, Die Einbeziehung des Anderen, Suhrkamp, Frankfurt 1996, p. 293.

8 For a general rehearsal of the issues related to the independence of judges e.g. *Simon*, Die Unabhängigkeit des Richters, Wissenschaftliche Buchgesellschaft, Darmstadt 1975.

9 *Ogorek*, Richterkönig oder Subsumtionsautomat?, Klostermann, Frankfurt 1986.

10 *Koch/Rüßmann*, Juristische Begründungslehre, Beck, München 1982.

interpretation of statutes though the "methodological climate" has somewhat changed in the aftermath of the Human Rights Act 1998. This ranking seems to stand in open contradiction with the principled system-oriented line of argument German judges or, more general, German lawyers will "cherish". Arguing in a codified system of law and in a jurisdiction which is governed by a written constitution might give the impression of a more restricted margin of manoeuvre for judges. I claim that this does not hold true despite the fact that a codification imposes itself commandingly on how the arguments will be presented.

This "hidden power" of German judges is a methodological heritage of *von Savigny* whose concept has not only favoured law professors but also judges in the process of shaping and developing the law. In France, contrary to Germany, more trust is vested into the administration than into the courts; the courts will have to hide their law-making function. In actual practice, the Cour de cassation makes use of it so abundantly that the French private law has moved towards a judge-made case law.[11] The age of the Code civil and the hasty style of the French legislator have contributed to this development. Furthermore the laconic reasoning of French courts will often enough serve as a cover-up for far-reaching innovations. In criminal law, the situation is not that much different. At least, the reign of the formula "*la loi pénale est d'interprétation stricte*" does not inhibit the "*definitional authority*" of the courts in the context of the general rules of criminal law.

The power of the courts to make new law is the classical testing case for the relationship between the courts and the legislator. In the case of Germany, the discussion goes back to *Bülow*. *Bülow's* main contention, "*daß der Richter vom Staat ermächtigt ist, auch solche Rechtsbestimmungen vorzunehmen, die nicht im Gesetzesrecht enthalten sind, sondern lediglich vom Richter gefunden, ja erfunden, von ihm, nicht vom Gesetz gewählt und gewollt sind*",[12] may sound a bit strong. However, everybody will agree that a formal approach to legal reasoning, if it ever existed, is for long passé though cases where the Federal Supreme Court will expressly hold recourse to this inherent power may still require a more elaborate reasoning. For constitutional courts this is a routine matter anyway which has in part to do with the vagueness of constitutional documents. With the Federal German Constitutional Court, it occurs interestingly enough most frequently in those cases where the Court refrains from handing down a cassation order. What looks like a tribute to the supremacy of the legislature often enough turns out to be a straight-forward legislative activity by the Court itself. In some cases, this "soft approach" of a "corrective interpretation in the light of the constitution" has caused major systematic changes which should actually have been left to the legislature. The best example for this is a decision of the Federal Constitutional Court on the judicial review

11 *Ranieri*, Europäisches Obligationenrecht, 2. Aufl., Springer, Wien/New York 2003, p. 64.

12 *Bülow*, Gesetz und Richteramt (1885), reprinted in the series Juristische Zeitgeschichte, Berliner Wissenschaftsverlag, Berlin 2003, p. 37.

of life imprisonment which has added yet another distinction to the already overly differentiated substantive law of murder and homicide.[13]

Of course, dynamism in interpretation will depend on the subject matter and the status of the court. The European Courts have taken the lead. In particular the European Court of Human Rights has become *the* European moral agent, the European Human Rights' conscience. This means that it can risk bold interpretations; it may even have to, taking into account the laconic character of the legal source it has to apply. Sources of international law allow for a larger margin of manoeuvre, even larger than a constitution, since, in Human Rights matters, progress cannot wait until the signatory states have managed to put into force an additional protocol. "Dynamic interpretation", "autonomous interpretation", the "convention as a living instrument", "rights that are real and not illusory" are the tools and metaphors the Strasbourg court has developed in this context. Nevertheless this court like any court only decides individual cases. It does not follow a pre-set course, nor does it constantly decree new Euro-norms.[14] Still we know that courts can in their adjudication not do without rules and the higher the court ranks in the judicial hierarchy the more attention it will have to pay to this rule-making function.[15] In most jurisdictions the courts of last instance are expressly or implicitly entrusted with the harmonization of the law. We should not forget, however, that the European Court of Human Rights also applies a counterbalancing strategy, in that it does often enough not touch on domestic law referring to the so-called "margin of appreciation" left to the member states in implementing the Convention's guarantees.

"Activism vs. restraint" is a juxtaposition which does not only apply to the European Court of Human Rights but to most any court of last instance in particular to constitutional courts. In US-America this debate has accompanied us ever since the famous *Marbury vs. Madison* decision.[16] We are reminded of it each time a new Supreme Court judge is nominated. Analyses of the different eras of the Supreme Court jurisdiction will adopt it as a *Leitmotiv*. I restrict myself to two brief comments:

1) It is naive to conceive of law and politics as two nicely separated fields.

2) The exercise of judicial restraint is often enough itself tainted with political intentions.

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13 BVerfGE 86, 288.

14 Cf. *Toma* (Fn. 3).

15 Cf. *Ellscheid*, Probleme der Regelbildung in der richterlichen Entscheidungspraxis, in: Herberger/Neumann/Rüßmann (Hrsg.), Generalisierung und Individualisierung im Rechtsdenken, ARSP-Beiheft 45 (1992), Steimer, Stuttgart 1992, p. 23.

16 *Marbury vs. Madison* 5 U.S. 137 (1803).

4. Recruiting judges

The recruitment of judges can be seen under different angles. We could go into the quality profile for judges and might then end up with legal education. We could also address the structural divide between the civil service career systems for judges and systems which rely on appointments of senior lawyers to the judiciary. *Guarnieri/Pederzoli* have suggested to distinguish between the "bureaucratic" and the "professional" model.[17] This distinction is, however, misleading since it implies that a civil service judge is not a professional. Also, the classical divide lies between "professional judges" and "lay judges". This said, the English legal system which would, according to *Guarnieri/Pederzoli's* distinction, fall into the category "professional" is being run to a large extent by lay judges in the magistrates or district courts.

The relevant institutional differences between the English and Scottish judiciary and the German judiciary rather runs along the line "individual judges" vs. the "*corps de justice*". This is not identical, but related to *Damaška's* distinction between "hierarchical" and "coordinate" models of justice and public authority.[18] Though it seems highly plausible that the German judiciary has a more homogeneous structure on paper and though we refer quite often to "*die Justiz*", one might just as well argue the opposite, namely that in actual fact the English and Scottish judges may even outrival German judges in their "*esprit de corps*".

The selection procedure for judges oscillates between two poles: democracy and professionalism. Democracy comes to the forefront in the case of juries or constitutional court judges. In the case of juries, the procedure even resembles a lottery. The election of judges is common procedure in the United States with detrimental side-effects such as election campaigns, populism and punitiveness. *Tonry's* critical appraisal of popular punitiveness in the US of today ends up in a plea in favour of a more professional recruitment of judges.[19] Whereas it may not be wise to rely on popular elections of judges only, we must also immunize selection procedures against an overdose of influence by the political parties. The selection of constitutional court judges in Germany for example is criticized for being overpoliticised since it takes place, despite its democratic structure, in small committees with little transparency. In France, the constitutional court judges are handpicked by the three leading political dignitaries which is certainly no guarantee for representativity. With regard to the "*juge ordinaire*" Italy, France, Spain, Portugal and several East European countries provide for councils to mediate between inde-

17 *Guarnieri/Pederzoli*, La puissance de juger, Editions Michalon, Paris 1996, p. 150.

18 *Damaška*, The Faces of Justice and State Authority, Yale University Press, New Haven/London 1986.

19 *Tonry*, Thinking about Crime, Oxford University Press, New York 2004, p. 206.

pendence and governmental influence. Italy, where the power of the courts and the prosecutors, or should I say where law, is at present under constant attack by the ruling right wing political majority, has developed the most refined system against political intervention including the independence of public prosecutors.

It has been suggested that the "*corps de justice*" should be entrusted with a full fledged self-government. I don't think that we should go that far. Such a system might favour a "closed shop" mentality detached from public life. Also one should not underestimate the risks of nepotism inside such an institution. It looks as if the existing compromise solutions may, despite their weakness, provide for the better system of checks and balances.

5. Who controls the controllers?

Power requires control. With judges, we tend to distinguish between the individual case and the general record of the judiciary. Often enough, the handling of individual cases produces such an outburst of public disapproval that the whole institution is on the defensive. In France, a child abuse case in Outreau with many false allegations has produced a real "*désastre judiciaire*" putting the whole of the judiciary on the spot.[20] Also, with politicians, media and the public at large haunted by an excessive fear of crime (as if one could ever eradicate risks!) judges who release prisoners on parole will regularly be on the spot in case a crime is committed subsequently.

The course of criminal justice is most liable to arouse criticism. Private law litigation is more remote from public attention and even administrative law cases do not attract much public attention. These issues lack the sensational touch which has always mobilised the general public for criminal justice.

We are inclined to link accountability to mistake. But what is a mistake? Can judges make mistakes?[21] Or do they just hand down decisions that one of the parties or both parties or the public at large will not like? We all know that "right" or "wrong" is a delicate distinction when it comes to the interpretation of statutes. Take for example the recent decision of the German Federal Constitutional Court on the dissolution of parliament by way of a "constructed" defeat in a vote of con-

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20 Cf. Le Monde of December. 2, 2005, p. 1, 13. The French parliament has in the meantime instituted a parliamentary inquiry commission whose at times court-like proceedings have in turn provoked criticism on the part of the judiciary; e.g. Le Monde of February 18, 2006, p. 1.

21 Illuminating in this respect *MacCormick*, Can Judges Make Mistakes?, in: Jung/Neumann (Hrsg.), Rechtsbegründung – Rechtsbegründungen, Nomos, Baden-Baden 1999, p. 76.

fidence.[22] Something is to be said in favour of each of the judgement's three opinions.

We should therefore not water down the independence of the courts in the name of accountability and introduce new devices to discipline judges or even remove them from office as a consequence of ordinary judicial activity. Accountability rather calls for counterbalancing measures of a different kind: to begin with, the courts will have to practice those virtues that have just been recalled by the avocat général in the "affaire Outreau" "humility, doubt and humanity". A culture of doubt, instead of self-assuredness, even arrogance, is not incompatible with decision-making. A decision is morally justified only if we are aware of uncertainties.[23] The list of secondary measures to build up or restore confidence should further include openness and the quality of judicial reasoning. Justice must, according to *Lord Hewart's* dictum, "be seen to be done".[24] The courts should therefore not toy around with the idea of a "*force cachée*" but, to the extent possible, "go public" to make themselves understood. Neutrality does not mean seclusion. Though I am reluctant to generally approve of "Court-TV" something is to be said in favour of a gradual opening.

Much depends on the language of the law. Lawyers apply a technical language and have, for centuries, only trumped by medical doctors, cultivated this language as an insignia of power. In part, versatility in legal matters will generate respect; yet this respect will only pay off if the very same lawyer is able to explain a decision. The credibility of the judiciary is also, often enough, being undermined by partisan criticism on the part of advocates and legal counsels with the inherent destructive message that adjudicating is an arbitrary business.

The accountability question has produced two off-springs. The performance of the courts is not exempt from criticism, one modern variant of it is called *"evaluation"*.[25] Professors and judges will probably share the same sceptical approach vis-à-vis evaluation which has to do with the reluctance if not resistance to develop criteria that would allow to evaluate the quality of a complex professional activity. A meaningful evaluation calls for combination models. Peer review will have to be combined with an appraisal of the acceptance by the clientele. Evaluation cannot be restricted to the use of statistical data, but will require a more sophisticated empirical research.

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22 BVerfG, NJW 2005, S. 2669 = JZ 2005, S. 1049.

23 Cf. *Derrida*, Gesetzeskraft. Der „mystische Grund der Autorität", Suhrkamp, Frankfurt 1996, p. 49.

24 *Lord Hewart*, in: R. v. Sussex Justices, ex parte McCarthy (1929), 1 KB 256, 259.

25 Cf. *Breen* (dir.), Evaluer la justice, Presses universitaires de France, Paris 2002; Schmidtchen/Weth (Hrsg.), Der Effizienz auf der Spur, Nomos, Baden-Baden 1999.

Though law and ethics is a familiar couple, it is difficult to locate the position of *ethics for judges*. Having originated from within the ranks of judges it forms part of the general move towards codes of ethics. Codes of ethics are at present being developed at the national and the international level.[26] They consist of a set of principles and general directives which either restate the law itself or borrow from common sense. Their promulgation anticipates public anxieties about a profession which is perceived to somehow escape control. It also responds to a widely spread feeling within the profession itself that some positive guidance may be needed in order to adjust one's bearings in the vacuum which tends to surround lofty principles such as judicial independence.

It is difficult to assess the character of such codes. They do not want to be taken as a disguise for rules of discipline. Yet I doubt whether they can, in the last resort, be anything else but disciplinary rules, at least, *in nuce*, only framed in a more positive way. Looking at it this way it is surprising to read in a French manual on deontology for judges that in Germany the topic has yet to be discovered.[27]

Despite my reservations against common place statements clad in lofty oratory these attempts to "codify" judicial ethics have at least triggered off an international discourse on the responsibility of judges and the essentials pre-requisites of an impartial decision-making, not to say on the role of judges in society.

6. Rivals

30 years ago *Christie* called for a change of paradigm in conflict resolution with his famous article on "Conflicts as Property".[28] It culminated in the message that the state had usurped conflict resolution. This was a powerful, if not the most powerful signal, for the ensuing campaign for new modes of conflict resolution, modes which aimed at reinstating the parties into their rights. The general distrust of self perpetuating bureaucracies, the detrimental side-effects of formalized procedure, the longing for more adequate responses to the emotional and social overload of cases, the need for suitable approaches to avoid the clumsiness of judicial procedures as well as a certain dose of grass root ideology – this and more encouraged people to look beyond justice. The older theme of alternatives to the justice

26 *Salas/Épineuse* (dir.), L'éthique du juge: une approche européenne et internationale, Dalloz, Paris 2003.

27 *Canivet/Joly-Hurard*, La déontologie des magistrats, Dalloz, Paris 2004, p. 56.

28 British Journal of Criminology 1977, p. 1.

system had a new name "mediation".[29] It was probably inherent in the philosophy of participatory models of justice that they would sooner or later want to do away with the old- fashioned judge and replace it by a mediator. Though this newcomer on the scene of conflict resolution can look back onto a long line of ancestors, the mediator embodies a new methodological approach to conflict resolution as well as a professional challenge to lawyers. Lawyers who used to enjoy a monopoly were all of a sudden threatened by professional rivals in the field of conflict resolution, above all social workers and psychologists. The process of professionalisation of mediators is well on its way and mediation has in the meantime crept into every pore of social life, from environmental law to family law and from commercial law to criminal law.[30]

Do we sense the winds of change here? Yes and no! Mediation is still a project with a limited range. Yet, its ideological impact is enormous. We are reminded of the fact that litigation need not end in the use of force, but that it can also be solved by way of consensus. We have to concede, however, that mediation is taking place in the shadow of the Leviathan. Its potential depends certainly on the willingness to engage in friendly settlements, which may differ from society to society. At least at present, it also depends on the existence of back-drop strategies, i.e. ordinary litigation.

What does this all mean for judges? In a way, judges or lawyers in general have entered into a competition. Some claim that the good judge has always been a good mediator. This may be true since a good judge should certainly be able to discover and bring to bear a consensus between the parties involved. Yet at the same time, mediation and mediators remind us that there are forms of authority which do not depend on the binding force of law. Therefore, it would be fatal for both sides if the lawyers would simply pay lip service to mediation and continue to do business as usual. Mediation would loose its autonomy and identity and the lawyers would only have defeated a rival. Therefore, I am hesitant to fully endorse concepts like the "*gerichtsnahe Mediation*", since closeness may well dilute the productive tension between mediation and litigation. On the other hand, judges could learn from mediators that communication in court need not be a formal exercise. Hence, there are areas where the profile and the skills overlap. Also mediation and mediators are somewhat like catalysts when it comes to understand the gist of the law and the performance of its actors. Since nobody is perfect, lawyers should be sensitive for the deformations that become apparent through the looking glass of mediation.

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29 *Jung*, Mediation: Paradigmawechsel in der Konfliktregelung?, in: Fs. für Schneider, Walter de Gruyter, Berlin/New York 1998, p. 913.

30 For an overview e.g. Haft/von Schlieffen (Hrsg.), Handbuch Mediation, Beck 2002.

7. Conclusion

Judges have always attracted our interest. They have revealed some of their secrets, but not all of them. I do not pretend that my search has been any more successful than that of others in disclosing the remainder. For many, judges are the personified version of the law, so analyzing the role of judges means analyzing the law. Others emphasize that judges are synonymous with the way authority is organized in particular society. For many, the role of judges is synonymous with the structure of legal reasoning, which means that we have to engage in an exercise of legal method.

The statement that judges have always attracted our interest is too weak, they have even fascinated us. The fact that they have the "last word" means that they are surrounded by mystery and even nowadays we are reluctant to do away with all of the symbolic and ceremonial ornament which underpins the representation of justice. Justice must be seen to be done. As a matter of fact, we learn more about a particular legal system by spending a day in court than by reading yet another manual. This holds true of our own legal system, but even more so of foreign legal systems. For a comparatist it is therefore essential to get acquainted with "law in action".

Reflections on the power of judges can of course not content themselves with the rehearsal of methods or the "democracy versus Rechtsstaat" dichotomy. We would also have to take into account the modalities of the decision-making. By that I do not mean *Pascal's* example of the fly which disturbs the judge.[31] Decisions are not taken on the spur of the moment, they emerge in a longer process. Many have their say in it, judges are susceptible to influences. Of course they are trained to stick to the law and, in comparison with lay judges professional judges guarantee a more rational process of decision-making though they are not totally immune against atmospheric influences.[32] Professional judges will on the other hand tend to act as a representative of the legal system and therefore pay too much attention to the protection of institutions.[33]

Judges will rarely fall prey to the "arrogance of power". Like all professions, they do, however, have to resist to the temptations of a technocratical approach, to the conceit of "superior knowledge" and to an overdose of managerialism. Of course,

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31 *Pascal*, Pensées, Fragment 44: "*Ne vous étonnez point s'il ne raisonne pas bien à présent, une mouche bourdonne à ses oreilles: c'en est assez pour le rendre incapable de bon conseil.*"

32 *Mathiesen*, Prison on Trial, Sage, London et al. 1990, p. 13, considers them to be anxiety barometers.

33 An aspect which I have addressed more thoroughly in my article: Zur Kadijustiz, in: Fs für Rolinski, Nomos, Baden-Baden 2002, p. 215.

judges cannot do without legal skills. The solution of legal conflicts requires the input of some legal expertise. Yet, without modesty and empathy and a touch of "bad conscience" adjudication risks to become a futile exercise.