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THE JUDGE IS TO PERFORM HIS DUTIES CONSCIENTIOUSLY

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1. Introduction

We remember professor János Zlinszky as a luminous restorer of the Hungarian democratic Rule of Law. Since 1989 it is enshrined in the constitution: *Hungary is a democratic state governed by the rule of law.* Professor Zlinszky's own experience had taught him how essential, but at the same time how vulnerable, such a provision is.

Allow me to recall to you a phrase of the Hungarian national anthem. *Bal sors akit régen tép,/ Hozz rá víg esztendőt,/ Megbűnhődte már e nép/ A múltat s jövendőt!* Long torn by ill fate, bring [, o God,] joyous times upon the Hungarians: this people has suffered for the past and the future! Most schoolchildren in my country, after 23rd October 1956, learned that anthem by heart, but we could then hardly understand it.

Professor Zlinsky did understand. He wrote in 1993[1]: *Nur zu gut kennen wir die Möglichkeit des Verschwindens schon erreichter Werte, wenn sie nicht genügend geachtet, beschützt, gepflegt werden. Wer steht, achte darauf, daß er nicht falle!* Values must be marked, protected, looked after. Today this is at least as topical as in 1993, in Hungary and elsewhere.

It is not without emotion, that I have the honour to talk to you on one of these Values: the conscience of the judge.

Judges must act according to their conscience. This is a generally received value in Western legal systems.[2] A judge may have to take an oath that he will perform his duties conscientiously; thus for instance the judges of the European Union Court

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1 János Zlinszky: Rechtsstaat Rom. In: Martin Josef Schermaier – Zoltán Végh: *Ars boni et aequi. Festschrift f*ür *W. Waldstein*. Stuttgart, 1993. 471–480. at 473.

2 Jean-Marie Carbasse et al. (ed.): *La conscience du juge dans la tradition juridique européenne*. Paris, Puf, 1999. Recently Wim Decock: The judge's conscience and the protection of the criminal

at Luxemburg.[3] Various Codes of judicial conduct prescribe that a judge must let himself be guided only by the law and his own conscience, free from undue influence, influence of the executive and the legislature, or of other judges.[4]

But explicit reference to the judge's conscience is not of everyday occurrence. It is rare indeed that a judge tells us that he felt necessitated by his conscience to take a particular decision. Similarly, legal literature parsimoniously mentions the conscience of the court as an issue that is relevant to understand a judgment. Yet, it is beyond doubt that a judge is guided by his conscience every day, when performing any of his duties. A judge is guided by a wide range of guidelines, but among these guidelines paramount and final importance belongs to the judge's conscience. I will now first recall to you two widely divergent parts played by the conscience of the judge in the course of Western legal history.

2. Two divergent parts assigned to the conscience of the judge

First an example from the Romano-canonical tradition. Here the question of the conscience of the judge was raised in various ways. Most debated, even passionately debated, from the 12th Century onwards until well into the 16th Century, and, with less fierceness, even until the later 18th Century, was the following issue.[5] Suppose: allegations and proofs have been brought in a lawsuit, but the judge knows they are not the truth; should he then give priority to his own private knowledge? The standard case is the judge who has to preside over a murder trial. All witnesses and other evidence point convincingly at the accused person. By rare chance, however, the judge himself, at the point of time the murder was committed in Paris, had seen the accused person, not in Paris but over a 100 km from Paris, in Orleans. So the judge knows for certain that the accused person cannot be the killer.

In the 12th Century, the so-called legalistic theory of proof had become leading. It held that the judge must base his decision only on the allegations and evidence brought in the proceedings, not on his conscience. He had to decide *secundum allegata et probata, non secundum conscientiam*. In the 13th Century, St. Thomas Aquinas, surprisingly, adhered to that theory. Yet St. Thomas taught that a man may never act against his own conscience. He could only reconcile these two opposing principles

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defendant: Moral safeguards against judicial arbitrariness. In: George Martyn et al. (ed.): *From the judges's arbitrium to the legality principle*. Berlin, Duncker & Humblot, 2013. 69–94.

3 *Protocol (N° 3) on the Statute of the Court of Justice of the European Union,* Art. 2: "Before taking up his duties each Judge shall, before the Court of Justice sitting in open court, take an oath to perform his duties impartially and conscientiously [...]".

4 Thus, *e.g.*, the *Bangalore Principles of Judicial Conduct,* Application 1.1: "A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason".

5 See my La casuistique de la conscience du juge dans la tradition romano-canonique (XIIe – XVIe Siècle). *Actes Société d'Histoire du Droit de Ljubljana*, Pravnik 133 (2016) 49–70., with further references and sources.

by means of a highly artificial distinction. He adopted the idea that a judge has two separate consciences, a private conscience and a judicial conscience. Each man has to form his conscience on the basis of his private knowledge. Acting as a judge, however, a man must form his judicial conscience only on the basis of knowledge gathered in the procedure.[6] The judge who privately knows the accused person is innocent, must nevertheless condemn that person, even if that means inflicting the death-penalty; for then the innocent person is killed, not by him, but by those people who assert that person is guilty.[7] A piece of incredibly rigid, rectilinear intellectualism, in our eyes, as one would not expect to find with the Doctor Angelicus. Even so, until far into the 16th Century the large majority of legal and moral scholars subscribed to this legalistic theory.

Around the year 1500 a golden mean between legalism and anti-legalism was defended only by one theologian, Adrian of Utrecht, the later tragic, short-lived Pope Adrian VI.[8] Is it permissible for a judge to condemn someone on the basis of what has been proved according to the legal rules, though it is at variance with the truth, known privately by the judge? Adrian answers: yes, as long as only a claim of damages is at risk. If, however, the death-penalty is at stake, or a penalty of mutilation of the body or its limbs, it is not permissible. Adrian's argument is ingenious: It is true, the people have instructed the judge always to disregard his own private knowledge, when the matter is not asserted and proved within the procedure. But in so instructing the judge, the people could not transfer more right than they themselves had, and they just had no right to their own life and body. An unexpected application of the rule *nemo plus iuris ad alium transferre potest quam ipse habet*! It took some time, but this golden mean gradually became the prevailing theory among theologians and legal scholars. The debate became outdated in the 18th Century, when the requirement of the *conviction intime du juge* became universally adopted, that is the principle involving that a crime cannot be held to have been proved in court, merely if sufficient legally acceptable evidence has been adduced, as long as the judge has not been convinced deep-down by that evidence.

In my second example a different part is assigned to the conscience of the court. We will now focus on Europe in the 20th Century, during the years of the rule of violence, in the Soviet Union and in Germany, in the countries occupied by the Nazis and in the so called satellite States of the Soviet Union. The essential values of

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6 Thomas Aquinas: *Summa theologiae, Secunda secunda.,* Quaestio 67, art. 2, conclusio: "Homo in his quae ad propriam personam pertinent, debet informare conscientiam suam ex propria scientia. Sed in his quae pertinent ad publicam potestatem, debet informare conscientiam suam secundum ea quae in publico iudicio sciri possunt".

7 Thomas Aquinas op. cit., quaestio 64, art. 6, conclusio: "Iudex, si scit aliquem innocentem esse qui falsis testibus convincitur, [...] non peccat secundum allegata sententiam ferens, quia ipse non occidit innocentem, sed illi qui eum asserunt nocentem".

8 Hadrianus Florentii de Traiecto: *Quaestiones quo[d]libeticae*. Lovanii 1518, quaestio 6, art. 3: "In his quae damna rerum concernunt licite potest iudex secundum allegata et probata iudicare contra veritatem quam novit ut privata persona; secus in damnis corporis ut occisione, mutilatione vel detruncatione membri".

democracy and the rule of law were not recognised by those in power. Still, even then there were judges who listened to the voice of their conscience and boycotted evil laws. An explicit reference to that conscience would usually be omitted, but it was not wholly absent. Such a courageous decision became immediately famous among those people who utterly deplored and rejected the dictatorial regime. They could find some hope and inspiration in that judgment. It could help remind them of the primacy of the essential values of democracy and the rule of law.

In my country, an example is a decision of 25th February 1943,[9] taken by the court of appeal for the northern part of the Netherlands, sitting at Leeuwarden. The occupying Nazi forces had assumed the practice that prison sentences for male prisoners were executed in special prison camps, in a barbaric, atrocious way, often resulting in severe injury or death. In the case brought to the court of appeal, the accused was convicted for theft of (1,525 Dutch guilders =) the equivalent of 235 000 Hungarian forint; the district court had inflicted on him a prison term of 9 months. In appeal the term was reduced to the 4 months the accused had already passed in provisional custody, so as to allow him to escape the prison camp. The court of appeal gave the following grounds, mentioning explicitly the conscience of the court.

"Considering [...] that the court of appeal wishes to take into account the circumstance that for some time several prison sentences, inflicted by the Netherlands judge on male offenders, have been or are executed in prison camps, in violation of the directions of the law and contrary to the intention of Legislator and Judge, aggravating the punishment in such a way as the Judge, in determining the measure of punishment, could not possibly have foreseen or even presupposed as possible;

Considering that the court of appeal, seeing the possibility of this way of execution of the punishment now to be inflicted, will, with a view to its conscience, abstain from sentencing the accused to imprisonment of such a term as in this case would be proportional to the gravity of the crime committed by the accused but would expose him to the possibility of an execution as mentioned above;"

When the judge, in an extreme case, appeals to his conscience, he always assumes a personal risk. A horrendous risk in times of the reign of terror - in our times all along a risk for the career of this judge.

3. What is the conscience of the judge?

But what is that conscience of the court? In the ethical sense, conscience is the inner tribunal where the judge, just as each human being, deliberates upon his conduct, in a secret dialogue – a dialogue with himself, or with the personified Idea of Law, or with God. St. Thomas Aquinas, with reference to Origenes, sees conscience as the corrector of the spirit and the educator of the soul; it keeps off from evil and adheres to good; and it enables, before some act is performed, to judge whether that act should or should not be performed, and after some act has been performed, to judge whether

[9] Published: *Nederlandse Jurisprudentie*, 1951/643.

it was good or evil.[10] This reasonable judgment which everyone, before his own inner forum, makes on his own acts, is also made by the judge on his acts in court. The judicial conscience, then, is the reasoned conviction of the judge that something is fair or unfair.

4. The irrational jump of the judge

In the Netherlands, the authoritative phrasing is still that of Paul Scholten (†1946), dating from 1931,[11] as further elaborated by Gerard Wiarda[12] (†1988). Scholten was a professor at Amsterdam University, Wiarda was president of the Netherlands Supreme Court and later president of the European Court of Human Rights at Strasburg. According to their view, each decision of the judge is rooted in his conscience. The facts must be established, the laws observed, and a logical reasoning formed – but in the end inevitably comes the *jump of the judge*, the jump to the decision. The jump of the judge – there is something arbitrary in it, something irrational, for the judge is answerable for it only to his conscience. That conscience, however, could err and it is subjective, but nothing better is available. It makes no difference if it is assumed that the individual conscience is liable to a last external touchstone – whether that touchstone is detected in the Idea of Law of idealism, or in the demand which Christian Faith hears in the word of God. For also under that assumption of an external touchstone, the irrational jump remains.

That the decision of the judge, in the end, is rooted in his conscience, is a statement which must not be stretched beyond its content. Admittedly, there are cases where the laws supply no other guideline to the judge than the open norm of reasonableness and fairness. If concrete legal norms are lacking, the judge must resort to his conscience. But even so, it is only *in the end* that the judicial decision roots in the conscience of the judge. Not too easily a judge may have recourse to a personal conviction which cannot further be accounted for. All objective viewpoints which may possibly be found should first be brought in and be used as signposts for determining in which direction the solution must be looked for. These signposts may be juridical views, prevalent in a specific country in a specific period. They do not always lead immediately to the final destination, but they may reduce the field within which the judge's personal preference will operate.

To sum up: if all relevant objective viewpoints brought in, do not lead to a cogent conclusion, then the final choice is made after a mental jump that cannot be justified objectively and rationally any further, and which may therefore be called a decision of

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[10] Thomas Aquinas: *Summa theologia. Prima.* Quaestio 79, art. 13: "Dicit enim Origenes quod 'conscientia est spiritus corrector et paedagogus animae [...], quo separatur a malis et adhaeret bonis' [...]. Per nostram conscientiam iudicamus aliquid esse faciendum vel non faciendum [... et] aliquid quod est factum, sit bene factum vel non bene factum".

[11] Paul Scholten: *Algemeen Deel (Mr. C. Asser's Handleiding [...]).* Zwolle, Tjeenk Willink, [3]1974. 129–135.

[12] Gerardus J. Wiarda: *Drie typen van rechtsvinding.* Zwolle, Tjeenk Willink, [3]1988. 147–150.

conscience. Judging is always both an *intellectual* and an *intuitively moral* operation. It is both deciding what *is* and what *ought to be*.

5. Concluding remarks

From what has been said so far, it must be derived that the conscience of the court is a vital and essential notion. It would deserve far more attention in legal theory than is usually paid to it. I will conclude with two remarks.[13]

A judge should abstain from regarding his personal convictions as universal moral commands. Decisions which are only founded on the personal convictions of some judge, neatly oppose that judge's conscience. If it belongs to the judge to write the proper rule which governs a case, he cannot be led by his *own* ideology. He must find the rule that proceeds from the *collective* ideology of that part of society which receives this rule. The judge's office is a public office and if he acts within that office, he has, for instance, to dim somewhat his personal religious conviction. Only in highly exceptional cases the judge may and must give priority to his reasoned conscience, before the laws.

My second remark. The guaranty for the necessary objectivity is the quality of the grounds stated in the judgment. The decision of the judge presupposes a preceding rationalization by which the case is freed of the heat of passion and the dust of the arena. Because that rationalization must be committed to writing, to the grounds stated, also an appeal court is enabled to test the quality of the chosen solution. Thus the deliberation on the inner forum of the judge's conscience is given its necessary transparency when expressed in strictly rational reasons. This strictness, of course, does not at all exclude an appreciation of the solution in ethical terms. And we should not lose sight of the conscience of the judge.

[13] These remarks should be further developed, but this is not the place to do so.