PROFESSIONAL RESPONSIBILITIES AND VIRTUES OF LEGAL PROFESSIONALS[1]

PROFESIONÁLNA ZODPOVEDNOSŤ A CNOSTI PRÁVNIKOV[1]

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ABSTRAKT:
Autor sa v príspevku zaoberá širšími súvislosťami právnej etiky a skúma profesionálnu zodpovednosť v kontexte právnického povolania. Venuje sa napr. relevancii rozhodnutí, ktoré síce sú v súlade so zákonom, ale vo svojej podstate sú nesprávne. Otázku právnej etiky konfrontuje s procesnými pravidlami a v kontexte princípu "*rule of law*". Polemizuje nad relevanciu právnej etiky v súčasnosti a jej súvislostiach.

ABSTRACT/SUMMARY:
Within the presented article, the author deals with the broader perspectives of legal ethics and deals with the matter of professional responsibilities and virtues of lawyers. Inter alia, he inspects the issue of (un)lawfulness of decisions that are awful and the relevance of such decisions. Selected issues of legal ethics are looked at from the perspective of procedural rules and the rule of law. Nevertheless, the author also examines the relevance and importance of legal ethics today.

1. INTRODUCTION: UNLAWFUL V. LAWFUL BUT AWFUL

A vivid expression of the issues to be treated here was offered by Kutz, in 2003:

> *The ambition of law is to resolve conflict, exchanging the coin of private (and public) violence for its own currency. For idealists, law's currency is justice, and it resolves conflict by reference to morally grounded rights. For cynics, law's currency is currency.*

For cynics ever so often their own cynical currency is the only thing that matters. Anything goes as long as one does not get caught: this is the "*principle*" of wide-spread legal practice even in so-called "*civilized*" jurisdictions. Thus documents and other pieces of evidence may be forged in order to curtail *bona fide* parties' rights, and worse. Or disciplinary procedures may be used in order to oust competent members of the judiciary unwilling to stand in line with *mala fide* superiors. And so on. One more example out of so many: all around the world civil lawyers watch their own purses in the first place, in deciding whether to go on in procedures however fruitless for their legally more or less ignorant clients but still dearly to be paid for: "*The client is just a bag (an insult in The Netherlands, in literal translation) filled with money …*". Anyone may imagine or even have experienced so many legal situations exploited in terms of self-interest, monetary or otherwise, at the expense of justice and right and far beyond spheres of civil adjudication.

Here it will be argued that "*idealism*" is the only way out. "*Cynicism*", the dog-fight over gains and losses in the exploitation of the legal landscape will inexorably lead to a new state of nature, thinly clad in false

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appearances of legal civilization. Struggle for power is then to replace any zeal for justice and right as the rightful objectives of any really civilized rule of law.

How to conceptualize this conflict and how to plausibly solve it on behalf of idealism, or put more simply in the interest of realization of justice and right? A further distinction is apposite here, implicit already in cases mentioned above. First there is unlawful conduct by legal professionals – and so many others. Such conduct is not worth much further discussion of course, apart from marginal issues of interpretation or even cases in which decisions *contra legem* serve purposes clearly superior to observance of positive law. In civilized jurisdictions such decisions may be rather rare in the end, as they ought to be.

Second and more important for this discussion is professional (and other) conduct in line with the law but still inacceptable from a moral or simply human point of view. "*Lawful but awful*" is the problem, then. It may be hard to strictly distinguish between unlawful and lawful but awful conduct, but still the main problem to be discussed here is the playroom offered by positive law for humanly unacceptable conduct. It may indeed be taken for granted that the badness or even real crime of really unlawful conduct by legal professionals and others needs no further critical discussion. Such conduct simply ought not to be and ought to be strictly sanctioned, again apart from rare *contra legem* cases serving higher purposes.

So falsifying documents is simply criminal, maybe apart from rare exceptions. But misuse of disciplinary proceedings may not directly violate explicit legal rules, though it is awful to say the least, both for the wrongly disciplined and for the quality of adjudication and the rule of law. One more example, adding to the cases already mentioned above: banks refusing rightful payment to clients may try to lengthen court proceedings, in order to force such clients to give up as a consequence of ever rising costs of such "legalized" conflicts going on and on. Or – lastly – think of so many bankruptcies solely designed to cheaply get rid of creditors and staff: lawful maybe but awful again. Or think of "facts" determined according to evidence law, making good use of parties' undeserved inabilities to offer relevant proof. Such "facts" may be ostensibly at odds with reality. Justice according to the rules? Probably not so.

2. LEGAL ETHICS NEEDED? THE WILL-O'-THE WISP OF ETHICS

But then what are yardsticks of awfulness here? Positive law cannot furnish them by definition. May legal ethics step in here, so as to determine what is awful in the end? Indeed legal ethics is a reasonably popular subject, at least on paper. Oftentimes it is discussed in connection with marginal issues like: may a judge display a crucifix in his personal office room? Or: may a public prosecution officer participate in a public body building contest? Or: may a criminal defense lawyer be politically active? And so on and so on. The general answer is of course that legal officials are entitled to personal liberties and private spheres of life just like any other citizen and that their professional lives ought to be generally independent from any personal issues.

Rather more interesting and consequential may be ethics applied to real life issues of "*lawful but awful*" as illustrated earlier on. But then what is ethics, purportedly furnishing distinctions between right and wrong, between what is human and what is inhuman? Ethics or normative ethics generally is regarded as "the ultimate guide to life", as Plato's well-known words already put it: "For no light matter is at stake: it concerns the very way life is to be lived." Or: ethics is normative, not descriptive and such ethics is intended to ultimately solve conflicts of motives and/or ends of human conduct. Also, normative ethics is generally taken to relate to really important issues, like harmony of interests, human happiness, salvation and other overriding ends. Lastly normative ethics as a guide to life probably would not make much sense without the given of conflicts of interests.

Such meta-ethical discourse on concepts of normative ethics (or morals) may be relatively uncontested, compared with deep conflicts on the contents of normative ethics in fact since the inception of humanity. Some live from deeply felt religious zeal or even fanaticism, others go for general happiness in terms of utilitarianism or otherwise, still others try to cultivate a virtuous life, while more than a few simply go for self-interest, however distorted subjective conceptions of such self-interests may be.

In line with this it is often contended that there is nothing like normative ethics transcending personal and/or cultural morals "*as they are*". Then any discussion of moral standards ends up in "*just your*

conscience if you get any against mine" and so on. Such moral relativism or even subjectivism excludes any meaningful application of ethics in criteria of awfulness in legal practice as well.

Small consolation here may be that all too simplistic ethical subjectivism and relativism is a self-stultifying standpoint, as follows. Imagine somebody advocating something like: murder, rape, bodily assault and so on are not wrong, all one may say is that somebody feels it to be wrong: nothing objective here. Then somebody else may try out a variation of a Socratic experiment, by hitting this speaker with a vengeance. A normal speaker will resent this, among other things, like: this ought not to have been done to me, this was not deserved, and so on. But such a reaction is at odds with any thoroughgoing subjectivism or relativism of course, excluding any normative judgment per se. Thus the poor subjectivist and/or relativist may be told that all he can say is that he did not like the treatment and the actor thought differently about it. This is the performative contradiction of simplistic subjectivism and relativism (see also Strawson, 1962).

Not for nothing the Golden Rule, however abstract, is at least implicit in any moral code of whatever status, if it is to be taken seriously (see Midgley, 1991, on this, also in terms of evolutionary explanation). Though it is clear enough that any Golden Rule, however strictly formulated in terms of Kants categorical imperative or otherwise, is too abstract to offer really clear directives in so many complexities of legal professional and not so professional life.

Still even the purportedly completely relativistic and/or subjectivistic speaker appeals to something like it against being hit hard for his "anti-moralism", at least as long as he really objects to such bad treatment. Put negatively anybody intending to wrongly further any personal interests at the expense of others may be asked "what makes him so special" – to quote Rachels (2002). Or: "what would happen if everybody would act like you?" Thus high-ranking court members exploiting the system to their own advantage may be told that they may do so only because so many others still behave decently, enabling them to milk a system more or less kept in working order by these others indeed.

But then would such court members take notice? Or so many others bending and breaking the rules of law, decency and even humanity to their own advantage or to what is seen as such? Probably not so. However sensible or even supremely important any Golden Rule may be, its practical influence may still be rather limited. Who really lives by explicit ethical or moral guidelines? Religious fanaticisms and its implications for daily and not so daily life may be another matter, but any normative ethics however well thought out probably does not make a consciously serious difference. Susan Wolf nicely expressed the point as follows (in 1984):

But before too readily mounting a high horse, it would be useful to reflect on a fact that contemporary moral philosophy fails generally to appreciate – namely, that the role distinctively moral thought plays in most of our lives is quite small and that much of what we most deeply value in ourselves and those around us has nothing to do with morality at all. ... There are limits to the degree to which the average person tries to be a good person, and we have reasons to question the assumption that we would all be better off if the average person tried more.

So enough said about ethics and thus about applied ethics as well. It cannot usefully serve to explain what may be lawful but humanly awful, given issues of widespread subjectivism and relativism. The Golden Rule in as far as exempt from such doubts is a good starting point, but probably too inoperative as a weapon against everything lawful but awful (but still see **§ 8**).

3. BACK TO THE FACTS, OR BETTER: FUNCTIONS OF LEGAL ROLES

Does this lead to an end of any sensible discussion of what is lawful but awful and of any legal ethics issue? Probably not so, as is there may a rather more fruitful way to discuss legal ethics, not just to address the "lawful but awful" issue. Why not first ask the question what it is all about, or who is concerned here, and in what professional qualities? To be clarified in the first place is what a judge (public prosecution officer, defense lawyer, etc.) is, so as to further discuss what such legal professionals are good for. Then next and without reference to any doubtful normative ethics issues of use and misuse of official positions may become clear.

To start with judges, or courts for that matter, what is their essential role in any separation of powers as a presupposition for the rule of law? The *trias politica* starts with the power of the people of course, translated into laws to be realized by government. The third branch is to decide on conflicts concerning the application of the law to the facts of contested cases. This is the function of the courts, in order to insure.

Government of laws, not of men

So no power to the people without legislature in the name of the people, as John Adams famously put it in 1780. Courts are to finally determine the meaning of the laws, in conflicts between citizens and/or between citizens and the state. Courts do not have the highest word – such is the legislature's or even a constitution's prerogative – but the last. They decide independently from any specific interests, political or otherwise, on the basis of laws valid for everybody. This is the courts' core function of their autonomous role. Legislatures and/or public administration ought not to adjudicate, as general or even particular interests and political penchants may wrongly interfere with impartial administration of justice.

This may all go without much further saying, however much any sensible separation of powers may be qualified by checks and balances, apart from practical complications in upholding strict roles. Still the essential function of courts in realizing material law and right is to be kept in mind. Having rights does not always imply being able to enjoy them and courts are to offer remedies for this in the first place.

Thus regarded the fundamental question for judges – and other legal professionals for that matter – is not: what is the law, what opportunities are offered by it and next may there be any legal ethics setting limits to application or exploitation of legal possibilities? But: Who am I, as an essential professional in a system aimed at realization of the rule of law, of material law and right? So also: what are usurpations of my professional role? Such expression of the "lawful but awful" issue forestalls any problems of reference to ethics, applied or otherwise, and its problems as noted in **§ 2**.

4. MAIN IMPLICATIONS OF PROFESSIONAL ROLES IN THE RULE OF LAW

Courts' and thus judges' independence comes first of course. This implies independence from the legislature and public administration. Again, politics and attendant realization of general interests is not to interfere with application of the laws valid for everybody. Independence from any particular interests ought to go without saying. Any judges' acceptance of undue influence, up to nepotism and outright corruption is betrayal of professional roles and prerogatives. In line with this independence is also to imply complete personal disinterestedness. Or better: any personal interest involved ought to be directed to professional satisfaction in optimal role realization: "*It's not about you, it is about your job, but then going for the best in it will still do you good*".

Such independence does not imply immunity from any outside control. Organization of courts, issues of appointment and dismissal, everything according to strict rules, are legislatures' and public administrations' official responsibilities of course. This in unrelated to essential independence in the sense of legislatures and public administrations' duties not to interfere in court cases any way. But all too often independence is wrongly appealed to in order to ward off outside control over courts and court dealings. Court organizations ought not to be self-contained or even self-serving "fortresses" corrupting adjudication, trying to oust *bona fide* judges and worse. Indeed it is any public administration's duty to demolish such fortresses of all too often self-serving professional misconduct, if need rises by any legally permissible means. Legislatures are to actively see to it that public administration guards over realization of impartial adjudication by the courts. – *Quis custodiet custodes*? No courts may function without serious self-discipline, but then some outside guarding is still apposite (see **§ 9** for some practical recommendations in this field).

Next and indeed in line with independence, impartiality is a basic value or virtue of courts. No facts apart from legally really relevant facts ought to determine any adjudicative outcome. Sex, ethnicity, nationality, caste, financial situation and so many more factors may more or less consciously influence judges' thinking and tendencies to outcomes not really compatible with the facts of the case and relevant law.

Legal knowledge and expertise are essential presuppositions for any acceptable role realization in the law, not just for judges of course. This seemingly self-evident issue still is a major problem even in so called

civilized jurisdictions. Not just bad faith in so many guises, but also simple ignorance is a threat to the quality of adjudication in terms of realization of material law and rights.

Just like sloppiness, laziness and worse. Zeal and good hard work contribute to any cause and certainly so to adjudication, too time consuming as it is anyway at least from the point of view of people having to live with results of adjudication to be expected some time in some far future. Remember the wise words written by Goethe, in 1774:

Und ich habe, mein Lieber, wieder bei diesem kleinen Geschäft gefunden, dass Missverständnisse und Trägheit vielleicht mehr Irrungen in der Welt machen als List und Bosheit. Wenigstens sind die beiden letzteren gewiss seltener.

("*So I have found out again concerning this petty business, my dear, that misunderstanding and sloppiness probably lead to more wrongs in the world than cunning and bad faith do. In any case the last are rather rarer.*")

Last but not least is the great importance of expertise and zeal in determination of legally relevant facts. Remember that the great majority of court cases is about contested facts, not about contested law (see interestingly on this Golding, 1984). Facts may none too hard to establish in the majority of cases again, but still enormous consequences may depend on finding the truth of the matter, not just in criminal procedure. Remember that convicting the innocent to any serious punishment is violation of basic human rights and in fact comes down to outright defeat of the rule of law. Letting some guilty offenders go free as a consequence of insufficient evidence and proof on the other hand is a rather lesser evil.

5. PROCEDURAL LAW AND OTHER FORMALITIES

Against this legal importance of factfinding it may be objected that legal proof is distinct from historical proof, legal proof being determined by procedure in the first place. Or: parties concerned are to do the work, courts are just to weigh their evidential contributions (or even rhetorical prowess) in as far as in accordance with the rules. Thus inability to furnish convincing evidence means losing the case, even if such evidence is overwhelming in principle. One ultimate consequence of this is probably too absurd to really pass muster – as expressed by United States Supreme Court Judge Antonin Scalia, in 1993 and repeated by him since:

Mere factual innocence is no reason not to carry out a death sentence properly reached.

So much for "*lawful but awful*" … Jeremy Bentham rightly stressed the importance of historical truth in legal evidence and proof, as famously expressed in 1812:

The field of evidence is no other than the field of knowledge.

Of course there cannot be any realization of material law and right without reference to the facts of the case as they were or will be, however hard it may be to even approximately determine such facts in court. But adjudication establishing facts ought not to be some or other kind of parties' contest in convincing the court according to "*the rules of the game*".

Indeed procedural law generally is imperfect procedural justice at best. "*Playing the game by the rules*" is no guarantee at all that material justice and right will be realized. In fact procedural law offers so many opportunities to either realize material law and right or to frustrate it. Or: one more illustration of the "*lawful but awful*" distinction.

Other formalities in legal professional life may be at least as important, both for procedures and for outcomes. Good manners or simply *politesse* in isolation of any professional conflict from personal relationships are essential. Again, professional life excludes personal involvement in important senses (see already **§ 4**). Also, such good manners are expressions of mutual respect, which apart from its autonomous importance may lead to more citizens' trust in legal professionals and thus in the outcomes of their professional conduct.

Such good manners are related to the formal and informal procedural value of *audi et alteram partem*. This is not just an expression of respect for all concerned, but may also serve to better establish the facts of the

case. It may even be maintained that *audi et alteram partem* is the first value in ethics and in the law (as explained by Hampshire, in 2000).

6. SOME OTHER PROFESSIONAL ROLES IN THE LAW AND THEIR ATTENDANT VIRTUES

So many professional rules and precepts relevant for members of the judiciary apply to other legal professionals as well. In fact the basic principle is identical: live up to your professional position, given its role in the realization of the rule of law and of material justice and right in the end. Thus public prosecution officers are expected to realize criminal law, according to the rules of criminal procedure. In this they are watched over by the courts, checking the lawfulness of public prosecution proceedings.

Of course public prosecution officers are not to neglect or even to meddle with facts any way either. Representing public interest they are expected to do their best in order to unearth what really happened. Without reliable establishment of facts there may be no suspicions and thus no criminal procedure either. Or the innocent are wrongly subjected to the hardships of criminal "justice".

Next any public prosecution office ought to act in full understanding of the unavoidable reality of so many criminals gong free. So rational choices have to be made: who is to be prosecuted and who is to be left alone? First things first is a main principle here: try to do something about deadly crime in the first place.

Professional independence, impartiality and related values are apposite here again. Leaving alone criminal colleagues or even partners in crime while prosecuting others suspected of the same kinds of crime is outright betrayal of such independence and impartiality. Thus drunken driving by members of the judiciary ought to be prosecuted in the same fashion as drunken driving by anybody, not just given possibly deadly consequences of such crime. Again, real life still leaves something to be desired in these fields (see also **§ 9** on prosecution of *mala fide* judges and other legal professionals).

Professional virtues of zeal and good hard work are important here too, just as there can be no decent public prosecution without professional legal expertise and skill. Here as well much is lost through lack of expertise, in law and in facts, and through outright sloppiness. All too often professional incompetence, disinterestedness and lack of zeal lead to violation of other people's rightful interests and rights.

So many if these virtues are important for the bar as well. Its essential role of course is "*translation*" of laypeople's interests or even rights in legally relevant terms, given the unavoidable complexity of law and thus also given general ignorance of it. Lawyers are to "*level the playing field*" in any legal conflict between people or bodies lacking thorough knowledge of the law. So without lawyers there would be less realization of law and right, at least in principle.

Professional independence from any other persons and bodies, public or otherwise, is essential for lawyers too. Impartiality is more problematic here, as lawyers are to represent or at least to stand by their clients. On the other hand lawyers are not to frustrate the realization of law and right by exploiting procedural law and other legal opportunities in order to intentionally deprive other parties of their rightful entitlements. This is the well-known and much debated issue of "the lawyer as partisan" v. "*the lawyer as officer of the court*" and its different aspects in different kinds of procedure, criminal or otherwise (see for a defense of lawyers as officers of the court Kaptein, 1998). In fact this conflict is a specific issue of Kutz' conflict between currency and justice, as mentioned in **§ 1**.

7. WHY THIS ALL IS SO IMPORTANT

Why is it so important for legal professionals to not just obey the law but also to act according to their roles and thus to use legal opportunities in responsible fashions, so as to avoid lawful but awful consequences? First, there can be nothing like *ius in causa positum* without legal professionals fully aware of their duties in realizing material law and right. Remember that adjudication in a wide sense is about having rights but being unable to enjoy them. This is to be kept in mind by everybody concerned, given professional roles in legal processes to be lived by in order to let justice prevail. There can be no rule of law with law in the books however adequate but real injustice in adjudication and other application of the law. What counts in the end is everybody's free enjoyment of rightful positions under the rule of law. This is what adjudication is about.

Any hindrance of such free enjoyment by inadequate adjudication and otherwise is not just injustice, but may also lead to varieties of private justice in order to ascertain rights – or what is taken to be rights, then. **T**his may still do some good in different forms of voluntary mediation. But then so many other forms of private justice amount to no more than crime of course. Or: replacement of the rule of law by a thinly disguised new state of nature again.

Good adjudication is not just important for rights, but for economical welfare as well. The free flow of currencies in commerce presupposes a rule of law to be trusted in rightful solution of any legal conflicts in business. Why trade in a country without recourse to an independent and competent court? Why trust any contract without guarantee that it may be enforced or at least be compensated for in the end? In line with Kutz' adagium again (**§ 1**): as soon as law's currency becomes currency, law is replaced by private and public violence, not just thwarting economical development of course.

The importance of rightful adjudication for public trust in public authorities probably goes without much further saying. Again it is essential for any rule of law to be more or less respected by the public that courts may be trusted to hand out rights to whoever is entitled to them. If not so, the public will increasingly regard not just courts but public authority at large as not really different from any other bodies trying to thwart their lives. This is the rather unattractive perspective of the new state of nature again.

8. WHY BOTHER IN YOUR OWN PROFESSION?

Even if there is full agreement on the bleak perspective of the new state of nature in which well-nigh everything depends on balance of forces instead of material justice and right in the first place, the next question may be: why bother? What have I got to do with this? Does this imply anything for my own personal professional responsibilities? Do my marginal contributions make any difference? Why try to be holy in an otherwise so unjust world in which I am not even treated justly myself?

A first and very important answer refers to the positive self-interest of professional self-respect (as already briefly mentioned in **§ 4**). Only if you really try to live up to the job you may call yourself a real judge, or public prosecution officer, lawyer and so on. Be proud of your job! Be aware of your great prerogatives, certainly so in comparison to the great majority of your fellow citizens! But remember that you are responsible for upholding the qualities and virtues of your position yourself as well. Actually a bad judge, lacking professional virtues or even worse, is nothing more than an impostor, exploiting semblances of authority even at the expense of his self-interest in being a well-respected official.

So respect yourself in your so important official role in adjudication, just as you ought to respect the law in a broad sense, also in avoiding anything lawful but awful in trying to realize material law and right in the first place. Luban expressed the point of this as follows (in 1988):

Respect for the law is respect for your fellow citizens, unless the law is wrong, stupid or unfair.

Alternatively, as expressed by Van der Ven, in 1968:

The mission of legal professionals is ultimately not to be found in law as no more than structure, but in the moral values protected and furthered by law. Formation and realization of law is not an issue of playing by the rules of codification and adjudication, not even an issue of playing the game of law and justice, however deeply significant such words may seem. Law is about human beings, about every human being, about all and everybody.

Why respect your fellow citizens, or fellow human beings for that matter? This leads back to ethics – full circle. In the end this is an issue of conscience, *conscientia*, more or less literally translated the "*knowing together*" that you are not alone. This again relates to the Golden Rule, so abstract and so specific and concrete at the same time in its appeal to treat and respect any other human being as if she or he were your self.

Rachels (2002) quoted one more time, in his forcefully Socratic question against anybody willing to take unfair advantage over others, in legal professions or otherwise; "*Why are you so special?*" So legal professionals living up to the standards of their professions in the end serve the self-evident goal of treating

everybody concerned equally and reasonably, in the *ars aequi et boni* of the law, however imperfect positive law may be at times.

This is indeed related to *ars vivendi* as well. Both legally, morally and psychologically much superior is trying to desinterestingly realize your profession, instead of exploiting it for the sake of money and other outward signs of outward status so often hiding narcissistic loneliness. Having a conscience instead and trying to live up to it, however difficult at times in the complexities of legal practice thwarted by so much incompetence, bad faith and worse, is what makes you not just a legal professional but a real human being. This was beautifully expressed by Canetti, as published in 1976:

Having a conscience is what makes somebody really to be a human being – having judgments and feelings related to others, even to completely unknown persons, without any reference to some or other goal of one's own, without calculation, and without any accompanying thoughts of success or influence.

This may be an antidote against doubts on the practical influence of any ethics as expressed by Susan Wolf (see **§ 2**). No longer just ethics is at stake, but personality and self-respect as well. Or: not having a conscience, professionally or otherwise, amounts to being a nobody.

Against this it will be remarked that "*nobody wants justice, everybody wants to win*". This may be a widespread attitude in jurisdictions with inadequate systems of adjudication. Again a seemingly simplistic answer may be apposite:

The problem with the rat race is that even if you win you're still a rat.

It is just because there are to many rats in the human world, or at least to much rat-like behavior at times that we need the rule of law and adequate adjudication practiced by honest and competent professionals not resembling such rats at all.

9. MORE PRACTICAL CONSEQUENCES: OUSTING THE RATS

Apart from such advice, probably wrongly labeled as moralistic in some circles, it is of course imperative to first clean up any judiciary or for that matter any public bodies contaminated with grossly incompetent or even *mala fide* officials. Disciplinary and criminal proceedings ought to be opened against such officials, aimed at removing them from office in the very first place. Again, there ought to be no special treatment for such officials, compared with common suspects and criminals.

What is this all about, in the end? Part of it was forcefully expressed by Peter Ustinov, in 1988:

I regard injustice, or even the risk of injustice, perpetrated in the august precincts of a court of law, with calm consideration and time for reflection, as utterly repellent.

In fact knowingly and intentionally misusing prerogatives in positions of authority and power, exploiting the law to one's own advantage is high crime indeed. Such officials are "*armed*" with rather more dangerous machinery than the average pickpocket, thief or thug. In fact *mala fide* judges and other legal officials may be compared to soldiers committing treason. Hired and fitted out as they are to perform essential functions in safeguarding the nation and the rule of law they actually do the very opposite. Adding to this they act from positions not so easily checked by other formal and informal powers. Who is to take up arms against the military, the monopolists of armed force? Who is to effectively stand up against the judiciary, monopolist of adjudication, in order to judge over them?

Traditionally treason was punished by death. Complete removal for life from any position in society with any public influence may be a milder and more adequate variety for the day of today. High court presidents dealing with mafia figures and the like are better sentenced to life penal servitude as well, or simply forced labour, so as to make up for a very small part of what they did wrong against so many people and society at large.

Again it would be a dangerous misunderstanding to belittle the enormous importance of honest and competent judges and other officials, for the sake of *ius in causa positum*, for the advancement of commerce and last but not least for citizens' trust in public authority (see already **§ 7**).

10. FURTHER AGENDA IDEALISM

What may further be done, in more constructive ways, so as to build up and maintain a proper judiciary force really serving the country? Still better legal schooling may do some good, not just in universities and law schools, but also as compulsory *éducation permanente*. Really important skills in factfinding for reliable establishment of evidence and proof need to be further developed as well. Legal ethics transcending marginalia ought to be on the educational agenda too.

Peer review may be a one more adequate method to guard over and promote professional honesty and competence. Professional promotion and demotion ought to be determined exclusively by professional skills and professional track records. Role realization ought to be the main factor determining professional status. *Mala fide* or just malfunctioning legal professionals ought to be actively removed from office indeed. Everything ought to be undertaken from common understanding of the sense and function of essential roles in adjudication and legal practice in general.

As stated before (in **§ 4**) this need not be left to an autonomously organized court system itself. The legislature ought to establish clear rules governing the organization of the courts, public prosecution offices and also of the bar. Public administration is to see to it that things are done by the rules and if not so, that due measures are taken. So it may not be a good idea to leave disciplinary procedures to the courts themselves, "*fortresses*" of self-protection as they tend to be, to the disadvantage of proper adjudication. Still dangers of political and/or executive influence on courts ought not to be taken lightly. Finding right balances here may require more good will and more good hard work. On the other hand evident maladies of the system, represented by well-known crooks sitting or even presiding in court, ought to be tackled immediately.

To conclude once more the question: what have I got to do with this all, that is, in as far as I am still willing to embark upon a judicial career, as a judge, public prosecution officer, or lawyer? What is the sense of me trying to act out my proper role in this more or less vile world of false appearances? Well, as Eliot stated in 1872:

… for the growing good of the world is partly dependent on unhistoric acts; and that things are not so ill with you and me as they might have been, is half owing to the number who lived faithfully a hidden life, and rest in unvisited tombs.

It's you. Nobody and nothing more or less determines the future of the law, of society and thus of your fellow human beings. So keep up the good work.
And thank you very much again for your so honourable invitation – it was a great pleasure to me to deliver this lecture, in commemoration of one of Europe's courageous defenders of liberty and the rule of law. Let us al go on, both professionally and personally, according to his principles and along his paths, on the way to justice and freedom for all, being well aware of our special responsibilities as legal professionals. And as fellow human beings of course.

ZOZNAM POUŽITEJ LITERATÚRY/LITERATURE:

1. J. Adams & *al*., *Constitution of the State of Massachusetts* (1780)
2. J. Bentham, *An Introductory View of the Rationale of Evidence: For the Use of Non-Lawyers as well as Lawyers* (1812), in J. Bowring & J. Mill ed., *The Works of Jeremy Bentham*, vol. 6 (William Tait, Edinburgh, 1843)
3. E. Canetti, *Das Gewissen der Worte* (Hanser, München, 1976)
4. G. Eliot, Middlemarch: *A Study of Provincial Life* (1872, Everyman's Library, 1930 f.)
5. J.W. von Goethe, *Die Leiden des jungen Werthers* (1774)
6. M.P. Golding, *Legal Reasoning* (Alfred A. Knopf, Inc., New York, 1984)
7. S. Hampshire, Justice is conflict (Princeton University Press, Princeton, NJ, 2000)
8. H.J.R. Kaptein, "*Against Professional Ethics*" in C. Sampford, N. Preston & C.A. Bois ed., Public Sector Ethics: Finding and Implementing Values (Routledge Studies in Governance and Public Policy, 1) (The Federation Press / Routledge, 1998), pp. 26-36
9. C. Kutz, "*Why We Obey the Law (Review of Jules Coleman, The Practice of Principle)*" The Times Literary Supplement (3-6-2003), p. 26
10. D. Luban, *Lawyers and justice: an ethical study* (Princeton University Press, Princeton, NJ, 1988)
11. M. Midgley, "*The origin of ethics*" in P. Singer ed., *A Companion to Ethics* (Basil Blackwell, Oxford, 1991)
12. J. Rachels, The Elements of Moral Philosophy (McGraw-Hill, 2002)
13. A.Scalia, in Herrera v. Collins (506 US 390, 1993).
14. P.F. Strawson, "*Freedom and Resentment*" Proceedings of the British Academy (1962), also in Strawson, Freedom and Resentment, and other essays (Methuen, London, 1973)
15. P. Ustinov, in B. Woffinden, Miscarriages of Justice [Hodder & Stoughton, Sevenoaks, 1988]
16. J.J.M. van der Ven, "*Mens-zijn in het recht*" in P.J. Roscam Abbing ed., Om de mens: ethiek in wetenschap en beroep [Leiden, 1968]
17. S. Wolf, '*Ethics, Legal Ethics, and the Ethics of Law*', in D. Luban ed., The Good Lawyer: *Lawyers' Roles and Lawyers' Ethics* [Rowman & Allanheld, Totowa, N.J., 1984]