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## JUDICIAL CONSCIENCE\*

### I. THE CURRENT RELEVANCE OF THE PROBLEM

If we break down the compound concept ‘judicial conscience’, it is relatively easy to define ‘judicial’ as relating to a person holding the office of a judge. Defining ‘conscience’ does not seem particularly difficult either—according to a dictionary of the Polish language, it is ‘a mental quality, an ability that makes it possible to adequately judge one’s own behaviour as being compatible or incompatible with accepted ethical standards; the awareness of moral responsibility for one’s actions and conduct’.<sup>1</sup> However, the combination of these two separate ideas into one concept is somewhat more complicated—firstly, we are not clear what role the conscience of a person holding the office of a judge can/should play in the process of interpreting and applying the law; secondly, does judicial conscience have any specific characteristics that distinguish it from the conscience of the individual in general? This is all the more complicated since the source of this inner voice is commonly understood to be either religion or another system of moral convictions not necessarily linked to a belief in a supernatural being.

This brings to mind the famous sentence of Gustav Radbruch:

We despise the parson who preaches in a sense contrary to his conviction, but we respect the judge who does not permit himself to be diverted from his loyalty to the law by his conflicting sense of the right.<sup>2</sup>

It is clear that this German philosopher of law was not recommending a categorical or complete suppression of judicial conscience for the sake of fidelity to the law. He rather warned us against the dominance of moral subjectivism and arbitrariness over the objective sense of the law. However, the question of whether this inner voice is admissible when judicial decisions have to be made—and if so what role it can play—still remains unanswered. The fact that it is/can be/should be allowed is confirmed normatively—it suffices to look at the judiciary oath formulated in the provisions of Article 66 of the Law on Common Courts Organisation:

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<sup>1</sup> S. Dubisz (ed.), *Uniwersalny słownik języka polskiego*, vol. P-Ś, Warsaw: WN PWN, 2008: 1450.

<sup>2</sup> G. Radbruch, *Filozofia prawa*, trans. E. Nowak, Warsaw: WN PWN, 2009: 93 [English translation: <[http://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1459&context=faculty\\_articles](http://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1459&context=faculty_articles)>].

When called upon, the judge makes a vow to President of the Republic of Poland, taking the following oath ‘I solemnly declare that as a judge of the court of general jurisdiction I will faithfully serve the Republic of Poland, safeguard the law, fulfil the duties of a judge with the utmost diligence, administer justice in accordance with the law, with impartiality, according to my conscience, keep secrets that are protected by law, and conduct myself with dignity and honesty.’ The oath may be taken by adding the following wording: ‘So help me God.’<sup>3</sup>

Similar oaths are also made by the judges of the administrative courts, the Supreme Administrative Court and the Supreme Court, on the basis of cross-referenced provisions. The oaths of the judges of the Constitutional Tribunal also referred to conscience, but it is noticeable that in the latest formulation this element was removed:

‘I solemnly declare that, by fulfilling my duties as a judge of the Constitutional Tribunal, I will faithfully serve the Polish Nation and safeguard the Constitution of the Republic of Poland, and that I will do so with impartiality and with the utmost diligence.’

The oath may be taken by adding the following wording: ‘So help me God.’<sup>4</sup>

I am not of the opinion that this omission resulted from a deliberate legislative measure entailing that the judges of the Constitutional Court, in contrast to all other judges, are prohibited from consulting their consciences. The fact that the concept in question was linked with the principle of impartiality in provision Article 66 of the Law on Common Courts Organisation, as was also the case in Article 21 sec. 1 of the previous Constitutional Tribunal Act, can only mean that the judge should be both impartial with regard to the parties to the proceedings and with regard to the case itself. Thus, a definite connection between a judge and a case that results in even the slightest suspicion of lack of objectivity may be cause for the judge’s exclusion upon request (*iudex suspectus*).

This would seem to be an important issue, since in the public sphere two diametrically opposed views on the issue of judicial conscience have recently been expressed. Ordinary citizens can only guess at the true meaning that hides beneath the enigmatic and unclear wording. And in fact a great deal can hide here—namely two very different understandings of the state and law, and consequently two very different visions of our rights and civil liberties. For example, a newspaper article (from *Rzeczpospolita* on 13 April 2016) reports that during the parliamentary committee hearing which considered the appointment of Professor Zbigniew Jędrzejewski as a new judge of the Constitutional Court, the following exchange of views took place:

In response to a dozen or so questions from Kamila Gasiuk-Pihovich [from the Nowoczesna (Modern) party] concerning the candidate’s position on the dispute over the Constitutional Court, the professor said: ‘If I answered, you would announce that I am a PiS [Law and Justice] candidate and I will rule this way or that; why do you want to show that I’m a bad guy from PiS?’

<sup>3</sup> Act of 27 July 2001, Law on the System of Common Courts [Prawo o ustroju sądów powszechnych] (consolidated text—Journal of Laws of the Republic of Poland [JL RP] 2016, item 2062).

<sup>4</sup> Article 4 sec. 1 of the Act of 30 November 2016, On the Status of the Judges of the Constitutional Tribunal [o statusie sędziów Trybunału Konstytucyjnego] (JL RP 2016, item 2073). English translation according to: <[http://trybunal.gov.pl/fileadmin/content/dokumenty/Akty\\_normatywne/The\\_Act\\_on\\_the\\_Status\\_of\\_the\\_Judges\\_of\\_the\\_Constitutional\\_Tribunal\\_en.pdf](http://trybunal.gov.pl/fileadmin/content/dokumenty/Akty_normatywne/The_Act_on_the_Status_of_the_Judges_of_the_Constitutional_Tribunal_en.pdf)>.

And Professor Jędrzejewski added that he would adjudicate in accordance with his conscience, after weighing up the arguments for and against.

This was an example of a negative message—instead of saying that he would be guided by the provisions of the Constitution, interpreted in accordance with the principles generally accepted in contemporary jurisprudence, Professor Jędrzejewski basically avoided giving a clear answer and directed us to the murky corners of his conscience. We do not know what is ultimately hidden in these nooks—is it reliable legal knowledge and faithfulness to the provisions of the constitution? Or is it maybe camouflaged, politically motivated views and questioning of the current political and legal order?

The position of the first President of the Supreme Court, Professor Małgorzata Gersdorf, stands at the other end of the spectrum—also appealing to judicial conscience, but in an entirely different way. In a letter addressed to the participants of the Annual General Assembly of the Judges of the Constitutional Court on April 20 2016, we read the following:

I shall end my speech with an appeal. I would like to ask all the Polish judges to be courageous. Today they are not only ‘mouthpieces of the law’, but also—and I say this without a hint of pathos or exaggeration—the depositories of the values of Polish democracy, and thereby guardians of the public authorities. It depends on them alone whether Polish citizens will appreciate the importance of the division of powers, and the validity and observance of the law. Judges must patiently explain the intricacies of the law and bring the constitution closer to the citizens through ever better justifications of their rulings. Let the courts therefore assert themselves with legal questions when they see an unjust law, and ensure that they do not apply that law if they receive a constitutional court judgment stating its incompatibility with the Constitution, even if the judgment was not promulgated in the Journal of Laws! It is worth recalling the thoughts of St. Thomas Aquinas, who admitted that there may be laws that ‘do not bind a man in conscience’ and which are in fact unlawful. There can be nothing more important than the being on the right side: on the side of one’s own right conscience.

Whether this appeal is accepted or rejected will depend on which philosophical-legal assumptions are adopted (for example positivist, non-positivist, natural law). However, there is no doubt that, unlike Professor Jędrzejewski’s position, Professor Gersdorf’s appeal is not an escape from the problem into the murky realms of a judge’s moral-political subjectivity. On the contrary, we are dealing with an unambiguous statement in the form of a positive message addressed to both individual judges and the judiciary as a whole. Consequently, we can avoid getting lost in supposition concerning what is at issue in the conflict of judicial conscience, in both individual and institutional terms.

While politicians allow themselves to improvise and juggle with all these concepts, it would seem that representatives of the legal profession who are equipped with certain basic methodological tools developed in the legal sciences are not permitted to behave in a similar fashion. With judicial conscience, fidelity to one’s own views is far less important than fidelity to the values underlying the laws of a democratic state. Judicial conscience belongs to a special category, and its crucial importance only becomes apparent when these values are at risk. Otherwise it becomes just an empty slogan.

## II. THE FOUR SOURCES OF JUDICIAL CONSCIENCE

Elsewhere, I have referred to the issue discussed in this paper as ‘the disobedience of judges’, but when defined properly ‘judicial conscience’ seems a more fitting term.<sup>5</sup> For the purposes of this study, I assume a somewhat broader understanding of the term, and I only connect it with the issue of worldview in one aspect—irrespective of whether the source is religion or another ethical system. Phrases which contain the idea of conscience<sup>6</sup>—for example, *it goes against my conscience, the bite of conscience, to have a clean conscience, to have something on one’s conscience, to examine your conscience*—entitle us to suppose that we are dealing with an inner voice that in certain situations tells us something, and sometimes warns us. With judges, the source of this voice may be extremely varied, not only their worldview—or perhaps not primarily—but also their legal knowledge and sometimes their professional routine, their basic sense of fairness and justice, or, lastly, their specific institutional identity and identification with the judiciary as the third estate, independent from the legislative and executive powers. Considering the specific characteristics of the judge’s profession, the inner voice—as Gustav Radbruch claimed in the above citation—can be treacherous and deadly for the idea of law and the judicial ethos, but we cannot rule out the existence of extreme and special situations in which a judge should not stifle this voice.

First of all, when speaking of judicial conscience, the analogy with conscientious objection in medicine springs to mind. This issue has been widely discussed in the bioethical discourse, and it is what judicial conscience is most commonly associated with. Although conscientious objection in medicine has its own regulation in positive law,<sup>7</sup> unlike judicial conscience, some similarities can be observed in the ways in which they operate. If judges were entitled to appeal to conscientious objection, then in practice this would mean that they could refuse to consider specific cases on a case-by-case basis, or a particular group of cases in general, for reasons connected with their worldviews. A typical example would be the moral dilemmas that a family judge faces in divorce cases, or in the cases that concern giving permission for an abortion. The problem is, of course, very controversial, but the first analyses of the conditions for possible statutory regulation and the practical admissibility of judges raising conscientious objections have already appeared in the literature.<sup>8</sup> These conditions are, among others, the importance of aiming to exclude

<sup>5</sup> J. Zajadło, *Nieposłuszeństwo sędziów, Państwo i Prawo* 71(1), 2016: 18–39.

<sup>6</sup> Cf. *Wielki słownik frazeologiczny PWN z przysłowiami*, oprac. A. Kłosińska, E. Sobol, A. Stankiewicz, Warsaw: WN PWN, 2010: 522f.

<sup>7</sup> Article 39 the Act of 5 December 1996 on the Doctor and Dentist Professions (consolidated text—JL RP 2017, item 125): ‘A doctor may refrain from providing health services which are in conflict with his/her conscience, subject to Article 30, but is required to indicate the real possibility of obtaining this service from another doctor or a medical entity, and to justify and document this fact in the medical records. A doctor who is employed by another or works within the National Health Service shall, in addition, be required to give written prior notice in writing to the supervisor’ (Cf. however also the judgment of the Constitutional Court of 7 October 2015, K 12/14).

<sup>8</sup> S. Mazurkiewicz, *Klauzula sumienia sędziego?—analiza z zakresu filozofii politycznej, filozofii prawa oraz prawa pozytywnego*, <[https://www.academia.edu/30463046/Klauzula\\_](https://www.academia.edu/30463046/Klauzula_)

worldviews, regulatory compliance, the prevalence of occurrence, normative status, the problem of professional equality, and the effects on the practical functioning of the courts.

Secondly, a phenomenon termed ‘judicial resistance and legal change’ is in currency in the Anglo-American literature.<sup>9</sup> This describes situations in which proposed or introduced legislative changes evoke a certain reluctance among individual judges and/or their professional community—in part or as a whole—and who respond to the proposals by criticising their rationality, or by displaying scepticism towards any innovation, preferring instead to fall back on ingrained habits. This attitude does not necessarily have to be displayed publicly by an individual or collective, as it often takes the form of an inner voice of resistance which, for the purposes of this study, I refer to as conscience. However, unlike conscientious objection, the source of this attitude is not a system of individual religious or ethical beliefs, but rather a broadly understood professionalism—both in a positive sense (knowledge and experience) and negative (conservatism and routine). I shall not analyse in detail here the mechanism and outcome of such judicial resistance—in practical terms it probably translates into the way that contentious legislative changes are interpreted and applied. In the Polish context, a typical example may be the discussion that took place in legal circles on the change from an inquisitorial criminal justice system to an adversarial system. Admittedly, this problem is already obsolete, as the reform was quickly reversed, but this example is still instructive and fruitful in terms of the interesting research material it provides. Closer and more detailed empirical studies on this issue have shown that this inner voice of resistance varied widely across different age groups and legal professions. Interestingly, resistance was not as strong and unequivocal among judges as *prima facie* knowledge would lead one to suppose.<sup>10</sup> The vast majority of judges were not ill-disposed toward the adversarial model due to their rational professionalism or conservative routine. However, this does not alter the fact that there is still a minority with an inner voice of resistance—as an example of this kind of judicial conscience, in the broad sense.

Thirdly, we may also encounter the problem of judicial conscience when certain axiological conflicts arise, however these situations are not analogous to those described above in the context of conscientious objection in medicine. Their source is not a religious or ethical outlook in the strict sense, but rather what is referred to in the philosophical-legal literature as ‘hard cases’. Without going further into an analysis of different conceptions of hard cases, including my own,<sup>11</sup> we can simplify by describing them as situations where the application of a particular provision compels judges to arrive at decisions with

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<sup>9</sup> M. Tokson, Judicial resistance and legal change, *The University of Chicago Law Review* 82, 2015: 901–973.

<sup>10</sup> M. Andrzejewska, M. Andrzejewski, Reforma procedury karnej 2013–2015 w wypowiedziach środowiska prawniczego (analiza statystyczna), *Państwo i Prawo* 71(11), 2016: 79–91.

<sup>11</sup> Cf. J. Zajadło, *Po co prawnikom filozofia prawa?*, Warsaw: Wolters Kluwer, 2008.

which they do not agree, due to the beliefs they hold on what is right. In these situations, judges do not say that they are unable to pass judgment impartially and objectively on a specific case or group of cases. They rather ask what to do and how, using their legal knowledge and life experience, so that their judgments do not come into conflict with their moral intuitions. In the previously cited text on the phenomenon of judicial disobedience, I examined this problem through the example of the jurisprudence of American courts that dealt with cases involving slavery in the first half of the nineteenth century. At first sight this issue seems to be of purely historical interest, but on closer inspection it may be the basis for paradigmatic considerations, and this is exactly how the example is treated in international contemporary philosophical-legal literature. It is recognised that in such situations the clash between the judges' conscience and their duty to follow the law will lead to one of the four following solutions: 1) escaping into formalism and application of the law, irrespective of its moral or amoral character or the effects of its application; 2) rejecting the immoral law and adjudicate against the law (*contra legem*), in accordance with their conscience; 3) resigning from their office; 4) escaping into judicial activism (namely dynamic and creative interpretation that is consistent with the law) or subversion (bending the law to suit the demands of their own conscience, being fully aware that such conduct is *contra legem*, albeit hidden and veiled by arguments that are put forward to hide their real motives).<sup>12</sup> The second and third solutions do not change the state of affairs at all, because explicit interpretation *contra legem* risks the judgment being overruled by a higher court, and if a judge resigns, the case could be taken over by a less sensitive judge. Thus the choice lies between the first and the fourth solutions, but it should be stressed that this choice is fundamental. In the first case, judges stifle their conscience and avoid the problem, hiding behind the authority of the formal letter of the law, and we do not really know what they actually think. In the fourth solution, in contrast, judges listen to their inner voice and draw on their professionalism, and on all their legal knowledge and experience, to proceed as far as they can without violating the essence of the law.

Fourthly, the jurisprudence of American courts on slavery brought to light not only conflicts of judicial conscience at an individual level, but also the institutional level. The whole problem revolved around a certain axiological context in which the American judges came to function: 1) the axiological discrepancy between the ideas of the Declaration of Independence of 1776 and the specific provisions of the 1787 Constitution; 2) direct manipulation of legal text by means of euphemistic avoidance of the word 'slavery' in the text of the Founding Documents; 3) the split personalities of the Founder Fathers, such as Thomas Jefferson, who as a slave owner was torn between humanist ideals

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<sup>12</sup> According to P. Butler (When judges lie (and when they should), *Minnesota Law Review* 91(6), 2007: 1791f.), subversion differs from *creative judging* in that the latter is not accompanied by consciously acting against the law (*contra legem*); on the contrary, in the case of creative judging, the judge is convinced that their adjudication is lawful, even if his/her interpretation is not based on earlier case law.

and economic interests; 4) diametrically opposed legislation in the northern and southern states, although it was supposed to be united under a uniform axiology at the level of federal law; 5) moral dilemmas caused by the rift between legal formalism and humanistic abolitionism; 6) the possibility of applying creative interpretation to the fugitive slave laws, or subverting these laws. In this context, an individual conscience was awakened in many judges, but it is difficult to claim that this led opposition at the institutional level with regard to the judiciary as a whole. On the contrary, for various political, social and economic reasons, as a whole the judiciary rather contributed to the petrification of slavery, as the constitution also sanctioned it.

### III. THE POLISH CONSTITUTIONAL CRISIS

In the contemporary philosophy of law, Ronald Dworkin emphasises that with appropriate moral interpretation of the Constitution, individual judges (individual conscience) and the judiciary as a whole (institutional conscience) could have questioned the constitutionality of pro-slavery legislation, especially the Fugitive Slave Acts of 1793 and 1850<sup>13</sup>. In my view, this issue is surprisingly topical, considering the debate currently taking place in Poland on the role of judges and courts, also considering the possibility of implementing the Constitution directly, and the so-called common judicial review. At first sight, it might seem that these historical examples of the issue of judicial conscience—at both the individual and institutional levels, according to Dworkin's interpretation—taken from another era and from a completely different legal culture, bear no relationship whatsoever to the Polish constitutional crisis. However, this is not the case—when treated paradigmatically, these examples can provide interesting arguments that are relevant to the discussion triggered by current events. This is all the more true as my remarks are made as a philosopher of law, rather than as an authority on the dogmatics of constitutional law or political science. Thus by analysing in a philosophical manner, I can allow myself a greater reach than if my arguments were conducted in a juridical or even political manner. We can test this approach with an extreme example, when the problem of judicial conscience is at the same time connected with the complex problem of judicial disobedience. In terms of the mechanism, the situation is similar to that of American slavery—the dissonance between constitutional axiology and the legal and extralegal actions of the legislative and executive powers, as well as the question of how the judiciary should conduct itself in such situations. It is no coincidence, I think, that when talking about the moral dimension of a judicial decision, one speaks simultaneously of a 'constitutional conscience'.<sup>14</sup>

<sup>13</sup> R. Dworkin, The law of slavecatchers, *Times Literary Supplement* 5 December 1975: 1437—was also a review of R.M. Covera's ground-breaking, *Justice Accused. Antislavery and the Judicial Process*, New Haven and London: Yale University Press 1975.

<sup>14</sup> See for example H.J. Powell, *Constitutional Conscience. The Moral Dimension of Judicial Decision*, Chicago and London: The University of Chicago Press, 2008.

Thomas Jefferson, one of the authors of the American Declaration of Independence, wrote on February 22 1787, in a letter to Abigail Adams, that one must be constantly prepared to resist the authorities, especially if one of them appropriates too much control over the law.<sup>15</sup> The question is whether he had the resistance of the people in mind, or the resistance of one of the authorities of the tripartite system if it was attacked by the other two. The contemporary literature on the subject emphasises that the latter situation is in fact rare, but it cannot be completely ruled out,<sup>16</sup> even in a democratic system that is functioning normally.<sup>17</sup> This is not a conflict of the rule of law with democracy in general (*in genere*), but rather a conflict of the rule of law with the worst aspects of poorly-understood democracy in particular (*in specie*).

In the first place, there is of course a very significant difference between civic and judicial disobedience. The former involves a deliberate breach of the law, broadly conceived of as being in the public interest, accompanied by a willingness to assume responsibility for it. With the latter, the judge must seek resolution on the basis of the existing law—either through a correct interpretation of the law that would result in a just solution (the individual dimension) or through direct appeal to the constitution, in defence of constitutional axiology, including the principle of the tripartite separation of powers (the institutional dimension). There is, of course, a paradox at work here—while civil disobedience is inherently nonlegalistic, judicial disobedience is, on the contrary, most certainly a legalistic stance.

Secondly, while the range of situations in which civil disobedience can be applied is essentially unlimited, judicial disobedience can only be deployed very rarely—in special, extreme cases. Hence, with regard to the institutional dimension in particular, some in the legal profession prefer to use the term *judicial resistance* than *judicial disobedience*. In any case, however, when a constitutional crisis involving the unconstitutional interference of the legislative and executive powers in the independence of the judiciary—thereby violating the principle of the tripartite separation of powers—reaches a certain level of intensity, it is precisely such a special and extreme situation. Therefore, some scholars are inclined to argue that in such circumstances the judiciary does not just have a right to resist, but even a duty to do so. This is particularly true when judicial obedience coincides with civil disobedience.

Thirdly, the US courts adjudicating the aforementioned fugitive slave cases, wishing to exercise judicial resistance on the individual and/or institutional level, were however condemned to follow a specific interpretation of

<sup>15</sup> Cited from: C. Möllers, *The Three Branches. A Comparative Model of Separation of Powers*, Oxford: Oxford University Press, 2013: 27.

<sup>16</sup> Cf. for example T. Campbell, *Separation of Powers in Practice*, Stanford: SUP, 2004: ix: ‘The arrogation of power by a branch in a manner crossing over those divisions exposes the comparative disadvantages of the arrogating branch and calls for vigorous resistance by the branch upon which the encroachment has occurred [emphasis mine—J. Z.]’.

<sup>17</sup> J. Allan, The activist judge—vanity of vanities, in: L.P. Coutinho, M. La Torre, S.D. Smith (eds.), *Judicial Activism. An Interdisciplinary Approach to the American and European Experiences*, Heidelberg, New York, Dordrecht, and London, Springer, 2015: 85 in: ‘It is a possibility that requires a theory of when judicial disobedience and lying are warranted in a generally well-functioning democracy [emphasis mine—J.Z.]’.



the legislation, because the constitution itself sanctioned slavery (although somewhat sophistically). The current situation in Poland is radically different in this respect. Here, the framers of the constitutional system did not limit judicial independence; rather the legislature and the executive are attempting to interfere with it in an unconstitutional manner. Thus there is no need to seek support for judicial disobedience in the institutional dimension through complex interpretational manoeuvres; it suffices to appeal to the Constitution—to its specific overriding normative character and its direct application.

Fourthly, analysis of the issue of judicial disobedience—somewhat paradoxically—provides arguments when discussing the material and procedural aspects of the composition of the Constitutional Tribunal and, in broader terms, the moral, professional and organisational qualifications of the judges. Recent years have witnessed the emergence of a new movement in the philosophy of law called ‘virtue jurisprudence’.<sup>18</sup> Its representatives make enthusiastic reference to an article published by Elizabeth Anscombe in 1958.<sup>19</sup> This famous British philosopher negatively assessed the state of moral philosophy, as it was entangled in the conflict between deontological and consequentialist ethics, and indicated a possible third way: Aristotelian virtue ethics. The instigators of the new movement in the philosophy of law have followed a similar path—the alternative to the dispute between legal formalism and realism is virtue jurisprudence. This dispute is particularly relevant for the selection of members of the Constitutional Court. Constitutional judges can be characterised by, among other things, their ability to combine all three philosophical positions at once. They are formalists because they cannot stray from the text of the constitution. Neither can they escape consequentialism, as they must consider the effects of their judgments. Above all, however, they should be in possession of some special virtues that will enable them to bear the burden of responsibility associated with their function. Therefore, I am inclined to argue that the procedure for selecting judges (*how?*) is secondary and minor when set against the criteria for selecting candidates (*who?*). To use the language of Pierre Bourdieu, constitutional judges operate in a wide field constituted by fundamental principles of law, and the capital and *habitus* the judges have acquired is of crucial significance. Analysis of the biographies and case-law of some of the American judges who ruled on slavery cases fully confirms this assessment. It is not the way that judges are nominated in general, or the way that constitutional judges are selected in particular, that determine whether a judge is aware of the issue of judicial disobedience (or, more broadly, judicial conscience) and knows how to respond on an individual and institutional level—this is rather determined by their virtues and the structural position of the judiciary as a whole.

In the theoretical analysis and philosophical analysis of law, the issue of judicial conscience figures quite predominantly, although it is not always

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<sup>18</sup> From the already rich literature on this topic, for a more detailed analysis of the underlying assumptions, see for example, L.B. Solum, *Virtue jurisprudence: towards an aretaic theory of law*, in: L. Huppes-Cluysenaer, N.M.M.S. Coelho (eds.), *Aristotle and the Philosophy of Law: Theory, Practice and Justice*, Dordrecht: Springer, 2013: 1–31.

<sup>19</sup> G.E.M. Anscombe, *Modern moral philosophy*, *Philosophy* 33(124), 1958: 1–19.

mentioned explicitly. This particularly applies to the theory of legal reasoning. In the works of authors such as Neil MacCormick, Ronald Dworkin, Richard Posner, or Deryck Beylveid and Roger Brownsword, it is admittedly difficult to find direct reference to the concept of judicial conscience, but nonetheless the concept is present implicitly. In the literature, however, the notion of judicial conscience is clearly linked to the three key ethical theories mentioned above—deontological ethics, consequentialist ethics, and virtue ethics. Although the latter primarily relates to empathy/love, the essence remains the same in the proposals of contemporary virtue jurisprudence.<sup>20</sup>

The issue of judicial conscience is sometimes interwoven into more general considerations connected to the following questions: Can moral issues be the subject of judicial deliberation and, if yes, to what extent? Should not these issues be resolved exclusively by the legislature? There are no definite answers to these questions because they depend in part on the accepted model of the relationship between the creation and application of law—and thus on the relationship between the legislature and the judiciary. It is no wonder that these problems absorb those philosophers of law who step outside their field and into the spheres of constitutional law, political philosophy and moral philosophy.<sup>21</sup> The issue is extremely complex, and all extremes are dangerous: on the one hand they are a menace due to gross simplification and moral ignorance, and on the other—excessive moral arbitrariness and subjectivism.

It is true that the legislative fiat of a democratically elected legislator has a greater chance of objectivity and social acceptance, and that to some extent it protects us from the moral subjectivity of an individual judge. However, a greater chance does not entail certainty, and in addition to the problems associated with the democratic legitimacy of the legislature there is also the problem of democratic parliamentary procedures—whether they are purely arithmetical, based on a straightforward majority that ignores the opinions of minorities, or whether they are participatory and deliberative, taking into account the views of all the participants in the lawmaking process. This is particularly relevant in situations where a given legislative decree simultaneously also entails a particular moral choice.<sup>22</sup>

However, it is also true that, from a certain point of view, the law as a decision of the legislature is just some pieces of paper covered with formalised, conventional text—its true nature is only revealed in the process of interpre-

<sup>20</sup> Cf. A.N. Shytov, *Conscience and Love in Making Judicial Decisions*, Dordrecht: Springer Science, 2001: esp. 54–73.

<sup>21</sup> Cf. the material of the special symposium devoted to this issue published in the pages of *International Journal of Constitutional Law* 7(1), 2009, with the keynote paper presented by Jeremy Waldron (Judges as moral reasoners, pp. 2–24), and the papers presented by Wojciech Sadurski (Rights and moral reasoning: A unstated assumption—A comment on Jeremy Waldron's "Judges as moral reasoners", pp. 25–45), David Dyzenhaus (Are legislatures good at morality? Or better at it than the courts?, pp. 46–52) and Olivier Beaud (Reframing a debate among Americans: Contextualizing a moral philosophy of law, pp.53–68), and also the reply from Jeremy Waldron (Refining the question about judges' moral capacity, pp. 69–82).

<sup>22</sup> R. Dworkin, *Justice for Hedgehogs*, Cambridge, Mass., and London: The Belknap Press of Harvard University Press, 2011: 5.

tation and application. The ontological essence of the law, as the Neo-Kantians noticed at the turn of the nineteenth and twentieth centuries, is not that it 'is', but that it is 'binding'. At the same time, although the law is indeed very important, it is not the only regulator of social life; it is embedded in other normative systems. In the process of creating, interpreting, applying and observing the law, there are frequent conflicts and collisions—not just within law itself, but also with morality, customary norms, economics, politics and religion. In the contemporary philosophy of law, such conflicts are called 'hard cases', and although the legislator does indeed get to grips with these, it is primarily judges who do tackle them, armed with their institutional consciences.<sup>23</sup> In this discourse we find ourselves between Scylla and Charybdis, and the best option is, of course, to find an Aristotelian golden mean, or—even better—a Rawlsian reflective balance.

The philosophy of law can certainly help judges in answering the questions of whether conscience can/should play a role in their case law, and how to appeal to conscience without violating the necessary reflective balance with the legislator. Aharon Barak, the long-time president of the Supreme Court of Israel, aptly observes that with the help of philosophy a judge will 'better understand the role of the law in a society and the task of the judge within the law'. He adds: 'One cannot accomplish much with a good philosophy alone, yet one cannot accomplish anything without it.'<sup>24</sup>

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## JUDICIAL CONSCIENCE

### S u m m a r y

The subject of this paper is a philosophical-legal analysis of the concept of 'judicial conscience', recently a popular topic in public discourse. The author proposes a broad understanding of the term, and distinguishes four different sources of this conscience: (i) a judge's worldview, which most often has a religious basis; (ii) professionalism; (iii) axiological conflicts internal to the legal system; and, (iv) awareness of belonging to the judiciary as an independent power (the third estate). The author illustrates his analysis of judicial conscience through the example of US case-law from the turn of the eighteenth and nineteenth centuries, when courts adjudicated on cases involving fugitive slaves. According to the author, it is possible, on this basis, to determine some paradigmatic attitudes available to judges facing axiological conflict. In the conclusion, the author applies his reflections to the present Polish constitutional crisis.

<sup>23</sup> J. Zajadło, *Po co prawnikom filozofia prawa?*, Warsaw: Wolters Kluwer, 2008.

<sup>24</sup> A. Barak, *The Judge in a Democracy*, Princeton and Oxford: Princeton University Press, 2006: 116.