

COMPARATIVE ANALYSIS OF THE WORK OF JÁNOS ZLINSZKY AND WILHELM RÖPKE

The constitutional protection of family

Lilla HEGEDÜS

PhD student, Pázmány Péter Catholic University

1. Introduction

The purpose of this paper is to map the scientific thinking of the jurist, János Zlinszky (1928–2015) and to reveal his method of scientific argumentation as a constitutional judge. To this end I will make a comparison with the method of an economist, Wilhelm Röpke (1899-1966) mainly focusing on the topic of protection of families. I will build on the standpoint and argumentation articulated by Zlinszky in his dissenting and concurring opinions as a constitutional judge and on his writings in ethics and legal history.¹

Zlinszky was a Hungarian, Catholic jurist, lawyer and member of the first Constitutional Court of Hungary (1989-1998). He lived and practiced in an era when Hungary's main goal was to carry out the transition of the country from national socialism to democracy. Zlinszky's first aim as a jurist was to realize the legal transition of Hungary from totalitarianism to the rule of law. He promoted the transition as member of the first Constitutional Court and also in the field of education by establishing the Faculty of Law of Pázmány Péter Catholic University in 1995. A Catholic law university in this era, after a long period when there was no freedom of religion and conscience in Hungary and no real values were represented and transmitted by the state and either by the education institutions, was essentially important.²

Zlinszky as a lawyer placed high emphasize on economic studies. Already at the beginning of the law faculty, he has launched a separate economic institution and he himself gained deep economic knowledge. So interdisciplinary was very close to his

¹ See the expalantion of the concepts of dissenting and concurring opinion under point 3.

² See more about the life and scientific work of János Zlinszky here: <http://zlinszky Muhely.hu/>

scientific approach. In one of his writings on the right to work and private property he refers directly to the German economist, Röpke.³

These were the main reasons why I have considered worthy to compare the scientific thinking of the two authors. Very quickly I have realized many similarities in the background and also in the scientific argumentation of the authors which served the topic for this paper.

Röpke was a German, protestant economist who practiced and lived 30 years before then Zlinszky, but still in a similar era, after the end of World War II. As an economist his main focus was also to carry out the transition of his country from national socialism to market economy. So both authors lived in a similar era and fought for similar goals.

Röpke had his own standpoint and approach on the interrelationship of law and economics. According to Röpke, law provides the framework for the operation of economic processes. He adds that economic order is based on two main set of rules which are interrelated with each other. These two set of rules are: legal rules, regulation and ethics (or rules defined by culture).

Röpke believed that between the two set of rules the second one, ethics is the more important, since without ethically good decisions optimal economic decisions may not be made.⁴ In his view in order to make optimistic economic decisions which serves the final aim of economics, that is a fulfilled existence, ethics may not be ignored from the economic decisions.

Röpke defined himself as a liberal economist, but did not believe in an absolute liberal approach. He separated his scientific thinking from classical liberals based on values. He believed that human nature has some constant needs and common values shared by all that should be respected over time and space. In this respect he referred to the values of the Catholic Social Teaching (hereinafter ‘CST’) stating that the values of the CST is in harmony with the nature of the man.⁵

Zlinszky just as Röpke was a modern thinker in an economic point of view. He never questioned the importance of a liberal market economy, but he also separated his legal thinking from the absolute liberals along values. As a constitutional judge he believed that the Constitution has an inherent set of values and there is an order between these values. He called these values as the values of the rule of law and considered them as constant values of all times. He emphasized the importance of the order of the constitutional values and their priority over other non- constitutional considerations, such as the market.⁶

³ ZLINSZKY, János: *Keresztény erkölcs és jogászai etika.* (Christian morality and legal ethics). Budapest, Szent István Társulat, 2017. 164.

⁴ Daniela ORTIZ: *Ethics and order of the free market. Wilhem Röpke's Fundamental Political Ethics.* EDUSC, IX volume della collana MCE Books, 2017. 116–121.

⁵ Ibid. 201–204.

⁶ ZLINSZKY, János: Az Alkotmány értéktartalma és a mai politika. (Values in the Constitution and the politics of today). In: KOLTAY, András (ed.): *A tizenkét táblától tizenkét ponton át a magánjog új törvénykönyvéig. [From Lex Duodecim Tabularum through the Twelve Points (1848) to the new Hungarian Civil Code (2013)].* Budapest, Szent István Társulat, 2013. 533–534.

As a conclusion, one of the main similarity between the two authors is that both authors believed in a liberal market economy after the long period of national socialism, though emphasized the drawbacks of an absolute liberal approach requiring that certain common, constant values of the society shall be respected when making legal or economic decisions. These values serve as a barrier and frame to the absolute liberal approach.

2. Method of Röpke

Analysing the method of Röpke I came to the following conclusions. Röpke denied the normative approach of natural sciences which excludes non-measurable or not strictly measurable elements of reality when calculating economic results. These non-measurable elements are for example emotions or value- judgements. Since human being live and think according to values and has not only material needs but also emotional or spiritual, says Röpke, these non-measurable elements may not be excluded from scientific calculations.

Instead of the normative approach Röpke applied a so called complex methodology. He mixed the method of understanding with the method of normative sciences and by the help of intuition he reached a synthesis between the two methods from which he could draw his conclusions.

The method of understanding applies analysis instead of explanation and abstraction applied by the natural sciences. Furthermore, the method of understanding leaves the facts in their context taking into consideration not only the measurable factors of reality, but many other, non- measurable aspects too. Röpke used interdisciplinary to put into practice his methodology, which means that he used the scientific results of natural sciences and also of human sciences, such as psychology, philosophy, sociology or anthropology. It is important to note here that the synthesis between the two methods which Röpke talks about does not mean a mere addition of the results of the natural sciences and the results of the method of understanding, but it results an absolute new quality which understands and reflects more the reality.⁷

2.1. The method of understanding in practise

I will introduce a good, representative example raised by Röpke to demonstrate how the method of understanding works in practise. In Germany after World War II. a large number of people bought consumer credits and as a consequence the number of private insolvencies became very high in Germany.

Röpke analyzed consumer credits in respect of the welfare of the individual and the operation of the economic system. He came to the following conclusions. He states that there is hardly any reason for buying consumer credits, because it does not bring welfare at the end, only productive or durable credit would be beneficial for the

⁷ ORTIZ op. cit. 150–160.

debtor. So, he raised the question: why so many people after World War II. bought then consumer credits?

He found the answer in the unethical behavior of the political and commercial actors not informing the people about the pros and cons of the consumer credits. In addition, there was present a so called delusion in the society caused by the current historical situation. Since during the war a great number of persons lost their social and family relationships, property and shared mindset or traditions. As a consequence, there was a moral-spiritual vacuum or purposelessness in the society which the people tried to fill with material goods as they wanted to get back the living standard quickly they had before the war. Although, it was not a real remedy for the real wound, that is for the lack of rootedness.⁸ As the crisis was just a transitory situation, Röpke stated, it was clearly an unethical behavior of the politicians and traders taking advantage of the moral instability of the people and implementing measures that promoted buying consumer credits but did not serve as a real solution for the moral-spiritual crisis.

Here Röpke gives an explanation again about the interrelationship of law and economics stating that ethics does not work by itself in the economic life (since the selfishness of the individual actors are too strong) so the legal system and the political level should provide a regulation that is proportionate to a liberal economy confessed by Röpke.⁹

3. Method of Zlinszky

Zlinszky as a constitutional judge has articulated dissenting and concurring opinions in a great number which shows us the presence of a unique legal thinking.¹⁰

Let me explain first what is a dissenting or concurring opinion. If any of the judges of the Constitutional Court of Hungary left in minority because he or she disagrees with the merit of the decision, he or she may articulate a so called dissenting opinion. If he or she agrees with the merit of the decision, but would base the decision on different arguments, may articulate a concurring opinion. In both cases the judge articulating concurring or dissenting opinion, he or she considers important to express his or her opinion – usually lead by their conscience for any reasons, such as informing the society about some important legal issues, eg. about the content of the rule of law more in detail.

At the initial period of the newly established Constitutional Court of Hungary (hereinafter ‘Court’), the Court declared that it will insist on a strict, literal, formalist and a value-neutral interpretation of the law and the Constitution. ‘In the current

⁸ The concept of rootedness is created by Röpke. See the explanation of the concept later under pont 6 of this paper.

⁹ Ibid. 187–192.

¹⁰ Lilla SZÁDVÁRI: *Thematic statistics ont he dissenting and concurring opinions by János Zlinszky*. Budapest, Zlinszky János Műhely, 2018.

historical situation the presence of a neutral and objective standard has a stabilizing effect.’ – stated the Court.¹¹

Opposed to the approach of the Court, Zlinszky did not insist on the strict, formal legal reasoning, but analysed the cases from a ‘higher’ perspective. In his reasoning he placed the human being itself at the center of analysis, examined the legal problems from a more human approach leaving any analyzing them in their historical and social context (similar to the method of understanding) and taking into consideration much more aspects than the Court did and also by the application of a value-based legal thinking he came to different conclusions than the majority of the constitutional judges. These could be the reasons why he articulated so many dissenting and concurring opinions, precisely all together 49 which was a very high number at that time compared to the number of dissenting or concurring opinions raised by other members of the Court.¹²

4. The rejection of absolute liberalism and the significance of values in law and economics

Zlinszky believed that the final aim of the individual and the society is to create values and to use them for the fulfillment of the life. So, the primary aim of the state is to make it possible for the individual and the society to create values freely.

Zlinszky was a liberal and a conservative thinker at the same time. He differentiated between liberalism and libertinism based on values. He categorized the human values into 3 groups stating that there are material, spiritual or intellectual and ethical values. Among these the ethical value is the highest one, then comes the spiritual and finally the material. The problem of the absolute liberal approach is that it denies the validity of spiritual and ethical values and only promotes the achievement of mere material values.¹³

He raises an example to highlight his idea. He says that it is not in harmony with the constitutional requirements if under the flag of liberalism and freedom the constant constitutional values of the rule of law are disadvantaged. For example, when the children’s right for healthy physical, emotional and spiritual development (which is a constitutional value) is displaced or overshadowed by the freedom of media, arts, expression or the press. The media instead of teaching values for children, teaches how to become a consumer, instead of teaching routes requiring efforts, shows how to find convenient solutions. So the media has a useless communication which has a destructive effect on the healthy development of a child. And the reason of the overruling presence of this negative absolute liberal trend is evidently financial, says Zlinszky.¹⁴

¹¹ ZLINSZKY, János: Manuscript. 17.

¹² Lilla SZÁDVÁRI: Dissenting and concurring opinions by János Zlinszky, The constitutional protection of private property. *Pázmány Law Review* VI. (2018) 91–92.

¹³ ZLINSZKY, János: Az Alkotmány értéktartalma és a mai politika. (Values in the Constitution and politics of today). In: KOLTAY (2013) op. cit. 535.

¹⁴ Ibid. 555.

He adds also that the defenders of this absolute liberal approach usually argue that the industry gives what the society need, so demand defines offer. Though, according to Zlinszky, it leads to a false argumentation. Since based on the Constitution the child has a constitutional right to healthy development. The problem arises when politicians does not make decisions according to the constitutional values, but promote unconstitutional liberal ideas.

It is very interesting that he admits also that the state regulation itself cannot serve a solution for this problem but only a value-based upbringing provided by the families for their children and firms ethics transmitted by the family may serve a barrier for the destructive effects of this absolute liberal trend.¹⁵

Compared to Zlinszky, Röpke advocated for a very similar liberalism concept. He made difference between liberalism and libertinism along values. He confessed that liberalism is not absolute freedom, but a freedom limited by the good or ultimate telos, 'to which it is directed, and by truth, the real situation of the human being as understood not only within his life context but also according to his nature.'¹⁶ He adds that absolute liberalism is a concept which is deprived from any inherent meaning or moral requirements.

He accentuates that the absolutization of the reason (confessed by the natural sciences) is not liberalism but libertinism. Röpke considered economics as a moral science and criticized those who tried to make an attempt to categorize it as a natural science. According to Röpke, there is always an inner dimension or subjective status for every economic dimension. So thus, economics have to understand the economic processes and not only make a mechanical explanation with formal models and based on abstraction. Understanding means to apprehend the motives and desires behind the economic actions and analyze them in their life- context.¹⁷ So, the differentiation between liberalism and libertinism along values is strongly present in the theory and method of Röpke as well.

5. Family in the work of Röpke

In the work of both authors, family had an important position. Both of them considered family as a basic, fundamental building stone of the society and promoted the strengthening of the families when approving laws or making economic decisions.

According to Röpke, the essence of the family may be summarized by the words of Robert A. Nisbet. 'This is the area of association from which the individual commonly gains his concept of the outer world and his sense of position in it. His concrete feeling of status and role, of protection and freedom, his differentiation between good and bad, between order and disorder and guilt and innocence, arise and are shaped largely by his relations within these realms of primary associations.'¹⁸

¹⁵ Ibid. 556.

¹⁶ ORTIZ op. cit. 108.

¹⁷ Ibid. 108–110.

¹⁸ Robert A. NISBET: *The quest for community*, 142., ORTIZ op. cit. 171.

He created a theory called rootedness which is at the center of his methodology. He states that only those economic decisions may result a fulfilled existence, that is the final aim of economics which strengthens the rootedness in the society. Rootedness has 4 elements: ownership, nature, tradition and primary communities. Primary communities are for example the families. So based on Röpke's theory an economic decision is optimal only if it does not weaken the primary communities, and as such, families.

Röpke explains also the characteristics of primary communities. These communities are based on real, natural relationships opposed to artificial ones. Since these primary communities, such as the family provide a secure, safe environment for children and transmits firm ethics, make the individual able to become a characteristic, responsible member of the society and have a fulfilled life. That is why Röpke says that primary communities serve as an opposition to mass society. Röpke believed that the economic sphere may work optimally only if the economic actors behaves ethically well and are able to act responsibly. Otherwise they will never make optimal economic decisions and may be easily deceived.

Röpke adds finally that primary communities involve in the existence of a common reality shared by all members of the society. The prerequisite of this common reality that all creatures are created by God. Röpke considered this relationship as the most fundamental relationship when talking about primary communities, and as such about family.¹⁹

6. Family in the work of Zlinszky

The importance of family is described by the following words of Zlinszky: 'Parents and their children are fundamental cells and natural building stones of the society. A durable building may be constructed on firm building stones. A strong, healthy society may be constructed on firm families.'²⁰

The Constitution protects and provides additional rights to families in several provisions. According to Zlinszky this high protection is justified by the fact that families provide a secure environment for the fulfillment of life of the children (physically, mentally and emotionally as well) so protection is justified primarily on the basis of the protection of the child.

Furthermore, economically is also justifiable the high protection because families provide the reproduction of the society.

He adds that one more constitutional requirement, namely the constitutional principle of proportionate public burden sharing requires to provide financial support for families not only on the basis of solidarity but because families bear more public

¹⁹ ORTIZ op. cit. 169–173.

²⁰ ZLINSZKY, János: Élet és család védelme az Alkotmányban. A család alapvető jogai. (Protection of life and family in the Constitution. The fundamental rights of family). *Vigilia*, 1998/4. 262–270. (Translated by Lilla Hegedűs)

burden by upbringing their children since when their children become adults, their work will be beneficial for the entire society and not especially for their parents.

If these constitutional requirements concerning the protection of families are not met, then families are discriminated, states Zlinszky.²¹

6.1. The object and the obliged of the protection

Before introducing a concurring opinion to represent the value-based legal argumentation of Zlinszky in the topic of family I will introduce shortly the constitutional regulation of the protection of families.

According to Zlinszky family is a legal relationship between a man and a woman blessed with children. The object of the constitutional protection is the relationship between the man and the woman, and also their children as a fruit of this relationship and finally the relationship between the parents and their children. Though, he emphasize that the primarily object of the protection is the interest of the child and the primary obliged is the state. So the state has a two-fold obligation. On one hand, it shall abstain from interfere into the inner life of the families by any legal instruments, on the other hand, it shall support the real freedom of families by providing financial and institutional support to them.²²

6.2. Concurring opinion by Zlinszky to decision no. 18/1994 of the Constitutional Court

In the last section I will introduce a concurring opinion by Zlinszky in which he fought for parents' rights to choose the values according to what they would like to upbringing their children and the enforcement of one of the constant values of the rule of law, namely social tolerance. In the concurring opinion Zlinszky also touches the topic of ideological neutrality of the state.

6.3. Background of the case

The applicant turned to the Court stating that certain provisions of an act is not in harmony with the Constitution, so he asked the Court to repeal the relevant provisions. He stated that the provisions concerned caused a discriminatory situation due to the fact that it did not make possible for the state and local governments to maintain ideologically committed schools.

The Court has rejected the application referring to one of its former, fundamental decision on ideological neutrality of the state. In this decision the Court declared that the state cannot maintain ideologically committed schools due to its neutrality, but if there is a need in the society for religious schools, then the state should provide adequate financial support to that aim.

²¹ Ibid. 262–270.

²² Ibid.

6.4. Concurring opinion by Zlinszky

According to Zlinszky, the notion of ideological neutrality of the state does not mean neutrality on values. Even more, some certain, constant values of the rule of law, such as social tolerance should be respected and enforced at all times enjoying priority opposed to other, non-constitutional aspects, such as the liberal idea of value neutrality of the state. He says that the values of the rule of law may be barriers to the fundamental rights as well, such as the parent's right to upbringing their children and the teachers' right to teach. Although, after socialism most of the professors working in neutral state schools were followers of the same ideology and rejected religious values and upbringing. Therefore, the value of social tolerance could be enforced in this situation only if the ideologies of professors in state schools would be present in proportionate to the pluralism of ideas among parents in the society. Though, in this historical situation it was only an utopistic idea yet, says Zlinszky. He also adds that the rule of law may be enforced in a society only if it is rooted deeply in the mentality of the people, and cannot be enforced just by the law. So according to Zlinszky this problem can be solved only by time and the by change in the social perceptions, not by the law.

He went further and raised attention to the fact that families who wants to upbringing their children based on values are discriminated since there is not enough religious schools in the society. He highlights that the state shall provide the opportunity of real choice to parents to exercise their right to upbringing their children, and a mere financial support by the state is not enough to provide the opportunity of real choice. He suggested to pass the maintenance of certain state schools into the hand of the church and also to provide financial support to these already religious institutions in proportionate to the state tasks they have overtaken. This solution could provide adequately the right to choose for religious parents according to the Constitution.²³

7. Conclusions

From the comparison of the scientific method of the two authors it became clear that both authors represent a softer approach compared to the method represented by the natural sciences. It is not easy to find a justification of this approach against those who believe in the generally accepted legal interpretation technique, that is the positivist approach. Though, it is important to stress, even if there is a generally accepted approach it does not change the nature of law and the nature of reality surrounding us (what the law should regulate) which might be better grabbed by a more complex, mixed methodology applied by Zlinszky. In my opinion, the justification of the approach of Zlinszky or Röpké cannot be questioned, though the barriers of this

²³ ZLINSZKY, János 18/1994. (III. 31.) AB határozathoz fűzött párhuzamos indokolása, ABH 1994. 93–98. (Concurring opinion by János Zlinszky to decision 18 of 1994 of the Hungarian Constitutional Court: 31 March 1994).

mixed methodology and how to apply it precisely is an important issue and might be a matter of further debate.

One of the most important elements of the method of the two authors is the presence of certain common, constant values in legal practice and economics. As we could see above Röpke originated the constant values present in economics back to the nature of the man which is in harmony with the CST. Even though, Zlinszky believed that the values of the CST are extremely close to the constant values of the rule of law, he accentuated that the two are not equally the same and he refers back to the Hungarian legal heritage when he talks about values. He states that constant values of the rule of law are originated back to the Hungarian legal tradition, the historical Constitution of Hungary. He also often emphasized that Europe's spiritual heritage is built on three pillars, the Christian morals, the Greek philosophy and the Roman law.²⁴ So these traditions cannot be ignored from the legislative process but should be respected. He also adds that in order to have real democracy and rule of law in Hungary, the values of the historical Constitution has to be revealed again, known and studied by all members of the society. Since without voluntarily keeping the law, rule of law cannot be enforced.²⁵

To precisely determine what are the constant values of the rule of law and what is their exact content according to Zlinszky a future research is necessary on the topic of values in the Hungarian historical Constitution.

²⁴ ZLINSZKY (2017) op. cit. 12.

²⁵ ZLINSZKY, János: Történelmi alkotmányunk fejlődése. (Development of the Hungarian Historical Constitution). In: KOLTAY (2013) op. cit. 317.