

DISSENTING AND CONCURRING OPINIONS BY JÁNOS ZLINSZKY

The constitutional protection of private property

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1. Introduction

As member of the newly established Constitutional Court, between 1990–1998, János Zlinszky formulated almost fifty dissenting and concurring opinions. That number is deemed very high, and testifies about a unique legal thinking.

The purpose of this paper is to reveal this unique standpoint by Zlinszky as compared to the majority opinion of the Constitutional Court (hereinafter ‘Court’). This is focused in particular to the issue of constitutional protection of private property. I also intend to show Zlinszky’s defining role in Hungary’s transition of law and the establishment of the rule of law.

As a first step, an overall, thematic statistics was set up cumulating the dissenting and concurring opinions by Zlinszky. Hence it was possible to outline the guidelines of Zlinszky’s legal thinking. It also served as a tool to narrow down the topic of the present research.¹

From the results of the statistics the following conclusion could be drawn regarding Zlinszky’s legal thinking.

Zlinszky believed that the constitution has an *inherent set of values* that should be implied in all cases in order to validate the real content of the rule of law. As opposed to the majority opinion of the Court insisting on the application of the so-called *narrower sense of the law*, as a necessary element for the legal transition, Zlinszky examined the legal cases from a higher perspective, placing those in the actual historical and social context. He always posed the human being in the center of his considerations in order to find a solution that serves not only the narrower, formal

¹ Lilla SZÁDVÁRI: *Thematic statistics on the dissenting and concurring opinions by János Zlinszky*. Budapest, Zlinszky János Műhely, 2018.

sense of rule of law but also the real, material sense, able to meet the real needs of society.

The four major territories to which Zlinszky formulated dissenting or concurring opinions are the followings: protection of property, rule of law, discrimination and social security (including the pensions). The present paper analyses the issue of private property and those parts of social security that have relevance to the constitutional protection of private property; namely, the matter of pensions and the issue of fundamental right to social care (as the specific, one and only fundamental right of social security).²

Zlinszky paid outstanding attention to the issue of private property, one of the most important issues of the Court itself. In the transition period, according to Zlinszky, settling property relationship was the ‘pre-requisite of the transition from socialism to market economy’.³

Concerning the sources of argumentation, Zlinszky frequently turned to Roman law, transiting its legal solutions and principles to modern law. In respect of private property, this statement is even more accentuated.

2. The concept of rem and the property relationship covered by constitutional protection according to Zlinszky

It is important to clarify certain definitions used by Zlinszky for the constitutional protection of private property. Zlinszky used a unique, special concept for the rem and the property relationship which is covered by constitutional protection. He originated the concepts from Roman law. The following section of this paper deals with the concept of rem and the concept of property relationship falling under constitutional protection as seen by Zlinszky.

2.1. The concept of rem covered by constitutional protection according to Zlinszky

The object of constitutional protection of private property is a cumulative term covering the objects of civil law property (movable and immovable properties), also the property rights and rights acquired by work. Zlinszky used a special concept for the civil law definition of rem covered by constitutional protection. He stated that rems can be classified into three categories. Under the first category fall the rems for consumption, under the second money as a rem; whereas, under the third category those rems fall which step into personal relationship with their owners, at the same time, are long-lasting by nature. He stated that it is only to the rems covered

² The Hungarian Republic recognises the right to social care as a fundamental right that shall be provided for all by social security and the system of the social institutions. Art. 70/E. § (2) of The Constitution of the Hungarian Republic (1989) (hereinafter ‘Constitution’).

³ ZLINSZKY, János: Észrevételek a magánjog új törvénykönyvéhez. [Observations to the new Hungarian Civil Code (2013)] 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. 669.

by the third category, to the so called *rems in a narrower sense* that constitutional protection should be provided. He originated this idea from Roman law, the division of *meum est* and *meum est ex iure quiritium*.⁴

2.2. The concept of property relationship covered by constitutional protection according to Zlinszky

Concerning the property relationship falling under the constitutional protection of private property, Zlinszky suggested going back again to the example of Roman law. Roman law regulates between the rem and the owner of the rem in contrast to modern laws that regulate between legal entities. He initiated introducing this concept in the Act V of 2013 on the Civil Code (hereinafter ‘Hungarian Civil Code’).⁵

After clarifying the basic concepts used by Zlinszky, let us unfold his standpoint on the issue of constitutional protection of private property based on the dissenting and concurring opinions attached to the Court’s decisions. The first part of this paper will deal with the matter of establishment and the termination of property, and the right to disposal of property. The second part of the paper will deal with the topic of pensions, namely, the stabilization of pensions and the common acquisition of the pension system. Finally, it comes to the insufficient, unconstitutional civil law regulations on the protection of private property based on Zlinszky’s argumentation.

3. Establishment and termination of property

Zlinszky in his dissenting and concurring opinions emphasized that property can be established and terminated only upon a legal title and by the will of the owner.⁶ There may be cases when the termination of property is independent from the will

⁴ The importance of the division of *meum est* and *meum est ex iure quiritium* in Roman law means that if a rem is *meum est*, that is *is mine*, it does not mean that the rem should be *meum est ex iure quiritium* that is *mine by the law*. The civil law protection (a much stronger protection than the protection by custom) was provided only to those rems that fell under the law of quirities. The category of rems falling under the law of quirites was very narrow at the initial period of the Roman society, it included only the 2–2 iugerum lands distributed to the pater familias and the house of the family. As the state became stronger, the category of rems covered by the law of quirites was extended. ZLINSZKY, János: *Állam és jog az ősi Rómában. (State and law in the ancient Rome.)* Budapest, Akadémiai Kiadó, 1997. 187–188.

⁵ ZLINSZKY, János: Alkotmányos tulajdonvédelem – biztonság a jogállamban – és a Ptk. 118. §. [Constitutional protection of private property, security in the constitutional state, in relation to 118. § of the Hungarian Civil Code (1959).] *Polgári jogi kodifikáció*, 2005/1. 18–20.

⁶ Zlinszky János 15/1993. (III.12.) AB határozathoz fűzött különvéleménye, ABH 1993. 135–136. (Dissenting opinion by János Zlinszky to decision 15 of 1993 of the Hungarian Constitutional Court: 12 March 1993 on the compensation for expropriations; hereinafter ‘Dissenting opinion by Zlinszky to decision 15 of 1993’)

of the owner, though in these cases Art. 13. § (1)–(2) of the Constitution, that is the constitutional criteria for expropriation shall be applied.⁷

Zlinszky pointed out the urgency and importance of the adequate settlement of property relationship several times, namely, to the sensitive problem of re-privatization after the transition period as an essential criterion for the establishment of rule of law and the transition to market economy. The following dissenting opinion shows clearly the inadequate settlement of this issue, and the standpoint of Zlinszky's.

3.1. Dissenting opinion of Zlinszky to the decision no.15/1993 of the Court; the matter of expropriation

The complainants attacked the regulation of the Act on Compensation, not differentiating between the aggrieved groups of persons based on the principle of legality.⁸

The Court ruled that the case falls out of the competence of the Court due to the fact that there was no existing living practice in the case concerned. The Court also stated that the Act on Compensation is not unconstitutional since it ensures the right to turn to court for the aggrieved persons in case of breaching the principle of legality.

Zlinszky put forth a different position compared to the majority opinion by declaring that the continuous and consequent refusal of the ordinary courts and the Supreme Court to decide and supervise these cases constitute a living practice. Accordingly, the Court had competence and should have decided in the merits of the case. Moreover, he added that the Act on Compensation should have differentiated between the aggrieved groups of persons just *based on the principle of legality*.⁹ He also stated that the fundamental right of the aggrieved to court has been breached due to the fact that the ordinary courts rejected to rule on these cases. The mere possibility to turn to court does not ensure the basic, fundamental right of aggrieved persons to the court.

Zlinszky suggested categorizing the aggrieved persons into three groups based on legality. The three groups are the followings.

First group: lack of formal legal basis, the decisions are not in harmony with legality.

⁷ The Hungarian Republic ensures the right to property. Property shall be expropriated exceptionally, upon public interest, in cases and in a manner regulated by an act and with a full, unconditional, immediate compensation. 13. § (1)–(2) of the Constitution, translated by Lilla SZÁDVÁRI.

⁸ The Constitutional Court decided to realize the legal transition on the basis of the constitutional principle of legality. Based on legality, all the legal relationships established legally in the former system should be recognized as valid in the new system too. Decision 11 of 1992 of the Hungarian Constitutional Court: 5 March 1992 on the retroactive prosecution of serious criminal offences, part III, point 3 of the reasoning. See [http://public.mkab.hu/dev/dontesek.nsf/0/3aca039c89527bc1258382003c4639/\\$FILE/en_0011_1992.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/3aca039c89527bc1258382003c4639/$FILE/en_0011_1992.pdf)

⁹ Dissenting opinion by Zlinszky to decision 15 of 1993 opt. cit. 134.

To the first category belong aggrieved persons whose property was expropriated based on an unlawful administrative act and no remedy was provided against the decision at the time of the expropriation. Zlinszky stated that the mere fact of not providing the legal, basic right to court to the aggrieved against these decisions does not result constitutive effect of the unlawful decisions. Thus, in these cases, the property right was not transferred to the state, the original owners are still legal owners of their own property, and hence the fundamental right to court should be ensured to them without failure.

Second group: lack of formal and substantive legal basis; the decisions are not in harmony with legality. To the second category belong those aggrieved persons whose property was expropriated in a manner without referring to any legal instrument. These acts constitute declarations without legal effect, so in these cases providing the right to court to the aggrieved is even more accentual.

Third group: here belong those aggrieved persons whose property was expropriated with full or partial indemnification in return. The demands for indemnification were suspended by later state instruments, but were not terminated by law. Since right to property is a right falling under the law of things and not limited by time, the demands for indemnification replace the former rights in rem. Moreover, due to the fact that later legal regulations did not terminate these demands, the suspension by state acts did not terminate them, only suspended the time for elapse. Therefore the right to court in these cases should be ensured as well to the aggrieved, with the difference that the ordinary courts should examine whether the limitation period for the enforcement of these demands were already passed or not.¹⁰

3.2. Inadequate settlement of property relationships; the rule of law and the principle of legal certainty have been injured

As stated before, Zlinszky considered this problem to be a highlighted issue that should have been handled with urgency and in a precise, adequate manner. Though, the issue became a victim of political constraints, and the Court did not raise its voice in order to ensure the legal transition in harmony with the constitutional criterion of legality, that is with the rule of law. As a consequence, theoretical unity of the fundamental principle of legality was broken; the basic concepts, such as legality, justice, people's power (legitimacy), have been relativized. This became a source of confusion in the use of terms and weakened the institutions of rule of law and legal certainty at the same time. As the beforementioned decision of the Court shows, the concept of property has become devoid of content.

The settlement of property relationship was guided by privatization instead of re-privatization. The legal status of aggrieved persons as owners was not restored; not even any kind of recognition of their demands was provided, despite the fact that property as a legal category cannot be terminated. In turn, a rich layer of the society developed, to whom privatization brought huge benefits. As a consequence, the

¹⁰ Ibid. 134–142.

private law foundation of property with legal title was lost; the concept of possession was superseded in contrast to the priority of commercial property based on the priority of market economy and competition over any other legal values, even though the Court questioned the value and fundamental right quality of market economy and competition several times.¹¹

The following section will introduce the opinion by Zlinszky on the right to dispose over property and its limits, based on a dissenting opinion related to right to pre-emption.

4. Disposing property and its limits

In theory, the owner can do with his property whatever he wants to. Though, modern laws, such as Hungarian Fundamental Law, already regulate this matter in a limited way. It means that the right to dispose over property is not absolute.¹² It has some barriers, e.g. fundamental right to social care, that is a specific element of social security and a subjective right of all citizens. (See in section V.) Let us deal with the state obligation to ensure protection of the right to disposal over property, based on a dissenting opinion of Zlinszky to decision no. 39/1992 of the Court.

4.1. Dissenting opinion by Zlinszky to decision no. 39/1992 of the Constitutional Court; the right to pre-emption

The complainants attacked the act on right to pre-emption. The act concerned ensured first and foremost right to pre-emption to the state owner and the lessees of the state owned share of the joint ownership and their relatives in case of selling the non-state shares by the non- state co-owners, but it did not ensure the same first and foremost right to pre-emption to the non-state owners and to the lessees and their family members of the non-state owned property share in return in case of selling the state shares. The complainants referred to Art. 70/A. § of the Constitution, that is the provision on prohibition of discrimination.¹³

The Court ruled that determining the order of the entitled persons by an act is not unconstitutional, and does not violate Art. 70/A. § of the Constitution as the right to pre-emption is only a benefit. The Court added that the right to pre-emption is not a right falling under the law of things, but a right covered by the law of obligations, so it has a nature of obligations. That is why the act concerned does not have to provide first and foremost right to pre-emption to the co-owners.

¹¹ ZLINSZKY, János: Az Alkotmánybíróság felelős az elmaradt rendszerváltásért? (Is the Constitutional Court responsible for the regime change that still has not been occurred yet?) In: KOLTAY op. cit. 584.

¹² 'Everyone shall have the right to property and succession. Property shall entail social responsibility.' Art. XIII. (1) of the Fundamental Law of Hungary (hereinafter 'Fundamental Law').

¹³ 'The Hungarian Republic ensures the human and civil rights for all the persons staying in its territory without any discrimination, namely based on race, color, sex, language, religion, political or any other opinion, national or social origin, wages, birth or any other status.' Constitution, Art. 70/A.§ (1), translated by Lilla SZÁDVÁRI.

Zlinszky took an absolutely different position in contrast to the majority opinion by declaring the right to pre-emption as a *right covered by the law of things, a power attached to property*. It is, thus, a right having a nature of rem and, as such, falling under the protection of 13. § (1)–(2) of the Constitution. Since the right to property is an absolute right, that is a right encompassing all parts of the property, the powers attached to the property also encompass all the parts of the property. It means that the co-owners shall have first and foremost right to pre-emption in case of selling property shares of the joint ownership by any of the co-owners.

In this case, Zlinszky emphasized the importance of the *in rem nature* of the right to pre-emption and fought to found the protection of the powers attached to property, namely, the right to pre-emption, in order to ensure the adequate level of constitutional protection to the owner. The progressive legal thinking and the merits of Zlinszky in this process are undeniable as the Hungarian Civil Code in force and many other contemporary foreign civil codes regulate the issue in a very similar way.¹⁴

4.2. The fundamental right to social care as a limit to right of disposal

Zlinszky was a spokesman of validating the fundamental right to social care that is a specific right being part of social security. The fundamental right to social care is the only element of social security that has a nature of constitutional fundamental right, which means that it ensures substantive right for the citizens. Social security emerged first in the social constitutions. It was the time when solidarity became a constitutional limit of the inviolability of property. The current, modern constitutions, such as the Hungarian Fundamental Law regulates this question. “Property shall entail social responsibility”.¹⁵

Zlinszky provided the interpretation of social security in the abovementioned manner and the enforcement of its content. Although, the Court finally recognized the right to social care as a fundamental constitutional right, the current legal regulation still imposes taxes on this right and does not ensure the sufficient, basic minimum living standard for all the citizens.¹⁶

The second part of this paper is going to introduce the problem of the pension system and its relevance to the protection of private property by the Constitution. After a short introduction in general, let us disclose the matter of state obligation to the stabilization of the pensions. Finally, let us introduce the unique standpoint represented by Zlinszky on the question of common acquisition related to the pension system.

¹⁴ Zlinszky János 39/1992. (VII. 16.) AB határozathoz fűzött különvéleménye, ABH 1992. 235. (Dissenting opinion by Zlinszky to decision 39 of 1992 of the Hungarian Constitutional Court: 16 July 1992.)

¹⁵ Art. 13.§ (1) of the Fundamental Law.

¹⁶ ZLINSZKY, János: Az Alkotmány értéktartalma és a mai politika. (Values in the Constitution and politics of today) In: KOLTAY op. cit. 570.

5. Regulation of the pension system and its relevance to constitutional protection of private property

The pension system as part of social security in Hungary has been operated on a mixed system. It means that it has two main elements: one is based on solidarity and the other one is based on insurance. The Court has criticized it several times highlighting the injustices of the system.¹⁷

Nowadays, in modern laws it is evident that the insurance element of the pensions should enjoy constitutional protection as it is strongly attached to the fundamental constitutional right to property by being an acquired right for consideration. Concerning the solidarity element of the pensions, this element evidently belongs to the right to social security as provided by the Constitution.

Although in the initial period of the Court the classification of the pension system and its two elements was not clear. For example, the definition of social security and the basic classification of the pension as a right in rem or a right falling under the law of obligations divided the members of the Court sharply.

Zlinszky propagated the importance of the constitutional protection of the pensions in many of his dissenting and concurring opinions. He declared his opinion on the state obligation for stabilizing pensions and the concept of social security in the concurring opinion to decision no. 24/1991 of the Court, then in the dissenting opinion to decision no. 26/1993 of the Court, also in the dissenting opinion to decision no. 1067/B/1993 and finally in the dissenting opinion to decision no. 277/B/1997. Firstly, let us reveal the standpoint of Zlinszky's on the stabilization of pensions based mainly on decision no. 26/1993 supplemented by the provisions of the aforementioned decisions.

5.1. Dissenting opinion to decision no. 26/1993 of the Court; state obligation for the stabilization of pensions

The complainants attacked the planned Act on Social Security regulating in a manner that determines the maximum increase of the pensions in percentage and also in nominal value. The complainants referred to 70/A. § of the Constitution, namely, the provision on prohibition of discrimination stating that the planned nominal increase of the pensions is less than the compensation of wages of the actively employed persons, and is not in harmony with the increase of inflation either. Moreover, the complainants referred to discrimination based on not only the altered ratio in amount between the pensioners and the actively employed persons, but also between the different groups of pensioners caused by the maximizing the pensions in percentage.

The Court refused the complaints and based its argumentation on the fact that pension is basically a social right, so there is no relation between pensions and Art.

¹⁷ SCHANDA, Balázs – BALOGH, Zsolt: *Alkotmányjog – Alapjogok. (Constitutional Law- Fundamental Rights)* Budapest, Pázmány Press, 2015. 335.

13. § (1)–(2) of the Constitution, namely the provision of right to property and its protection.

As opposed to the majority opinion, Zlinszky took an opposite opinion by declaring pensions primarily as acquired rights based on insurance and, as such, falling under the constitutional protection of property ensured by Art. 13. § (1)–(2) of the Constitution. Zlinszky emphasized that the state can apply the element of solidarity in the process of determining the amount of pensions, but the amount of pensions already determined fall under constitutional protection.

The Court ruled that maximizing the pensions in nominal value is not against the Constitution since the state has no obligation for stabilizing the pensions to be in harmony with the inflation or to compensate the wages of the actively employed persons. The Court added that there is no ground for comparison of these two categories as the pension system and the fluctuation of the wages of the actively employed persons operate on an absolute different basis. While the wages of the actively employed persons are compensated by the market, the pension system is based fundamentally on solidarity. Moreover, the maximizing in percentage does not result in discrimination between the different groups of pensioners due to the fact that it is only the solidarity element of the system for the benefit of the pensioners with lower incomes.¹⁸

In contrast to the argumentation of the Court, Zlinszky based his starting point of his argumentation on the fact that pension is a right in rem, an acquired right for consideration. That is why the state has an obligation to ensure stabilizing pensions for the whole life of the pensioner, especially due to the fact that the state obligated the pensioners to pay pension contributions. Thus, they were practically deprived of their right to making savings. Stabilization means that the ratio cannot be changed as compared to the real value of the pensions acquired at the beginning of the pension period, and also compared to the wages of the actively employed persons or different groups of pensioners.¹⁹ Though, Zlinszky added that the object of constitutional protection in the terms of pensions is only the amount already determined by law, so the solidarity element of the pension system can be applied in the process of determining the amount of the pensions.²⁰ Zlinszky gave voice to his opinion very sharply when stating this: if the state does not ensure stabilization of the pensions and cannot justify the decrease of the real value of the pensions, by another constitutional purpose (based on the test for expropriation according to Art

¹⁸ The Court stated the same about the maximizing pensions in its decision no. 277/B/1997.

¹⁹ Zlinszky János 277/B/1997. AB határozathoz fűzött különvéleménye, ABH 1997. 744–747. (Dissenting opinion by Zlinszky to decision 277/B of 1997 of the Hungarian Constitutional Court.)

²⁰ Zlinszky formulated his opinion on the issue first in his concurring opinion to injunction no. 24/1991 of the Hungarian Constitutional Court. In this case the Court rejected making a decision in the merits referring to the comprehensive reformation of the pension system. The Court revealed its opinion first in decision no. 26/1993. Zlinszky János 24/1991. (V. 18.) AB határozathoz fűzött különvéleménye, ABH 1991. 364–367. (Dissenting opinion by Zlinszky to decision 24 of 1991 of the Hungarian Constitutional Court: 18 May 1991.)

13.§ (2) of the Constitution, that is the criteria of necessity and proportionality) then it deprives its citizens from their own property.²¹

In its decision, the Court revealed its position on the debated concept of social security. As the Court stated, pension is primarily a social right, it declared that only two state obligations exist in terms of stabilizing pensions. One of them is preserving the level needed to provide the fundamental right to care as the only element of social security constituting constitutional fundamental right.²² The other obligation of the state is no changes in the ratio between the two elements of the pensions discretely, i.e. the element of solidarity and the element of insurance.²³

After introducing the topic of stabilization, let us introduce the characteristics of the common acquisition in the pension system proposed by Zlinszky, based on the dissenting opinion to decision no. 874/B/1994 and the concurring opinion to decision no. 5/1998 of the Court.

5.2. Dissenting opinion to decision no. 874/B/1991 of the Court; A reform of the pension system is needed, based on common acquisition, Zlinszky held

The complainants attacked the regulation of the Act on Social Security on the matter of permanent widow's pension. The Act on Social Security differentiated between those windows who had pensions on their own rights and those who were entitled to pension only on the right of their spouse. For the former category, the act ensured only a one-year temporary right to widow's pension. The claimants referred to Art. 70/A. § of the Constitution, that is the provision on prohibition of discrimination.

The Court rejected the complaints stating that the right to widow's pension is a social right; hence is based on need. So the regulation is not unconstitutional.

Opposing the majority opinion of the Court, Zlinszky criticized the pension system and the Act on Social Security, stating that it is not in harmony with the essential requisition of the constitutional protection of family and the equality of the spouses. He based his opinion on the argumentation that spouses basically live in common acquisition, because, if they do not regulate otherwise, then all their properties acquiesced during marriage constitute common acquisition, based on the law. That is why none of the spouses can be deemed as a dependent, but both of them should

²¹ Ibid. 366.

²² In separating constitutional rights, there are three main categories. In the first category fall the so called constitutional fundamental rights. These rights may enjoy the strongest protection by the constitution; all citizens have substantive right to them. Under the second category fall those constitutional rights that do not constitute fundamental rights, so no substantive rights come from them, but the state still has some obligations to ensure their being based on the Constitution. Finally, in the third category fall those rights which are only state aims, so lower legal instruments are needed to implement them. SCHANDA–BALOGH op. cit. 318–320.

²³ Zlinszky János 26/1993. (IV. 28.) AB határozathoz fűzött különvéleménye, ABH 1993. 212–213. (Dissenting opinion by Zlinszky to decision 26 of 1993 (IV. 28.) of the Hungarian Constitutional Court on the amount of old-age pensions and other allowances.) See <http://public.mkab.hu/dev/dontesek.nsf/0/FDF68FBBB0C1FB42C1257ADA0052761E?OpenDocument&english>

be entitled to pension by virtue of their own rights and in a fifty–fifty percent ratio of the total amount of the pensions, acquired by the two spouses. If the law regulated otherwise, that would constitute as a benefit or discrimination. Therefore, Zlinszky suggested reforming the entire pension system: harmony with the requisition of protecting the family; the equality of spouses and common acquisition system and, ultimately, constitutional protection.

The idea by Zlinszky about the common acquisition pension system can be deemed unique and may make the legislators think since even today a high number of spouses live in the system of common acquisition.

The last part of this paper deals with the civil law regulation related to the constitutional protection of private property in Zlinszky's activity. This section of the paper is not based on the dissenting and concurring opinions by Zlinszky. Though, since the issue is strongly related with the topic of the paper, is worth an introduction in a nutshell.

6. The inadequate civil law regulation; termination and restriction of private property

6.1. Breaking the ancient principle of *nemo plus iuris* and the inadequate protection in case of tort

It is conspicuous that in his argumentation Zlinszky goes back again to the problem of protection of the market opposed to the protection of private property. He already raised the importance of this issue in the transition period when settling the property relationship.

By the approval of the Hungarian Civil Code in 2013, the ancient principle of Roman law – the principle of *nemo plus iuris transferre potest quam ipse habet* – has been broken.²⁴ The Hungarian Civil Code stipulates that if a person who acquires the movable thing in a commercial transaction in good faith and for consideration shall acquire ownership by transfer, even if the transferor was not the owner.²⁵ In this manner, the seller is exempt from common assurances and from the compulsory *bona fidei* as required by civil law. This regulation has been extended to persons acquiring property right in good faith for consideration from persons indicated in the land registry.²⁶

Zlinszky criticized the current legal regulation ensuring enforcement of criminal claim first and foremost to the state. The original owner may enforce his civil law

²⁴ In Roman law, when selling a product unlawfully (e.g. if the seller was not owner of the product), the vendor has not acquired property right, the property right was not transferred to the vendor. If the owner has found his property in the possession of another person, then the owner could claim back his property by the institution of *evictio*. There was only one exception from the principle of *nemo plus iuris*, namely the case of debtor fraud. For these cases Roman law established *Lex Aquila* as a solution. ZLINSZKY (2005) op. cit. 18–20.

²⁵ Act V of 2013 on the Civil Code, 5:39. §.

²⁶ ZLINSZKY (2005) op. cit. 18–20.

claim only after the state's criminal claim and only upon bad faith of the seller. Bad faith has to be proven by the owner, which in most of the cases is hardly possible. Thus, Zlinszky stated, the civil claim of the owner, i.e. civil law protection, ultimately, constitutional protection of private property in case of unlawful termination of property is not provided at any level.

Zlinszky declared that the regulation for unlawful restriction or damage of private property by tort is inadequate as well because instead of strict liability, it requires only liability upon imputability from the perpetrator. Zlinszky notes that even though in case of tort the regulation is insufficient, by requiring liability upon imputability, the legislator still provides a *certain* level of protection at least. This is opposed to the case of termination of property by breaking the principle of *nemo plus iuris* when the legislator does not provide *any* solution for the broken protection of private property.

6.2. Proposal for civil law regulation, adequate and in harmony with the constitutional protection of private property

For both cases, i.e. when breaking the principle of *nemo plus iuris* and in case of tort, Zlinszky proposed the same legal solution to resolve infringement by a solution originating in Roman law. He suggested creating a new, *private delict* to the owner against the person placing the property of the owner on the market. Furthermore, *strict liability* should be applied in these cases to found the liability of the perpetrator and convert the damages on him.²⁷

7. Conclusions

By analyzing all the dissenting and concurring opinions by Zlinszky his special legal thinking could be mapped. Zlinszky examined the cases in tiny little details, never stopped himself to give voice to his conscience, and this attitude resulted a wide-ranging and rich legal material of which a small portion was unfold in this paper.

It is undeniable that Zlinszky had a crucial role in establishing and strengthening the rule of law in Hungary. He believed in real values, and by the means of law, he put them into practice.

Concerning his merits in the issue of constitutional protection of private property, he clarified and outlined the criteria for the establishment and termination of property relationship based on legality, an essential basis for the legal transition and the establishment of the rule of law. Furthermore, he determined the scope and barriers of one of the powers attached to property, namely the right to pre-emption based on constitutional criteria. Related to the settlement of property relationship, privatization and re-privatization and also – by his suggestions and notifications – the current civil law regulation, Zlinszky raised the attention to the ruling position of global market economy as a negative effect on the before inviolable constitutional fundamental right of private property. Furthermore, he has raised his voice for supporting the

²⁷ ZLINSZKY (2005) op. cit. 18–20.

poor by emphasizing the insufficiency of the legal regulation on the fundamental constitutional right for social care as a limit to disposing private property and a call for social responsibility. His ideas on the constitutional protection of property and the pension system are outstanding; perhaps the current legislating power might not neglect, albeit take into consideration these guidelines.