The personality of the judge and legal decision making in private law*

'There is no guaranty of justice
except the personality of the judge'

Ehrlich

I. Introduction. Personality influences on legal decision making

In this paper some of the results are discussed of a 3 year research project in the Dutch judiciary, 'Personality Influences on Decision Making in Private Law', which has been completed in December 1981. This project was financed by the Ministry of Justice and the Faculty of Law, Erasmus University Rotterdam[1].
The project was a joint venture of lawyers and psychologists to study the relations of personality traits of judges and the decisions rendered by them in the field of private law. It was a sequel to research done earlier by us on judges in training and law students. The research has its starting-point in the present author's inaugural lecture, which dealt with the relevance of humanistic psychology for decision making in private law[2].

The subject of our inquiries is by no means a novel one. The word of the 'Freirechtler' Eugen Ehrlich, placed at the beginning of this paper, has been cited with approval by Justice Cardozo, in his The Nature of the Judicial Process[3]. The writings of Cardozo himself, illustrate the point vividly. Two examples, which are both relevant for our topic. In the first one Cardozo, when treating the 'subconscious forces', discusses Montesquieu's paradigm of the judge as 'la bouche de la loi', as the mouth that pronounces the words of the law, which is contrasted with the opposite extreme, the view of Saleilles at the end of the last century in his treatise De la Personalité Juridique, cited by the author: 'One wills at the beginning

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1 The project has been carried out by Peter J. van Koppen, psychologist, and Jan Ten Kate, J.D. and psychologist, both of the Rotterdam Faculty of Law, Institute of Legal Decision Making, under the supervision of Willem K.B. Hofstee, Professor of Psychology at the University of Groningen, and the present author. The report of the project as presented to the minister of Justice (January 1982, in Dutch) and an English version of it, presented for publication, can be obtained from the authors, Van Koppen en Ten Kate (Erasmus University Rotterdam, Postbus 1738, 3000 DR Rotterdam, The Netherlands). The project has also been reported by the authors in: 5 *Trema* (1982), 13 (in Dutch).

2 *Riskante rechtsvinding* (The Risky Finding of the Law), inaugural address Rotterdam, 1974.

3 1921, 37th printing, 1976, 16.

the result; one finds the principle afterwards; such is the genesis of all juridical construction. Once accepted, the construction presents itself, doubtless, in the ensemble of legal doctrine, under the opposite aspect. The factors are inverted. The principle appears as an initial cause, from which one has drawn the result which is found deduced from it'[4].

Cardozo takes a position midway between these extremes, and finds support in a statement of Roosevelt, that judges by interpreting legal concepts, like contract, property, liberty, etc., 'necessarily enact into law parts of a system of social philosophy'. The citation concludes:

… 'we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions'[5].

Incidentally, Saleilles' point of view was held by several authors at the end of the last century. One German author of those days once described the judicial decision making process, as a judge, shooting an arrow first, and then afterwards, at the place where the arrow struck, drawing a target with the arrow in the bull's eye. I will return to this aspect later, when discussing the results of our present research project. The same applies to the Roosevelt inspired view of Cardozo.

The second example I would like to mention, is Cardozo's argument that the judge is bound by 'subconscious loyalties', an insight derived from James Harvey Robinson[6]. The reference is too nice to leave unquoted: 'Our beliefs and opinions, like our standards of conduct come to us insensibly as products of our companionship with our fellow men, not as results of our personal experience and the inferences we individually make from our own observations. We are constantly misled by our extraordinary faculty of 'rationalizing' - that is, of devising plausible arguments for accepting what is imposed upon us by the traditions of the group to which we belong. We are abjectly credulous by nature, and instinctively accept the verdicts of the group. We are suggestible not merely when under the spell of an excited mob or a fervent revival, but we are ever and always listening to the still small voice of the herd, and are ever ready to defend and justify its instructions and warnings, and accept them as the mature results of our own reasoning'[7].

The addition made by Cardozo, is that the training of the judge, combined with the 'judicial temperament', will help 'in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions. It will help to broaden the group to which his subconscious loyalties are due'.

This concept of subconscious loyalties finds a remarkable parallel in more recent publications on law and psychology, as we will see below. I expect the observations so far, will suffice as a warming up for our subject.

II. The project on decision making in the Dutch judiciary. Some results.

In this paragraph I will give a short outline of the above mentioned research pro-

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[4] At 1970; this is seen by Cardozo as 'a sweeping statement (which) exaggerates the element of free volition'.

[5] At 171, taken from a message to Congress of 1908.

[6] At 175.

[7] O.c., by Robinson.

ject, the way it has been set up and its conceptual basis. Finally, some results will be presented, which will be discussed in par. III.

A study of American research in this field, revealed that, due to different circumstances in the Dutch legal and judicial system, little use could be made of it for our purposes. Thus, for the present project we had to develop our own methodology. The basic philosophy was that in hard cases, where the personality of the judge counts most, there is the characteristic situation that the judge in making his decision has to choose between two positions: that of the one party having a strong position from the point of view of the law, or that of the other party having a strong position when considering his personal interest at stake. Therefore, there are good arguments to decide for either party: in a more formal, legalistic approach the first party will succeed, in a more 'principled', result-oriented approach, the second party will win. For the purpose of our project the first party is labelled as having a stronger '*legal construction*' at her disposal (statutory rules, contractual rights, rules of precedent, etc.), the second party as having a stronger '*interest*' than her opponent, thus having equity on her side (principle of good faith, reasonableness, rules of equity, etc.).

On this basis 9 cases have been selected and presented to the judges; the cases were not too complicated (one page length) and were derived from common practice (e.g. contract, tort, rent, unfair dismissal). In selecting the cases the interests of the one party were thought to be in balance with the legal construction (-arguments) of the other party. In our project the following decisional dimensions have been used. The only dimension, commonly applied in American research, which was suitable to be used in our project, was the '*Underdog*-dimension': the measure in which the party with an underdog-position was supported. The choice between 'interest' and 'legal construction' was reflected in the dimension of *Legalism*, related to the support of the party with the stronger legal position. Finally, we also used the dimension *Majority*, related to decisions made by the majority of the judges participating.

Three personality characteristics were used, which expectedly would correlate with some of the decisional dimensions: *Need of security*, *Social orientation*, and *Self-esteem*. To measure these characteristics a Dutch questionnaire was used, the Maslow Need Questionnaire (developed by Liebrand, Groningen).

For the project another questionnaire has been developed, to measure social-psychological characteristics, namely, *role-expectation*, *role-ideal* and *role-orientation*. The first concept deals with the judge's perception of the expectations of the community of his performance as judge; the second concept designates his own ideals, and the last concept his actual behaviour. Based on a survey of literature on judicial decision making, three scales have been distinguished:

1. *Legalistic attitude* (the formalistic, positivist approach);
2. *Solution-oriented attitude* (result directed method, open for societal needs);
3. *Autonomous attitude* (independant policy, conscience-oriented).

Finally, some biographical data of the judges have been obtained, as age, sex, education, years of experience before and after joining the bench.

In the project 114 judges participated, which is 27% of all judges in the Cantonal Courts (Kantongerechten) and Courts of First Instance (Rechtbanken) which have been invited by us. This response we consider to be very satisfactory, taking into

account the understaffing of many courts and the fact that a number of judges may have refused for lack of experience in civil cases, when sitting in a criminal chamber for an extensive period of time. The sample proved to be representive in respect of sex, age, education, experience at the bench and prior to appointment. All judges have taken a degree in law at one of the 8 Faculties of Law in the Netherlands: 30% of the newly appointed judges nowadays are career-judges who have taken a 6-year training. Other judges are taken from the bar, legal departments of companies or the administration, etc.
The cases have also been presented to law students at different universities, and to laymen. The last category was university trained, namely members of the faculty of the departments of the Dutch, German and French languages at the universities in the country. 103 Students participated, and 156 (response of 47%) laymen.
Before turning to one of the results which I have taken as topic for this paper, I will give a summary of the other results. The decisions of the judges showed a low intercorrelation, and the decisional dimensions had very low internal consistencies. Nonetheless, the decisional dimensions correlated with some of the Role-questionnaire scales. Judges who professed a *Legalistic attitude* role-ideal, for example, decided less in favour of the *Underdog*. However, no correlation was found between the Legalistic attitude Role-ideal scale and the decisional dimension *Legalism*. On the other hand, judges who scored on Legalistic attitude in regard of *Role-expectation*, made less legalistic decisions.
The *Solution-oriented* judge decided more in favour of the underdog, made less legalistic decisions, and made more majority decisions. About the same correlations have been found in the case of the judge with the *Autonomous attitude* as Role-ideal.
A remarkable feature was, that the personality characteristics of the judges did not correlate with the decisional dimensions. The biographical data also rendered no exciting results; we only found that the more prior experience, the less legalistic decisions are being made. Further details, and the data, can be obtained from Van Koppen and Ten Kate, as indicated above.

We now come to the results that are to be discussed in this paper. Surprisingly, although the cases had been so constructed that the interests of the one party were in balance with the legal construction (arguments) of the other party, in every case (with one exception, which can be explained), *the judges chose with an approx. 4:1 majority for the same party*. This outcome became even more puzzling, when we found that *the students and laymen decided in almost the same way*. Apparently, in deciding these cases, where principles and rules of conduct were involved, it made no difference whether the judging person was a law-trained judge, a law student, or a layman with university training.
The following table shows the figures:

Decisions made by judges (N=114),
laymen (N=156)
and students (N=103)

Case	Judges	% for plaintiff Laymen	Students
1. Contract (unfair dismissal)	81	76	77
2. Contract (negotiations)	83	80	92
3. Contract (rent; repudiation)	79	85	73
4. Tort (squatting; internal conflicts)	73	92	50
5. Contract (close Corporation)	77	47	40
6. Tort (traffic; causation)	80	85	68
7. Social security (gifts)	12	7	11
8. Contract (infancy)	33	20	15
9. Contract (rent; repairs)	35	20	22

III. The role of the personality in legal decision making

The striking similarity in decision making by judges and laymen which was one of the results of our research on the Dutch judiciary deserves further study. For possible explanations of this feature I would like to turn to the realm of Jurisprudence and Legal Philosophy to see which theories or insights can be of any help. In doing so, we must keep in mind that the type of cases presented to the respondents all had to do with socalled 'open norms': the principles of good faith (contract), and duty of care (tort), which are also known as legal standards, a category a shade vaguer than the legal norms. Therefore, the decision asked for had much to do with what is thought to be fair and reasonable in the given case, general principles of equity, norms of conduct, and the like. By this approach a wide range of jurisprudential expositions may be of interest.

Two questions will be posed. Firstly, can the similarity in the decisions of judges and laymen be explained by a form of inter-subjectivity, and if so, on what basis? Secondly, what role is played by the legal argumentation in deciding the case, as it apparently did not cause a deviance in deciding behaviour between jurists and non-jurists. And, in this context, what relation is there to the wide-spread belief that the legal argumentation serves only as a dressing-up of the judge's decision taken on other grounds? In the search for answers for these questions the excursion in Jurisprudence and Legal Philosophy can start. However, a selection has to be made of the promising areas which can be visited on our itinerary.

a. The 'feeling of justice' and 'intuitive law' theories

From the early twentieth century several streams in legal theory and legal philosophy, dissatisfied with rationalities of positivism, stressed the function of the feeling of justice, the 'Rechtsgefühl'.

In Germany and Austria the 'Freirechtler' gave instinct and intuition a central place in judicial decision making, advocating the free unfettered discretion of the judge (an idea abandoned after some time, when it became clear that the judges were recruted from the higher circles in society and were not particularly open to new developments in society; some authors even advocated a legalistic attitude for the judge). In the same periode in the Netherlands a group of authors of which Krabbe became well known, adhered the theory of the 'Rechtsbewustsein' (consciousness of law). The Russian Petrazhitsky developed his theory of 'intuitive' law, and Del Vecchio established the theory of the 'sentimento giuridico', which

enables man to weigh specific grades of truth. In France Gény, like Del Vecchio a follower of Bergson (Evolution Créatice), was very influential with his vitalist concept of 'creative intuition' equiped with legal technique. The adherents of the 'Wertphilosophie' (philosophy of values), an offspring of the phenomenological school (Husserl), like Scheler and Hartmann, base their scale of values on the guidance by the Rechtsgefühl. The *a priori* consciousness of values is an emotional and spontaneous *a priori*, which 'immediately, intuitively and emotionally permeates our practical conscience, our entire conception of life' (the differentiation of the ethic of values from natural law philosophy is the establishment of an absolute and immutable hierarchy of values). The American author Edmond Cahn took the 'sense of injustice' as the motive force in legal decisions.

The common core of all these theories is the acceptance of the sense of justice as a guiding factor in legal decisions making[8], which leads to the conception of an intuitive finding of the solution to the legal dispute, in a value-oriented way.

This might be the explanation of the similar decisional behaviour of judges and laymen: their guidance by a sense of justice, more concisely, an identical sense of justice (that is, a source rendering decisions in the same proportion 1 : 4). This line of thought is an invitation for further study.

The approach of the intuitive law adherents has roots in the early history of law. In more primitive societies the 'charismatic' law finder, as Weber coined it, finds the law intuitively. In Greek law Plato's philosopher-king knows and applies justice with insight and virtue, derived from the balance and harmony of his personality.

The position of Plato at the beginning of the line desenes some comment. Here again, we are confronted with an old cross-roads in human thinking and science: the Platonic way in contrast with the Aristotelean way. Western science is based on Aristotelean epistomology and logic; if one has an interest in the irrational besides the rational, and in the role of personality in human thinking, one has to go beyond Aristotle and turn to Plato and earlier thinkers[9]. The impact on legal thinking of the choice between these two schools of thought is tremendous: two fields are highly dependant on the outcome of this choice. One is the methodology in decision making; the subsumption model in the application of legal rules to facts (Major, Minor, Conclusion) used solely by legal positivists is nothing more than the core of Aristotelean logic. A second field is the dichotomy between legal certainty and equity. The common philosophy of Western lawyers in the last ages is, again, derived from Aristotle: the equitable seen as a correction of law where it is defective owing to its universality. The universal law, consisting of universal statements, is written for the usual case and, thus, cannot take into account a specific individual case (Nicomachean Ethics V, Ch. 10). For Plato, on the contrary, the equitable is an immanent part of the law, and no correctional devise for law in practice. Therefore, a central place is given to the personality of the person in the adjudication process, the philosopher-king we just mentioned. In relation to this, the *dialectical model* of legal decision making (resolving the *Is - Ought* dichot-

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[8] These theories are treated in most textbooks on jurisprudence. Compare for instance W. Friedmann, *Legal Theory*, 5th Ed. 1967, at 29, 85, 186, 199.

[9] This also holds true when criticizing Kantian jurisprudents, or neo-Kantians, like Rawls. Compare for this subject, and the Is-Ought split in general, J.M. van Dunné, *The Personality of the Judge. Some jurisprudential remarks*, paper presented for the Research Committee for Comp. Juc. Studies (IPSA), Oxford 1981 (publ. forthcoming).

omy), developed by several recent authors, fits best in the Platonic way of thinking. We will return to this last feature later.

b. The 'Natur der Sache' approach

An off-spring of the phenomenological value philosophy is a group of authors, especially in post-war Germany, developing the '*Natur der Sache*' concept, the 'nature of the thing'[10]. This school of thought, akin to the natural law philosophy, the reality of phenomena contains immanent values which are the moving force in the transformation of legal institutions, in relation to social change (Radbruch). In the concrete situation, in the application of law, certain basic values, such as elementary feeling of justice, are influential (Coing). These values may be personal, but also institutional (personal dignity on the one hand, and e.g. contract as based on the principle of reciprocity on the other hand). For Maihofer ('Concrete Law of Nature') the *Natur der Sache* serves as an extra Standard to bring the abstract rules of law in accord with the norms of conduct prescribed by the social situation of a concrete legal condition. An illustration is found in the general concepts of the Civil Code like good faith or reasonableness. In this sense the *Natur der Sache* serves as a source of law in the decision making process.
A related view is conceived by Fechner, who, building on the value-hierarchy of Scheler and Hartmann, of which man is an intrinsic part, accepts a more dynamical structure. Fechner uses an existentialist approach, by giving the individual a definite role in the realisation of values, with his choice of alternatives, contributing to the gradual change in the order of values. Moving further away from an order of values is an other author, Amselek. In his phenomenological theory the crucial part is the view that legal science should refrain from the classical quest for certainty and prediction, and should seek to observe the 'intersubjectivity' of juridical norms. In his phenomenological positivism the need is felt for a psychological and socio-logical theory of law.
As Friedmann exposes[11], much of these valuable contributions of the phenomenologists to legal theory is not completely new. Some basic thoughts have also been developed by the German 'Freirechtler', by Gény in France and by the American realists earlier this century. This observation is a bit loose though. The German post-war *Natur der Sache*-school is clearly a revival of an earlier stream in German philosophy of the 19th century and the beginning of this century. As to American realism, this school has known a strong influence of the German Freirechtler (Ehrlich *et al.*) generally but also more specifically of the German and French *Natur der Sache* philosophers. Cardozo in his writings is referring extensively to Gény; Llewellyn, in developing his concept of '*situation sense*', is leaning heavily on the German author Goldschmidt (1874). Llewellyn gives a citation, in his own English translation: 'Every fact-pattern of common life, so far as the legal order can take in, carries within itself its appropriate, natural rules, its right law. This is natural law which is real, not imaginary; it is not a creation of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man of the life conditions of the time and place; it is thus not eternal nor

[10] Compare for this school of thougt: Friedmann, o.c. 203; K. Larenz, *Methodenlehre der Rechtswissenschaft*, 2nd Ed. 1969, 137, 140, 225; J. Esser, *Grundsatz und Norm in der rechterlichen Fortbildung des Privatrechts*, 2nd Ed. 1964, 5, 164.
[11] At 207.

changeless nor everywhere the same, but is indwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law'[12].

Looking for earlier sources of the nature of the thing approach, the Roman concept of *ius in causa positum* comes to mind, 'the law lies in the case'. This view inspired a group of authors in Western-Europe which, from the 1870's attacked legal positivism and founded the reliance theories (Vertrauenslehr, 'la confidence légitime', the Löfte-theory). In the formulation of some Dutch authors of that time the model of decision making should not be 'through the rule to the law', but, on the contrary, 'through the law to the rule'.

c. Dialectical jurisprudence

In the last decades several authors, mostly West-German, made a contribution to legal theory which has a common core, namely a dialectical structure. In their view there is no sharp distinction between norms and facts, no dichotomy between *Is* and *Ought*. These concepts are inter-related: legal norms are being exemplified, realized, by application to the facts, and on the other hand, facts are qualified, are obtaining legal relevance by the confrontation with legal norms.

An influential exponent of this school of thought is the German author Esser, who combines Continental and anglo-american sources in his writings. A typical adherent of an open system of law, he stresses the functioning of extra-systematic 'topical' principles, which are based on legal-ethical principles and general convictions, expressed with the old rhetoric concept of *eudoxa*, the maxims of law, Esser refers in this respect to the comparable anglo-american concepts of public policy and common sense, and the importance attached to them by Holmes and Salmond.[13] For the 'Normbildung' the case-centered method (problem-oriented) is essential: 'Erst die Kasuistik teilt uns mit, was Rechtens ist', we can only know the law through the case. At the same time there exists a relation with the general principles of law and the 'Rechtsgedanke', the legal thoughts, which are 'kasuistisch profiliert' (243; 288).

In a later work Esser is going deeper into the concept of 'Vorverständnis', preconsciousness, in decision making, and into the functioning of juridical control, the 'Richtigkeitskontrolle'[14]. Leaving aside his interesting observations on the use of legal texts and the qualifications of factual situations, based on hermeneutical insights (Gadamer), an essential part in his thinking is the duty of the decision maker to find a solution to the legal question which is in accordance with the consensus of his Umwelt, which is 'Konsensfähig'. Thus, the decision is value-oriented, and directed at the level of expectations of the legal community ('Erwartungshorizont').

The aspect of values is given more attention by another German author, Larenz, who in many respects is on the same line as Esser (cited with approval numerous

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[12] *The Karl Llewellyn Papers*, W. Twining Ed. 1968, 122, cited by W. van Gerven, *Het beleid van de rechter*, 1973, 56. At p. 32 this author cites Gény on 'la nature des choses', a statement of remarkable resemblance with the one just cited.

[13] O.c., 53.

[14] *Vorverständnis und Methodenwahl in der Rechtsfindung*, 1970, specially at 12, 16, 27, 148, 160. Esser is building on the works of other German authors like Viehweg, Kriele and Müller.

times)[15]. The dialectical structure in Larenz' thinking is even more accentuated, which is due to his confessment to the philosophy of Hegel. His exposition on the 'Bewertungsmassstäbe' (standards of value) is instructive. In Larenz' opinion these standards have a double function of instruction: the author distinguishes objective values (justice, reliance in good faith, holding one's word) on the one hand, and norms of conduct and opinion ('Sozialverhalten') as sediments of the general consciousness of law on the other hand. In the combination of both, in a dialectical process, the standards find their concretisation in the judicial process.
In Dutch jurisprudence a similar approach is that of Paul Scholten, an influential author of the pre-warperiod.[16] In some respects Scholten's view is more far-reaching than that of Esser and Larenz, especially in the qualification of the dogmatic system of positive law in its control function. In the over-stressing of the dogmatic system by the last authors still some positivist influence is noticeable.
The work of Scholten was a considerable contribution to the primacy of ethical principles in law, illustrated by the enormous growth in the use of the 'open norms' in private law (good faith, etc.). The juxtaposition of the rational and the irrational in decision making, the role of the personality of the judge, the ultimate appeal on the judge's conscience in deciding cases, these views are almost common knowledge in legal circles in The Netherlands, especially among the judiciary. Exemplary for this legal climate is a recent act in Administrative Law, where in describing the 'general principles of reasonable administration' referencc is made to the general consciousness of law.

d. The present author's view on personality and decision making

Looking back at our journey through some provinces of Jurisprudence and Legal Philosophy, one may conclude that there is a strong tradition, opposed to the classical positivist or neo-positivist (Kantian) philosophy of law, stressing the role of the feeling of justice, the use of intuition in deciding cases, the uncovering of immanent values or law in the case itself, by using a 'situation sense', the looking for harmony between general objective values and the concrete norms of conduct. In this approach there seems to be room for the thought that the judge, making a 'subjective', value-oriented choice, is tuning in on the other subjects who are composing the legal community, and thus a correct decision may be characterised as an 'intersubjective' act. Whether this judicial act is really volitive, or bound within a strict but unconscious hierarchy of values, or as a compromise, whether the judge has an (existential) margin to contribute to the shaping of the order of values of his time and society, remains subject of discussion of a rather speculative nature.
Returning to the outcome of our research on the Dutch judiciary, this survey seems to suggest that a similarity of decisions by judges and laymen is natural. 'Natural of the thing', so to speak: it may well be that the solution to the legal dispute, the applicable norm, is to be derived from the case itself. By the appeal to the general consciousness of law, involved where a reasonable and fair solution is sought, and more concrete, in the search for norms of conduct in daily life, judge

[15] O.c., especially at 138, 264 (cf. 460), 473.
[16] Asser-Scholten, *Algemeen Deel*, 1931, 3 rd. Ed. 1974. Compare for the legal philosophy of Scholten, and dialectical jurisprudence in general, my Oxford paper, mentioned *supra*.

and layman stand in an identical position. An intriguing question remaining, is the one concerning the 1 : 4 proportion of the decisions. What causes this division?
In the following observations I would like to make some suggestions for a legal theory in which some familiar threads are put together. The essence of the philosophy of law of Hegel which I find very attractive, is the thought that all philosophy of law has to do with the development of man's personality. I have elaborated this theme elsewhere. The main consequences of this outlook are twofold: first, in legal thinking and decision making one cannot disregard the personality of the person involved; secondly, the deciding person relates all values involved to personal values, regarding himself, and transposes all norms in question to norms of conduct, or social interaction. To give an example, the infringement of an absolute right like legal ownership is in legal practice not the starting-point for legal reasoning, but the violation of duties of care or the standards of good faith. There is a definite tendency away from a static, institution-oriented approach, towards a dynamic legal conduct-oriented approach.
This attitude of a legal decision maker, leads to an act of identification with one of the parties in the dispute. To put it more popularly, the judge will ask himself, consciously or sub-consciously, 'what would I do in such situation?' Or: 'How would I react to this act?' On a more abstract level of thinking this becomes: 'What would be a reasonable act/reaction to an act?' In this way an appeal is made to the intuitive and empathetic faculties of the judging person. In this identification process much depends on his experience, whether the situation is known to him or not, on his acquaintance with the social background of the litigants, etc. This is meant in a sense beyond mere prejudice, more in the sense of a social and ethical 'Vorverständnis', pre-consciousness.
Another point I want to make, is the way in which this process of decision making occurs. Many authors talk of the 'hunch', the 'intuitive jump', and the like, which I do not want to put aside as judicial small-talk. I have the idea that in legal matters, just as in several fields of arts, or of medicine, or science in general, in the process of making a basic decision one gets a paranormal insight in the question or problem presented, in a lightning moment. A flash of higher consciousness, of an intuitive character. Just as when a componist like Mozart, as reported, 'sees' the whole symphony in one indivisible moment, or a poet like Mandelstamm 'hears' the whole poem in one moment, the judging person may get the same flashing experience of the solution to a case.

The case itself is subject to its own instrinsic harmony, its own internal law. In concentrating on the case on hand, one is opening his consciousness (or conscience?) to the norms immanent in the case. Isn't this another way posing the *Natur der Sache* concept? The case presented forms a *Gestalt* in itself, and at the same time it is part in the Gestalt of comparable cases, or of the institution involved (contract, tort).
In an interesting study by Bihler on the feeling of justice, the author develops a view which is in some respects close to the one presented above[17]. In his explanation of the value judgment he also stresses the identification with one of the parties, the role of empathy, and further also points out the aspect of a personal appeal or challenge in rendering a value judgment. Important in my opinion is the

[17] M. Bihler, *Rechtsgefühl, System und Wertung*, 1979, especially at 59, 121, 142.

reference made to the work of Eberhard, who developed a theory on value judgments based on concepts of developmental psychology[18]. In Eberhard's view, from childhood on, objects have a certain 'Wertton' (value-tone) for individual man, which is acquired directly or indirectly during life, with a very influential period in early childhood. This sub-conscious value-structure is seen in the form of Gestalts. As paradigm for Gestalt is taken the melody, which is more than the total of the notes used.

A final remark, it should be interesting to look into legal anthropology for instructive materials on decision making in folk law systems. The case- or problem-centered method is for instance common in the Indonesian Adat Law, where the use of abstract rules of colonial-Dutch law raised problems[19]. An interesting study I would also like to mention is Gluckman's work on the Barotse Law (Africa), especially his observation that the Barotse judge applies the standard of 'Reasonable Man' in assessing the behaviour of the parties in dispute[20]. This standard is explained largely in terms of role expectations, and not as a judicial fiction. Thus reasonable or proper behaviour is the central standard in the judical process. To my judgment there is a striking resemblance between judicial decision making in more 'primitive' legal societies and in our Western society, which deserves further study.

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[18] M. Eberhard, *Das Werten*, 1950. Compare this view with that of Cardozo (Robinson), discussed *supra*, par. I.

[19] Compare B. ter Haar, *Adat Law in Indonesia*, 1948, and also Asser-Scholten, 127.

[20] M. Gluckman, *The Judicial Process among the Barotse*, 1955; *The ideas in Barotse Jurisprudence*, 1965. Compare for Gluckman and the discussion of his ideas: M.B. Hooker, *Legal Pluralism*, 1975, 39.