

GOALS AND MEANS IN LAW, OR JANUS-FACED ABSTRACT RIGHTS*

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In the age of modern formal law, most of our social institutions are organised and regulated in depth, according to a bureaucratic model. Since the analyses carried out by MAX WEBER, we have been aware of the significance and long-term impact of this fact and also of the reifying influence it may presumably exert on the underlying relations.¹

In the field of jurisprudence, it was pointed out by the research of, e.g., FRIEDRICH CARL VON SAVIGNY, FRANÇOIS GÉNY, JEAN DABIN and others² that, in result of its application, law can only appear contextualised in one or another setting, by the use of given legal techniques. However, given that *reductio ad infinitum* is impossible, the technique of law-application not only defies further normative definition, but enables applications with equal chances in logic that point to expressly opposite and practically mutually excluding directions.³ Option for *inclusio* or *exclusio*, *argumentum a simile* or *argumentum e contrario*, recourse or not to *analogia*, searching for a basic underlying identity or marking a difference – this is what Civil Law and Common Law justices are used to deciding on at all times in their professional life, be their legal cultures based on posited rules, on casual (precedental) decision or on finding a formula (writ) outlining in what and how to proceed. But the answer to the question of what way they act and how they proceed will be quite simple: they act by following patterns – as long as they can; then, by resorting to their own decisions – when there is no pattern any longer to provide guidance.

Therefore, in its practical materialisation, law depends to a considerable extent on the mode of selecting out and actualising those technical and interpretive, argumentative and evidentiary means and procedures which are accepted in law to both shape and channel the formation of the judge's final conviction, over which the law has no control any longer. By such necessary mediators being wedged in the process, the reified power of the law gets back into the hand of man (with no relief any longer from his personal responsibility), who has equal chance to use or misuse (under-use or over-

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¹ Cf., from the author, 'Chose juridique et réification en droit' in *Archives de Philosophie du Droit* 25 (Paris: Sirey 1980), pp. 385–411.

² See, e.g., Karl Friedrich von Savigny *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* [1814] 3. Aufl. (Heidelberg 1840); from François Génay, *Méthode d'interprétation et sources en droit privé positif I–II* (Paris: Librairie Générale de Droit et de Jurisprudence 1899) and particularly his *Science et technique en droit privé positif I–IV* (Paris: Sirey 1914–1921); from Jean Dabin, *La théorie générale du droit* (Bruxelles: Bruylant 1944), especially Part II: La méthode juridique, pp. 97–203 and also his *La technique de l'élaboration du droit positif spécialement du droit privé* (Bruxelles: Bruylant & Paris: Sirey 1935).

³ Cf. Csaba Varga & József Szájer 'Legal technique' in *Rechtskultur – Denkkultur Ergebnisse des ungarisch–österreichischen Symposiums der Internationalen Vereinigung für Rechts- und Sozialphilosophie 1987*, hrsg. Erhard Mock & Csaba Varga (Stuttgart: Franz Steiner Verlag Wiesbaden 1989), pp. 136–147 [Archiv für Rechts- und Sozialphilosophie, Beiheft 35].

use) the law, as the case may be, as well as his predecessors' heritage and his own talent.¹

For this very reason, our theoretical interest in and responsibility for the work of law can by far not stop at the point where the law is posited. Just like "law in books" [somewhat as a *Ding an sich*] becomes tangible for us [as a *Ding für uns*] in the reality of "law in action",² law cannot be considered otherwise than a process. And taken as a p r o c e s s , law works in function of its environment and can only be assessed through its conditioning and contextualising culture.³

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The philosophy placing the person in the centre as formulated by the Supreme Pontiff John Paul II during His philosopher's life earlier in Poland, which became integrated within the social teaching of the Church by now,⁴ reflects methodologically similar insights regarding institutional operation in general. Notably,

"Man cannot relinquish himself or the place in the visible world that belongs to him; he cannot become the slave of things, the slave of economic systems, the slave of production, the slave of his own products. A civilization purely materialistic in outline condemns man to such slavery",
the more so because

"What is in question is the advancement of persons, not just the multiplying of things that people can use. It is a matter [...] not so much of »having more« as of »being more«."⁵

And it is man at all times who bears responsibility for this all, which he may not in the least shift to his institution, superstructure or society. Not any given arrangement of a certain human community is a purpose in and for itself. And it cannot be used as a self-justification either. We have to be aware that

"Human rights and the rights of God go hand in hand."⁶

All our call-words and the institutions constructed by us are fruits of man's striving for good, of man's struggles and partial successes. Man has indeed every reason to protect the products of his efforts. However, the significance of all such fruits cannot lie in themselves but exclusively in the values they may assist to implement. Man's ultimate evangelical purpose is not just to devise instruments but to properly serve the human personality and its unalienable dignity here on Earth, through developing the suitable media caring for it. To quote just one example,

"In fact, democracy itself is a means and not an end, and »the value of a democracy stands or falls with the values which it embodies and promotes«."⁷

This same relation of goals and means (with the latter necessarily subordinated to the former) arises also in connection with the evaluation of world-wide integration into one unity, as one of the main tendencies dominating our age and determining our future.

"Globalization, *a priori*, is neither good nor bad. It will be what people make of it. No system is an end in itself, and it is necessary to insist that globalization, like any other system, must be at the service of the human person; it must serve solidarity and the common good."⁸

¹ Cf., from the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris].

² As the announcement of the American sociological jurisprudence, this is the conceptual differentiation proposed by Roscoe Pound in 'Law in Books and Law in Action' *American Law Review* 44 (1910) 1 and further developed in his *Jurisprudence* IV (St. Paul 1959), pp. 14 (and, as applied to practical issues, in III, pp. 362 et seq.).

³ Cf., from the author, *A jog mint folyamat* [Law as process] (Budapest: Osiris 1999) 430 pp. [Osiris könyvtár: Jog].

⁴ For his phenomenological personalism, see, from Karol Wojtyła, 'The Acting Person' [1969] *Analecta Husserliana* X (1979), 'La persona: soggetto e comunità' [1976] *Il Nuovo Areopago* 5 (1986) 4, 'Participation or Alienation' *Analecta Husserliana* VI (1977), 'Transcendence of the Person in Action and Man's Self-teleology' *Analecta Husserliana* 9 (1979); and, as collected, his *Person and Community* Selected Essays, trans. Theresa Sandok (New York: P. Lang 1993) pp. xvi + 370 and *Perché l'uomo* Scritti inediti di antropologia e filosofia (Milano: Leonardo 1995) 320 pp. For an essayistic outline of his legal considerations and their philosophical foundations, see also Zenon Grochowski *La filosofia del diritto di Giovanni Paolo II* (Roma: Editrice Falma Edium 2002).

⁵ *Redemptor hominis* (March 4, 1979), 16b and 16d.

⁶ "Und doch gehören Menschenrechte und Gottesrechte zusammen." In 'Commentarium Officiale: Acta Ioannis Pauli Pp II' *Acta Apostolicae Sedis* 80 (1988), p. 323.

⁷ 'Message of the Holy Father' in *Democracy Reality and Responsibility* [The Proceedings of the Sixth Plenary Session of the Pontifical Academy of Social Sciences, 23–26 February 2000] ed. Hans F. Zacher (Vatican City 2001), p. xxxvi [Pontificiae Academiae Scientiarum Socialium Acta 6], quoting *Evangelium Vitae* (March 25, 1995), 70. As continued by R. Minnerath—'Le développement de la démocratie et la doctrine sociale de l'Église' in *ibid.*, p. 416—, "Democracy in itself [...] is not a supreme value. [...] There are universal values inherent in the human substance about which no majority is entitled to decide on."

⁸ 'Address of the Holy Father' in *Globalization Ethical and Institutional Concern* [Proceedings, Seventh Plenary Session, 25–28 April 2001] ed. Edmond Malinvaud & Louis Sabourin (Vatican City 2001), p. 28 [The Pontifical Academy of Social Sciences, Acta 7].

Obviously, if “globalization is ruled merely by the laws of the market applied to suit the powerful, the consequences cannot but be negative.”¹ The outcome seems evident if, as illustrated by the Papal examples, the effect of globalisation manifests itself in

“absolutizing the economy, unemployment, the reduction and deterioration of public services, the destruction of the environment and natural resources, the growing distance between rich and poor, unfair competition which puts the poor nations in a situation of ever increasing inferiority.”²

No institution is therefore innocent by itself and no institution carries its value alone in its self. The only reason for institutional existence can be the service of humans in the sense that

“the person in the community [...] must, as a fundamental factor in the common good, constitute the essential criterion for all programmes, systems and regimes.”³

Searching even deeper for the core of the “internal need” or “interior demand of the human being”,⁴ at the service of which human efforts shall be aimed, we inevitably arrive at the realm of values: values which we ourselves have to reveal and identify in the created world, based on our own culture, experienced and continuously improved, helping us find our way in the world, in which we move by giving an account of our existence as humans. All this testifies to an unchallengeable priority amongst values. In terms of this, we can agree that

“Ethics demands that systems be attuned to the needs of man, and not that man be sacrificed for the sake of the system. [...] Globalization must not be a new version of colonialism. It must respect the diversity of cultures which [...] are life’s interpretive keys”. Aware of some contemporary threats, the Pope asserts that what is desirable as an outcome is “not [...] a single dominant socio-economic system or culture which would impose its values and its criteria on ethical reasoning”, that is, as implied by the above, certainly “not [...] absolute relativization of values and the homogenization of life-styles and cultures”.⁵

It is the person’s decision about his own life with respect to the principle of subsidiarity that is absolutely vital. And this also involves the respect of the levels of decision for that sovereignty can be realised on both an individual and a statal plane.

“The essential sense of the State, as a political community, consists in that the society and people composing it are master and sovereign of their own destiny. This sense remains unrealized if, instead of the exercise of power with the moral participation of the society or people, what we see is the imposition of power by a certain group upon all the other members of the society.”⁶

In the light of the same teaching, even the achievements of several centuries of our Euro-Atlantic development, taken for granted so far as democracy, parliamentarism and human rights,⁷ can in themselves be hardly conceived of as anything more than faceless techniques. Or, they are nothing but neutral instruments *in se et per se*, carrying values exclusively through the realisation of their underlying goals.⁸ Yet, if this is the case, they can only be universal (or universalised) as abstract potentialities, for exclusively the depth of how they actually fill their roles under *hic et nunc* given conditions may qualify their concrete materialisation eventually good, beneficial or exemplary. Whether our duty is to operate or develop (by deepening or extending or reconsidering) them, as may be required at a given time, we must not forget that they are only justifiable to the extent they encourage the development of the person directly or indirectly.⁹

¹ Pope Paul VI in *Ecclesia in America* (January 22, 1999), 20, quoted by Diarmuid Martin ‘Globalization in the Social Teaching of the Church’ in *The Social Dimensions of Globalisation* [Proceedings of the Workshop on Globalisation, 21–22 February 2000] ed. Louis Sabourin (Ex Aedibus Academicis in Civitate Vaticana: MM), p. 86 [Pontificiae Academiae Scientiarum Socialium, Miscellanea 2].

² *Ibid.*

³ *Redemptor hominis*, 17d.

⁴ Joseph Ratzinger *Crises of Law* [the Cardinal’s address as an honorary doctor to the Faculty of Law of LUMSA (Rome, 10 November, 1999)] [www.zenit.org/english/archive/documents/crises-of-law.html].

⁵ ‘Address of the Holy Father’ in *Globalization*, p. 29. As an American author – Thomas L. Friedman *The Lexus and the Olive Tree* [New York: Farrar, Straus & Giroux 1999] rev. ed. (2000), p. 302, quoted by Mary Ann Glendon ‘Meeting the Challenges of Globalization’ in *ibid.*, p. 338–continues, “You cannot build an emerging society [...] if you are simultaneously destroying the cultural foundations that cement your society and give it the self-confidence and cohesion to interact properly with the world [...]. For without a sustainable culture there is no sustainable community and without a sustainable community there is no sustainable globalization.”

⁶ *Redemptor Hominis*.

⁷ Cf., e.g., Giorgio Filibeck *Human Rights in the Teaching of the Church From John XXIII to John Paul II* (Vatican City: Libreria Editrice Vaticana 1994) 494 p. [Pontifical Council for Justice and Peace / International Federation of Catholic Universities] and *Human Rights and the Pastoral Mission of the Church* (World Congress on the Pastoral Promotion of Human Rights, Rome, July 1998) (Rome 2000) 80 pp.

⁸ See, e.g., *Democracy Some Acute Questions* [The Proceedings of the Fourth Plenary Session of the Pontifical Academy of Social Sciences, 22–25 April 1998] ed. Hans F. Zacher (Vatican City 1999) [Pontificiae Academiae Scientiarum Socialium Acta 4] and *Democracy Reality and Responsibility* (note 10) 450 pp.

⁹ Cf. Csaba Varga ‘Jogállamiság – kihívások keresztútján’ [Rule of law – at the crossroads of challenges] *Valóság* XLV (April 2002) 4, pp. 28–39.

We have to be aware of the fact that these do not prevail by themselves as parts of nature or as entities, destined from the beginning to share or shape humans' lives. For instance,

"Democracy, as an idea as well as a practice, does not come by itself; it is neither an intellectual evidence nor a spontaneous behavior. On the contrary [...]."¹

Well, these are artificial human constructions,² skills developed through the constantly controlled experience accumulated through generations,³ sustained and substantiated by the unceasing human effort at socialisation, re-generation and re-conventionalisation.

Examining the lessons drawn from anthropology in the perspective of the history of philosophy,⁴ we may arrive at a reconstruction according to which the person (including his personality and individuality) can only develop in human history as conditioned by forms of association that are indispensable for the biological as well as the social reproduction of humankind, known – in want of better identification of types – as the family as well as the nation. Person, his/her family and nation: these are the basic constituents to be taken as axiomatic foundations, successively building upon one another as balanced in their mutual preconditioning and support. Therefore, no external limitation (even in the name of such usually absolutised human values as freedom and self-determination) can be imposed upon and to the detriment of any of them. In consequence, any other specifically human value is thus reflexive upon and instrumental to them – in function of the optimum development of the person and his/her family and nation.⁵

Obviously, family and nation, as media of reproduction, are instrumental for the person to develop with dignity realised. Human rights, fundamental freedoms as well as the legal values of freedom and self-determination are instrumental to the former.⁶ Finally, the values of legal formalism such as legal security, equality before the law or the law's foreseeability are instrumental as merely formal mediatory values to all the above foundational values.

Thus, the purport of institutional operation is necessarily more than the destiny of itself; therefore, it cannot be controlled, qualified or justified merely by reference to and in terms of its institutional constitution. The observance of a set of rules defining institutional operation in its formalised homogeneity is only sufficient for the operation in question to be qualified as complying with its own rules but not for anything more. No doubt, institutions are expected to operate regularly, however, certainly they have not been established for the very reason to be regular for their own sake (so to say, in a *l'art pour l'art* way). On the whole, something far more is at stake here than the one suggested by "the doctrine of the supremacy of the greater number, and that all right and all duty reside in the majority".⁷ For "The imperium of truth is not and cannot be democratic."⁸ The institution points beyond its own self. "Democracy does not itself introduce values, nor does democracy itself produce values. It mediates between values."⁹ The institution is intermediary in assisting to implement imported values in their respective professional homogenised fields.

¹ René Rémond 'Democracy in Western Europe' in *Democracy* [Proceedings of the Workshop, 12–13 December 1996] ed. Hans F. Zacher (Ec Aidubvs Academicis in Civitate Vaticana: MCMXCVIII), p. 52 [Pontificiae Academiae Scientiarum Socialium, Miscellanea 1].

² For the first application of the term, see Georg Klaus *Einführung in die formale Logik* (Berlin[-East]: Deutsche Verlag der Wissenschaften 1959).

³ The Pope himself refers in his message to the 4th plenary session of the Vatican's Academy of Social Sciences convened in 1998 to discuss *Democracy Some Acute Questions* (note 19)–'Address of the Holy Father', p. 26–to *Centesimus annus* (May 1, 1991), 43, in terms of which "The Church has no models to present; models that are real and truly effective can only arise within the framework of different historical situations, through the efforts of all those who responsibly confront concrete problems in all their social, economic, political and cultural aspects, as these interact with one another."

⁴ Cf. János Goják 'Az európai értékrend antropológiai alapjai' [The anthropological foundations of the European order of values] [lecture delivered at the international Conference organised in Budapest on March 7, 2003 by the Committee 'Justitia et Pax' of the Hungarian Bishops' Conference on *European values and the European Constitution in Making*]. Cf. also *Laborem excersens* (14 September, 1981), 10, 6d and 3b.

⁵ Cf. Csaba Varga 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' [Man, elevating himself? Dilemmas of rationalism in our age] in *Sodródó emberiség* [Mankind adrift: on the work of Nándor Várkonyi »The Fifth Man«] ed. Katalin Mezey (Budapest: Széphalom 2000), pp. 61–93.

⁶ One of the reasons why the Emeritus Professor of Demography at the Catholic University of Leuven, MICHAEL SCHOOLYANS considers the decisive influence on global planning by New Age's secular ideologists under the United Nations' aegis even more threatening than the classical revolutionism of one-time MARXists, because the former, running against the spirit of the Universal Declaration of Human Rights (1948), make the fate of the world and, in it, also of the unalienable dignity of the human person a mere function of a series of majoritarian decisions taken by unequal parties, in order to impose their will on other nations as a kind of world-government, to the detriment of the principle of subsidiarity. See, e.g., 'Globalization's Dark Side' *Inside the Vatican* (October 2001), and – as an archiepiscopal stand – Elden F. Curtiss 'United Nations Population Management' *Social Justice Review* (May–June 2002), as well as a number of similar views in <http://perso-infonie.be/le.feuv/ms>.

⁷ XIII Leo *Libertas Praestantissimum* (June 20, 1888).

⁸ Habib C. Malik 'Democracy and Religious Communities: The Riddle of Pluralism' in *Democracy Reality and Responsibility*, p. 372.

⁹ Hans F. Zacher 'Democracy: Common Questions' in *Democracy*, p. 134.

Thus, institutional existence cannot be taken as an in itself sufficient totality. Its homogenised operation is only intended to maximise its instrumental efficiency. However, there is a price to be paid for this. For the institution as such will be dependent on external factors and, if getting into improper hands or into the attraction of improper intentions, it may become exposed to whatever kind of uncontrollable powers. This is the underlying reason why the social teaching of the Catholic Church has to emphasise in describing the interrelation between large systems that

“if there is no ultimate truth to guide and direct political activity, then ideas and convictions can easily be manipulated for reasons of power. As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism.”¹

Consequently, the human person with his own personal faith, conscience, values and conviction shall not be neglected. Likewise, personal responsibility with the ethos of moral commitment and the predisposition for re-consideration (adaptation and response to new challenges) any time when needed is part of the scheme.²

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Approaching legal dilemmas with such a sensitivity, what we can see is that due to the inherent polarity arising from the law's formalism, the development of legal thought (both in judicial practice and scholarship) often takes place through generating (positing) in themselves utterly artificial antithetical concepts which may then abruptly switch over into one another. The conflicts, for instance, of SHAMMAL and HILLEL in classical Jewish law or of the PROCULIANS and the SABINIANS (following LABEO and CAPITO respectively) in Roman law equally illustrate the collision of form and contents with their emphasis on strictness of being tied to the text, on the one hand, and livability with the realisation of the underlying goals in mind, on the other.³ Moreover, listing more examples up to the tragic recent past of 20th-century European history, the controversy between HANS Kelsen and CARL SCHMITT in the Weimar crisis can – apart from their positions being thoroughly twisted under the constraint of conditions – also be construed as the (equally dangerous, if taken as exclusive) alternative of either a purely formal proceduralism justifying any result (maybe destroying even the last chance of national advancement) from the outset or a substantivism calling for a sovereign decision with the expectation of being able to finally reach the underlying goal.⁴ Or, the conditional acceptance of formal requirements, that is, the justification of procedurally defined paths in function of their suitability for achieving the actual purpose (with searching for the mutuality of satisfactory balances instead of the one-sidedness of exclusivities) is all but new recognition in the history of legal thought.⁵ This is what presents the application of any norm in the context of pondering between the goods to

¹ *Centesimus Annus*, 46.

² The following remark emerges in this context: “The principle of democracy excludes that any power—whether it be of rule or of fact—dominates over the others. Yet today democracy is threatened by the hegemony of two powers: that of the media and that of the judges. A reflection is necessary to define the parameters, the limits and the competence of each one.” Rémond, op. cit. in *Democracy* (1998), p. 49. For not even “the role played by the constitutional courts is [...] without its problems. Their democratic legitimation is as a rule less obvious than the democratic legitimation of parliament [...]. It depends very largely on the credibility with which the constitutional courts base their decisions on the constitution, if decisions with which they oppose the authority of the legislature or indeed of the government are not to imperil democracy or the constitutional court itself.” Zacher, op. cit. in *ibid.*, p. 127.

³ See, above all, Chaïm Perelman ‘Legal Ontology and Legal Reasoning’ *Israel Law Review* 16 (1981) 3, pp. 356–367 and Peter Stein ‘Logic and Experience in Roman and Common Law’ *Boston University Law Review* 59 (1979) 3, pp. 433–451, reprinted in *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 pp. [The International Library of Essays in Law & Legal Theory, Legal Cultures 1], pp. 363 et seq. et 333 et seq., respectively.

⁴ Cf., from the author, ‘Change of Paradigms in Legal Reconstruction (Carl Schmitt and the Temptation to Finally Reach a Synthesis)’ in *Liber Amicorum in Honor to Professor Jes Bjarup* ed. Peter Wahlgren & Mauro Zamboni (Stockholm: Almqvist & Wiksell 2004) [in preparation].

⁵ The mutuality of balances: this is what the Lithuanian scholarship [Alfonsas Vaišvila *Teisinės valstybės koncepcija lietuvoje* [The Lithuanian approach to rule of law] (Vilnius: Litimo 2000) 647 pp.], critical about the present direction of transition to rule of law, is looking for nowadays both in the assumption of social solidarity and – as to be expressed also in the law's technicised homogeneity – in the balance of rights and obligations. Cf., as the author's review essay on it, ‘Rule of Law between the Scylla of Patterns and the Charybdis of Realisations (The Experience of Lithuania)’ *Rechtstheorie* 35 (2004) [in press].

The papal instructions are quite clear on this issue too. “For each of these rights, there is a corresponding duty, and We proclaim the duties with equal force and clarity – Pope Paul VI told on April 11, 1976 [Message of the Holy Father for the 1976 World Social Communications Day] –, for to give the rights predominance over the duties would be to provoke an imbalance, which would be reflected in a damaging way in social life. It must be remembered that the reciprocity between rights and duties is an essential thing; the one springs from the other, and vice versa.” “Every individual has the obligation – Pope John Paul II went on on December 2, 1978 [Message for the 30th anniversary of the Universal Declaration of Human Rights] – to exercise his basic rights in a responsible and ethically justified manner.”

be protected and the goals to be achieved, just as JESUS CHRIST did, when He declared, as against the Pharisean interpretation of the Sabbath's law: "So it is lawful to do good on the sabbath".¹

The dramatic self-transcendence by GUSTAV RADBRUCH – who had to realise on the ruins of the Third Reich that his earlier dedication to security in law might destruct the basic need of justice, moreover, it might also leave the damages caused by the facts of crying injustice both unremedied and unremediable in the law² – served as an empirical proof for him and for us all that any one-sidedness (no matter how eternal and guaranteed the human principles involved seem) may have a destructive impact upon law. The solution is obviously not just stumbling about between the extremes but pondering upon the ancient Roman wisdom. Namely, conceiving of law as both craftsmanship and arts, i.e., 'a r s' in Latin, presents law in a state of equilibrium from the very beginning, in which both the questions of "wherefrom?" and "along what standards?" to start reasoning as well as those of "where to?" and "arriving at what result?" to channel reasoning are of complementary and equal importance.³ After all, reasoning started from somewhere has to be channelled in a considered and continuously re-considered perspective.

In fact, the consciousness of the genuine purport of legal technique in law may help us to achieve that such a continuous meditation, pondering and balancing on and amongst various aspects, values and interests with the subordination of all kinds of institutional operation (and their inherent strive for alienation) to the service of the cause of the person, his family and nation as a community home will be increasingly realised in everyday practice.



Tikslai ir priemonės teisėje

Prof. dr. Csaba Varga
Vengrija

SANTRAUKA

Straipsnyje gvildenama teisės teorinės rekonstrukcijos požiūriu aktuali tema: tikslų (vertybių) ir priemonių (teisinių instrumentų) santykio problema. Straipsnyje siekiama parodyti, kad teisė, disponuodama savo metodais, įrodomosiomis ir procedūrinėmis priemonėmis, pati šių instrumentų nekontroliuoja. Šių instrumentų naudojimas ir teigiamais, ir neigiamais sumetimais ima priklausyti nuo žmogaus. Straipsnyje teigiama, kad teisės funkcijų tokiu atveju galima vertinti pagal tai, kokiais principais ir vertybėmis vadovaujasi teisės subjektas. Teisės subjektas, t. y. žmogus, negali atsisakyti savo savasties, t. y. tapti daiktų, ekonominių sistemų vergu, todėl demokratijos institutai ir globalizacijos procesai savaimė nėra nei geri, nei blogi. Svarbu tai, kaip žmogus su jais sąveikauja, ar nėra jų pavergiamas.

¹ Matthew 12:12 in *The New American Bible* [http://www.vatican.va/archive/ENG0839/_PVL.HTM]. Cf. also Peter Noll *Jesus und das Gesetz* Rechtliche Analyse der Normenkritik in der Lehre Jesu (Tübingen: Mohr 1968), p. 11. [Sammlung gemeinverständlicher Vorträge und Schriften aus dem Gebiet der Theologie und Religionsgeschichte 253].

² Cf. Gustav Radbruch 'Gesetzliches Unrecht und übergesetzliches Recht' *Süddeutsche Juristen-Zeitung* (1946), No. 5. For the theoretical background, see Zoltán Péteri 'Gustav Radbruch und einige Fragen der relativistischen Rechtsphilosophie' *Acta Juridica Academiae Scientiarum Hungaricae* II (1960) 1–2, pp. 113–160. For a present-day re-consideration, cf., e.g., B. Schumacher *Rezeption und Kritik der Radbruchschen Formel* [Diss.] (Göttingen 1985); W. Ott 'Die Radbruch'sche Formel: Pro und Contra' *Zeitschrift für Schweizerisches Recht* 107 (1988), pp. 335 et seq.; Arthur Kaufmann 'Die Radbruchsche Formel vom gesetzlichen Unrecht und vom übergesetzlichen Recht in der Diskussion um das im Namen der DDR begangene Unrecht' *Neue Juristische Wochenschrift* 48 (1995), pp. 81 et seq.; H. Dreier 'Die Radbruchsche Formel – Erkenntnis oder Bekenntnis' in *Staatsrecht in Theorie und Praxis* Festschrift für Robert Walter, hrsg. H. Mayer (Wien: Manz 1991), pp. 120 et seq.; Stefan Talmon 'The Radbruch Formula: Legal Injustice and Supra-legal Justice' *ELSA Law Review* II (Winter 1991) 1, pp. 17–30; Stanley L. Paulson 'Radbruch on Unjust Laws: Competing Earlier and Later Views?' *Oxford Journal of Legal Studies* 15 (1995), pp. 489 et seq.; H. Dreier 'Gustav Radbruch und die Mauerschützen' *Juristenzeitung* (1997), pp. 421 et seq.; Robert Alexy 'A Defence of Radbruch's Formula' in *Recrafting the Rule of Law The Limits of Legal Order*, ed. David Dyzenhaus (Oxford & Portland [Oregon]: Hart 1999), pp. 15–39. Cf. also Rudolf Geiger 'The German Border Guard Cases and International Human Rights' *European Journal of International Law* 9 (1998), pp. 540–549, especially para B.2, pp. 544–545.

³ Cf., from the author, 'Technique and Doctrine in Law' in *Festschrift an Lothar Philipps* hrsg. Bernd Schünemann, Frau Tinnefeld, Roland Wittmann (Berlin: Berliner Wissenschaftsverlag 2004).