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# REFLECTIONS ON VALUES IN LAW

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**Suzana Medar**

Niš

**Abstract**. *The task of axiology of law is at least twofold: establishment of a value of law as a particular phenomenon, of social order, in fact, on the one hand, and establishment of legal values, values produced by law, in fact, on the other hand. Connectivity of values, that is, of sense of law to the sense of life at all may be established by deductive and inductive methods, respectively. Metaphysical opinion asks for giving sense only in general principles, so that it draws a conclusion on the value of law from the value of the whole human existence, or, even further, from the whole world. By induction, the source of sense is found out in parts, individual forms of human existence, transferred then from them to the totality. Usually found in the vocabulary of values produced by law are justice, peace, order, security, truth, freedom, human dignity. In addition to these, so-called material values, which point to the fact on how the society should be brought to order and how power and goods should be distributed, there are also specific formal legal values that show what relations among the legal norms in a law system should be. There fall coherency, that is, legality, completeness and determination of legal norms.*

**Key words**: *value of law, legal values, justice, fairness, peace, security, order, human dignity, freedom, truth, legality.*

A hard task, however, has been assigned to us, lawyers: to believe in our life vocation, but, never-theless, at the same time, to doubt it from the bottom of our hearts.

Gustav Radbruch[1]

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[1] For, "only a man of restricted intellect feels himself at any moment as an undoubtedly useful member of human society. Socrates' shoemaker knew what he was living for: he lived to make shoes for Socrates and the others; Socrates only knew that he did not know what he lived for", Gustav Radbruch, Rechtphilosophie, Beograd, 1980, p. 139.

The sense of whatever form of human existence is linked to the sense of life in general, as particular to general. That is also the case with law, as an undoubted form of coexistence of people in the society, established upon the norms of specific kind, namely, upon the legal norms. This does not claim to resolve, probably a barren question, on the priority of importance of relations or norms within law. And, let reminiscence be allowed us only as a digression to that what is more or less a tacit attainment of the overall development of legal and theoretical thought. It is a question of existence of three "basic colours", that is, "pictures" of law – values, norms and relations the presentation of which may be given in a unique "frame" of an integral theory of law or in an appropriate composition made of a greater number of "pictures"[2]. There are three crucial questions: why, how and what for is law? The answer to the first one leads us to the domain of sociology, namely to the province of certain social relations that should be regulated. Explanation of the method, that is, means by means of which that is accomplished can be found in the field of legal normativeness. Finally, as for the question of sense, purpose, objective of law an answer lies in pointing to the corresponding values within a, more or less developed, axiology of law.

Consequently, what is law for? Connectivity to the sense of life in general may be established in two ways, in view of two possible directions of derivation. One of them is deductive conclusion, which draws its judgement on the value of law from the value of the whole human existence, or, even further, from the whole world. Another one is induction, where the source of sense is found in parts, individual forms of human existence, transferred then from them to the totality.

Metaphysical opinion asks for giving sense only in general principles, not in nearness, in concrete human communications. The world is a nonsense, according to it, because it is in such world that a man could not live. Nonsense, that is, a nothing, no matter that nonsense is senseless, void of any sense. There are two assumptions that make grounds for such a view. According to one, sense can be found only in the sources of the world, according to another, sense can be found only in the totality of the world. Its is only from the totality that it refers to a part, that is, parts. It is inconceivable that sense sourcefully appears in parts, even less that it transfers from them to totality.[3] That would, namely, be in contrast to equality established on the nonsense-nonsense relation, because it would mean existence and validity of the senseless totality of the world, the sense-giving of which would be left at the mercy of a multitude of forms of human life and actions.

Proclaiming the two metaphysical assumptions for prejudices is accompanied by moving away a centre of meaningful from the general to individual. The sense of the world is filled from something particular, which is, in addition, according to a definition, both secondary and dependable. Here, according to the contraria contrariis curantur (fight fire with fire) principle, the senseless world is shown to be just the world meaningful for a man. This conclusion requests at least two assumptions too – that senseless is not against the sense, but in itself sensibly indifferent, consequently, open to sense-giving and that

[2] Reductive would, however, be that projection that sheds light only upon one of them and that light which is "too dazzling and makes our eyes shut before other problems, leaving us without a clear insight into the entirety". H.L.A. Hart, The Concept of Law, Podgorica-Cetinje, 1994, p. 37.

[3] See; Nicolai Hartmann, Ästhetik, Beograd, 1979, p. 480.

man is a being gifted for sense-giving.[4] Then, it is just in that way that sense acquires senseless world, for only as such it provides a terrain for sense-giving to man (society). Man would be superfluous in the world that would already without him be filled with sense. In parallel with such view there also appears a possibility of breaking ties between the general and particular in the questions of meaningfulness. Something restricted and individual may be meaningful without referring, at the same tie, at all to some larger totality or principle.[5]

The above, so-called metaphysical problem understands solution to the question on the way of existence of values, of sense and origin of their validity and of their relativeness, that is, absoluteness. Without claiming to resolve this basic axiological problem, we are closer to understanding on interdiction of different classes of values in the supreme and autonomous value of life.[6] All the more so the value of law would make a particular contribution to the attainment of this, that may be designated as "The Good, the survival of the world, that is, the survival of the largest possible number of beings, in their full dignity".[7] It is a general value of law that is in question and by means of which it is, in view of the Good as its objective, closely related with morale. Specific nature of law as a means of survival and growth of society is in that it necessarily needs compulsion, which is a nonvalue in itself because it limits freedom of an individual and directly offends dignity of man. Therefore, understating on the general value of law may only be obtained on the basis of measuring relations between law as a means of survival of society and compulsion as negation of values.[8]

The task of the axiology of law, in addition to establishing *value of law* as a particular phenomenon, social order exactly, on the basis of a corresponding share in the autonomous value of life, is less fundamental, but not less complex, in view of the wealth and versatility of materials, establishment of *legal values*, exactly the value produced by law. Justice is, it seems mostly for etymological reasons, a constant, followed by peace, security, order, human dignity, freedom, truth, legality...

Although it is only one segment of morale, one of ethical virtue, justice is, at the same time, most of them all a legal virtue. Because of that, both its inclusion into a wider class of social values and treatment as a specific legal value is a meaningful thing. Justice is a specific value of social orders, both legal and moral, customary and religious. Justice is a basis of society – Iustitia est fundamentum regnorum, so it is senseless if it contains a social element.[9] It has the most elementary element in law, because it shares a general characteristic of formalism with it.[10] Justice, as a central notion of natural law teaching, shows

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[4] Ibid., p. 481

[5] Ibid. "Thus, any morally good deed, any wise thought, any adequate and valuable answer in the life is in itself sensible and further sense-giving. In itself, it means: that in that way it is senseless because of something else."

[6] "A task of theory on values is to show whish is the utmost, basic aim man should fight for to accomplish his authentic human capabilities ... Formulation of such utmost aim is a basis on the grounds of which the existing systems of positive values is estimated". Milan Životić, Čovek i vrednosti, Beograd, 1969, p. 11.

[7] Radomir Lukić, Sistem filozofije prava, Beograd, 1992, p. 485.

[8] Ibid. p. 448.

[9] See; Djordje Tasić, Uvod u pravne nauke, Enciklopedija prava, Beograd, 1955, p. 262. Justice, sccording to the author "would be nothing else, but a specific form of solidarity"

[10] According to Lukić justice is "the most rude, the most simple and the least noble. Here, material values or at least the goods that may be approximately materially expressed are mostly exchanged, but if they are not

itself as lasting and opportune in the history of legal thought, such as that teaching. Even more, because it may also be made a theme independently of it, within law political considerations on the method and measure (quality and quantity) of attainment of the supposed ideal by positive law.

Reflections on justice can in no way bypass the view of Aristotle since it is a cornerstone in this field. General justice, as respect of laws, is not emptied of any contents, because law takes care of social good. Particular justice, as a part of general justice, refers to something concrete and means establishment of equality. Here, it is "no more a question of that fairness that is measured against positive law, but that fairness against which positive law is measured".[11] At one time, justice attains its motto "Form your judgement on the same cases in the same manner, on those different in different manner" by the method of geometric proportion, another time it does that by the method of arithmetic proportion. A well-known division to distributive and corrective justice is in question. Distributive justice is applied in distributing, so that one gets out of the common goods proportionally to one's merits. The province of application of the corrective, commutative, equalizing justice is exchange or compensation, which means that each of two sides in the mutual relation are granted equal parts. While the principle of distribution of obligations and rights in the public law is attained by the distributive justice, corrective justice breathes life into the principle of exchange of equivalents in obligations and compensation of damage according to its objective value. Distributive justice is the original form of justice, because commutative justice, as justice among the equals supposes an act of distributive justice by means of which participants acquire an equal status, that is, equality.[12]

Reviving memory of Aristotle's view on the substance and kinds of justice, only one indisputable part of understanding it has been marked. Namely, there is complexity, exactly twofoldness in the structure of the idea of justice. Uniform or constant principle of equality is only one layer that may be effective only in co-existence with a certain criterion for establishing relevant similarities and differences. For, on the one hand, in the idea of distributive justice only proportion can be found, but not the way of treating different persons, on the other hand, the commutative justice principle does not tell who shall be treated as equal and who as unequal. Differentiation of two layers, that is, forms of justice requires the corresponding terminological differentiation as well. As a rule, formal and material justice terms are suggested.[13] Formal justice, that is, a formal form of justice, relies on the absolute, logical principle of identity, which in the field of social life imposes a request for equal treatment with equal things, that is, unequal treatment with unequal things, proportionally to their inequality.[14] The material form of justice makes human measure of value by means of which an estimation is made what things are equal, that is, in which proportion they stand each to other for their values. Like relative, that is,

material, they are at least real goods the value of which may precisely be measured." R. Lukić, op. cit., p.265.

[11] G. Radbruch, op. cit., p. 46.

[12] Ibid., p. 47.

[13] "While formal justice represents arithmetic and unchangeable principle of equality of treatment, the notion of material justice contains a social criterion on the value of things and people changeable in space and time". Božidar S. Marković, Pravičnost kao misao i pravno iskustvo, Arhiv za pravne i društvene nauke LII/1937, p. 221.

[14] See Božidar S. Marković, O pozitivnom i pravednom pravu, Zbornik za teoriju prava, Vol. IV, Beograd, 1990, p. 51.

changeable, it brings dynamism into justice, like extremely complex, versatility.[15]

Although often treated as synonyms, differentiation must be made between the notion justice and equity. We are also indebted to Aristotle for this knowledge, according to which equity is a part of justice, specific in respect and adaptation to the characteristics of a concrete case. So concise and picturesque is Radbruch's conclusion: "Equity is justice of an individual case".[16] Consequently, the difference between justice and equity is not material, but methodological. It is wrong to reduce equity to feeling only, because it, like justice too, contains certain ideas and principles to which abstract regulations are harmonized in application.

Values of peace, order and security are nearly a general place in the law literature, but not always with a precisely separated competence.[17] There is least disagreement in view of the value of peace, which is most frequently negatively defined as absence of fight and use of force at all. Monopolization of physical force on the side of social community, that is, state, as a positive determination of peace, points to the fact that it is really possible as a relative category. Peace in a subjective sense, as a will for peaceful agreement among people is also spoken of. [18] In any case, a value indispensable and immanent to law[19] is in question, which, however, must not be a basis for its abstract glorifying.[20] It is an interesting fact that value of peace is also recognized by normativists, considering it the only value that may be a subject of rational knowledge. Thus, Kelsen, within his functional analysis, speaks of social peace and collective security, although only as a "minimum and indirect peace, having instrumental value, since it serves as a prerequisite to attain other ends".[21]

In view of the ontological status of order, as a value of law, there are marked disagreements. On the one hand, there are views according to which order does not designate any special value of law, in addition to peace and security.[22] On the other hand, there is no a unique view, among those who admit specifics of the value of order, on its ontological independence. While, according to some of them, order in itself has a value, according to others, order is not a value in itself, but only in conjunction with other values.[23] However, appearing also with the former is order in convergence with peace and security. Thus, according to Tasić, order in the objective sense is connected with peace, while order in the subjective sense is connected with security.[24] And, indeed, order, as a system of established social relations functioning according to defined social (within that, according to

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[15] According to Marković "it consists of material facts and spiritual states, rational and irrational factors: biological conditions of life, economy, religion, politics, scientific knowledge, ideology, beliefs, mistakes, tradition, organized force and other social forces". Ibid. p. 72. Having arguments or not, a number of writers prefer some factors. Thus, for example, Hart singles out general moral and political attitudes as fundamental. See: H. Hart, op. cit., pp. 200-201.

[16] Ibid. p. 48.

[17] "Expressions 'peace', 'order' and 'security' are regularly used in such a way that we are not sure whether they designate one or more different phenomena". Nikola Visković, Pojam prava, Split, 1981, p. 138.

[18] See: Dj. Tasić, op. cit., p.260.

[19] According to Lukić, peace is a basis and particular value of law, because it originated and exists just to serve peace in a society where there exist sharp conflicts of interest of various kinds. See: R. Lukić, op. cit., p.462.

[20] On axiological rank and humanitarianism of unrest, see: N. Visković, op. cit., p. 140.

[21] Norberto Bobbio, Eseji iz teorije prava, Struktura i funkcija u Kelsenovoj teoriji prava, Split, 1988, p. 119.

[22] See: N. Visković, op. cit., p. 138.

[23] See; R. Lukić, op. cit., p.464.

[24] See: Dj. Tasić, Pravda i red kao principi prava, Izbor rasprava i članaka iz teorije prava, Beograd, 1984, p. 211.

legal as well) rules, is a condition of peace and assumption of security. Although order is not exclusively, even predominantly, legal, but social value, it is best protected by law thanks to its organization and means of force.

The value of security is usually treated as a specific legal value, although its general meaning as a form of human existence is also recognized. Sometimes, it is designated as a supreme legal value that nearly coincides with law itself, because in the objective sense it is nothing other than state of certainty, timely and full application of legal norms in all cases they regulate. Conscience of that objective state, as a reliable conviction that law will be applied, makes subjective facet of security. Like other values of law, security is relative too, in a double meaning of the word. As a means of attaining other legal values, it is conditioned by those other values, first of all, by the corresponding understanding of justice. There is also relativity of legal security of ontological nature, expressed in that that absolute predictability is not possible in any sphere of human activities, even in law. It, as such, after all, is neither desirable, for it would be an obstacle to human activities for the purpose of transforming and improving the existing living conditions.[25] Security is to that extent conditioned by peace and order that there are views according to which it is exhausted within them. Thus, according to Radbruch, security as the first assignment of law, equally approved by all and described by deeper valuable formulas, is reduced to peace and order.[26]

The general knowledgeable value of truth has, in the province of law, not at all popular particularity, because of which specifics of the legal truth can be spoken of. We think, first of all, of establishing authenticity of lawfully relevant facts. In view of widening the field of application of the value of truth to the legal normativeness, we are reserved, because the possibility of "authentic" derivation of legal norms from the existing reality is very debatable. That the legal norms would be effective, it is necessary that they correspond to the realistic social relations, to be, consequently, to some extent, their reflection. But, it is an indisputable fact that this reflection has no quality of truth as a objective, intersubjectively confirmable knowledge, the ideal of which can allegorically be compared with mirror reflections. It should not even have such quality, if it wants to change the existing reality to a defined direction. Characteristic of a legal truth, in the aforementioned restricted sense, as a precise establishment of facts regarding the defined concrete legal relations, consists in that that it is connected with in advance precisely provided procedures, which must strictly be applied. Thus, in addition to a substantial historical move from the formal to the material, it necessarily preserves a certain measure of formality.[27]

There is a material closeness between freedom and human dignity, because human dignity as pride of human self-subsistence is not possible under the conditions of nonfreedom, such as there is no freedom without the feeling of one's own value and dignity.[28]

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[25] See: N. Visković, op. cit., p. 142.

[26] See; G. Radbruch, op. cit., pp. 95, 109. On arguments against this view, see: R. Lukić, op. cit., p. 479.

[27] Because truth for law is only that what has been established within a precisely determined legal procedure, in a precisely determined way "there may also occur a tragedy what nonjurists, common sense people, can hardly understand: the innocently condemned to death go, shocked, to gallows and can in no way understand rationality, social, legal rationality of such law, which is being turned into its pure contradiction. But, it is so and can hardly be avoided", R. Lukić, op. cit., p. 471.

[28] For, a man without that feeling, who neither respects it in others, "cannot be free, since he will rather be inclined to surrender himself to illusory pleasantness of serving or doubtful enjoyments of ruling". Kosta Čavoški, Uvof u pravo I, Osnovni pojmovi i državni oblici, Beograd, 1994, p.71.

However, while human dignity is closer to morale, available to which are more suitable means for its protection, freedom is an ontological supposition of law.[29] The theory of freedom is the most influential in the group of those views that define law in a material way, by determining its objective. Usually taken as a paradigm is Kant's determination of law as regulation of conduct according to which freedom of everybody would go together with the freedom of all. Although law acts as restriction to freedom, because the substance of each norm, even that of law, is in excluding free opinion, its objective is just possible procurement of individual freedom in the society. Freedom is usually determined as an ultimate goal in the individualistic understanding.[30] But, its appearance is possible even in the domain of social. In that case there is a "magnificent connection between a singular individual as a moral person and the interests of society, which is ... nothing else than interests for freedom, invulnerability, dignity of a person".[31] Political and social freedom assumes psychological freedom of will, that is, freedom of choice, not as arbitrariness, but as overwhelming of compulsion of subjective factor over compulsion by means of other opportunities.[32]

There are writers who think that all specific legal values should be divided into material and formal values. The material ones, where all or some of those previously spoken of fall in, show how the society should be regulated and power and goods distributed. Specific formal legal values show, on the other hand, what should the relations between the legal norms and in a legal system be. Included in them are coherency of legal norms, that is, their legality as well as their completeness and determination.[33] At the same time, both of them are necessarily filled with the contents of nonspecific legal values of life, health, ownership, power, education, etc. It is, thus, that these, although nonspecific values, become primary axiological contents of each legal order, since specific legal values are only the means of their regulation. A particular question, to be a topic only in the form of a note, is a question referring to the character of relations among the very specific legal values. That question is particularly expressed in the case of their conflicts that may occur in numerous variants, in view of many relations of their mutual contacts. The most significant is a tension that may occur between justice and other legal values and, first of all, legal security. It is very hard to answer the question what should be given priority, because both fairness and positivism, provided for by the legal security, are substantial for law. In his Philosophy of Law of 1932, Radbruch expressly stands for positive law: "Justice is another great task of law, the most important being legal security, peace and order".[34] In the author's post-war philosophical and law papers, after the temptations in connection with the Nazi criminal laws, relation among values has been switched in favour of justice.[35]

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[29] "When a man would not be free, he would 'behave' as ordinary substance, and law would not have any impact on him, therefore, it would not exist". R. Lukić, op. cit., p. 476.

[30] See: G. Radbruch , op. cit., p. 75.

[31] Ersnt Bloch, Natur-recht und menschliche Würde, Beograd, 1977, p. 147.

[32] Ibid., p.146.

[33] See; N. Visković, op. cit., p. 136.

[34] G. Radbruch, op. cit., p. 109.

[35] "When laws deliberately deny will for justice, when, for example, human rights are arbitrarily approved or refuted to people, then those laws are not effective, then people need not observe them, the lawyers must summon courage to deny their character of law". G. Radbruch, Pet minuta filozofija prava (1945), op. cit., p. 267.

The treatment of values in the theory of law goes from complete excluding from the notion of law and law science, through rejecting only the values criterion of lawfulness to introduction into the notion of law and finally, recognition for the very criterion of lawfulness.[36] It seems that here too, as well as in estimating social phenomena at all, extremes are not acceptable and that the "right measure" is somewhere in the middle. The legal phenomenon on the whole cannot be understood beyond the relations with the valuable attitudes and goals. Because of that it is indispensable that the minimum programming request of the theory of law should be an explanation of the axiological composition of the being of law by means of description of its characteristics connected with the value. An acceptable maximum request must go below taking values, most frequently justice, for the criterion of establishing legal obligation of norms, because it always brings with itself a danger of slavery of law to the ruling political and law ideology. The theory of law is legitimate not only for description, but also for estimation of the legal order on the whole and all of its elements from the specific legal values point of view. Delicacy of such engaged, exactly critical assignment, is expressed in the responsibility for one's own view, which understands request for objectivism and balanced scientific approach.

## REFLEKSIJE O VREDNOSTIMA U PRAVU

**Suzana Medar**

*Zadatak aksiologije prava je barem dvostruk: s jedne strane utvrđivanje vrednosti prava kao osobene pojave, upravo društvenog poretka, s druge strane utvrđivanje pravnih vrednosti, upravo vrednosti koje pravo ostvaruje. Povezanost vrednosti, odnosno smisla prava sa smislom života uopšte može se uspostaviti deduktivnim i induktivnim putem. Metafizičko mišljenje traži osmišljavanje samo u opštim principima, te i sud o vrednosti prva izvlači iz vrednosti celine ljudske egzistencije, ili još dalje, celine sveta. Indukcijom se izvorište smisla pronalazi u delovima, pojedinačnim oblicima ljudske egzistencije, pa se sa njih prenosi na celinu. U vokabularu vrednosti koje pravo ostvaruje uobičajeno se nalaze pravda i pravičnost, mir, red, sigurnost, istina, sloboda ljudsko dostojanstvo. Pored ovih, tzv. materijalnih vrednosti, koje upućuju na to kako treba urediti društvo i raspodeliti moć i dobra, postoje i specifične formalne pravne vrednosti koje pokazuju kakve treba da budu relacije između pravnih normi u pravnom sistemu. Tu spadaju koherentnost, odnosno zakonitost, potpunost i određenost pravnih normi.*

**Ključne reči**: *vrednost prava, pravne vrednosti, pravda, pravičnost, mir, sigurnost, red, ljudsko dostojanstvo, sloboda, istina, zakonitost.*

[36] On the six types of attitudes of the law science in view of the relations valueable and theological contents of legal experience and the notion of law, see: N. Visksović, op. cit., pp. 110-124.