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INSTRUMENTALITY IN THINKING ABOUT LAW (A SKETCH OF THE PROBLEM)

Abstract. The paper highlights the significance of instrumentality in law by emphasizing its inherent nature and transformative potential. Instrumentality is portrayed as a fundamental aspect of law, suggesting that law naturally tends to become an instrument. This characteristic allows law to adapt and respond to various social and legal needs, making it a dynamic and evolving entity. The paper questions the possibility of maintaining non-instrumentality in law, implying that the instrumental nature of law is essential for its function and relevance in society.

Keywords: law, instrumentality, non-instrumentality, cognition of law, analytical studies, real legal problems

INSTRUMENTALNOŚĆ W MYŚLENIU O PRAWIE (ZARYS PROBLEMU)

Streszczenie. W artykule podkreślono znaczenie instrumentalności w prawie, zwracając uwagę na jej nieodłączny charakter i potencjał transformacyjny. Instrumentalność jest przedstawiana jako fundamentalny aspekt prawa, co sugeruje, że prawo w naturalny sposób ma tendencję do stawania się instrumentem. Ta cecha pozwala prawu dostosowywać się i reagować na różne potrzeby społeczne i prawne, co czyni je dynamicznym i ewoluującym podmiotem. W artykule podano w wątpliwość możliwość utrzymania nieinstrumentalności w prawie, sugerując, że instrumentalny charakter prawa jest niezbędny dla jego funkcji i znaczenia w społeczeństwie.

Słowa kluczowe: prawo, instrumentalność, nieinstrumentalność, poznanie prawa, studia analityczne, realne problemy prawne

1. I believe that the issue of the instrumentality of law can be considered as fundamental, especially if we could cognitively reconstruct the stopping point at the boundary, and within this stopping point, between instrumentality and non-instrumentality, if non-instrumentality is indeed consistently possible in law.

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This is not about descriptively presenting something as an instrument or simply naming it so in the introduction to legal studies. The doctrine recognizes many such cases, yet little can be drawn from this prospectively. To fundamentally free ourselves from them, let us instead try to perceive and create instrumentality secondarily in the dependencies of the examined reality or in the expressed views.

It seems that this instrumentality is seen as something dependent on law, which does not always mean that it is primarily legal. On the other hand, it is something wholly produced within law and for law without delving into primacy. Finally, it is something generated because of the verticality of law regarding its essence. And there is no end to this. For law, in its expressed characteristics, posseses the ability to be reduced to instrumentality. It requires numerous facilitations in this regard. Could this influence its understanding and functions? It is not the aim of the paper to reflect on how this instrumentality is used. We do not want to achieve only a significant impact on the scope of the functions of law in quantitative terms, which limits the problem that law itself in its study becomes significant and more organized. It is not about further divisions but about clarifying the essence of law in its need to be law. This need presupposes a different kind of philosophy than law, as it is presented through known definitions or other used terms.

We know that law has numerous complexities, partly because it is everywhere, also with vague boundaries of occurrence, especially in terms of subject matter, which plays a fundamental role in instrumentality or conventionality. It may also appear in various complex issues, often repeated, thus generally becoming simple. For the considerations in understanding law, it would be beneficial to establish trends between the complex and the simple or vice versa. Naturally, the multitude of entanglements corresponds to the multitude of interpretations with various qualifications and invented so-called tools. Meanwhile, it seems most important for this to determine whether it is easy, applying the principles of the classification of ease, or whether it opens inventiveness to law. This issue borders on the creation of an interpretative theory, which does not yet exist, and thus there is also no developed theory of law, or developed law at all. Today's interpretation is a kind of sealed law. We have many conceptual and terminological resources. Moreover, we are ready to announce every new term even in exaltation, sometimes forgetting its placement within legal thought. This often happens due to the failure to recognize the sphere of the emergence of more instrumental law than that created in appropriate procedures. It is uncertain how these multitudes relate to each other, moreover, how their generation proceeds against their backdrop, as we have few research solutions concerning them and few deepened relations, but a lot of repetition in discussing (describing) their very elements. On these occasions, the question might arise: what in legal-theoretical statements corrupts law in the course of its implementation, especially since we do not always deal with direct pursuit? It is precisely the elements and relations in the context of instrumentality that constitute the focus of this analysis.

2. It is not about the fact that laws are sometimes specially named, often becoming slogans rather than emphasizing their theoretical distinctiveness, which for this reason, because of said distinctiveness, gives more weight to the complexity of their emergence than to the fact that they simply exist. There seem to be many issues here, certain methodological injunctions that are more instrumentally directed to the aforementioned emergence as instrumental distinctiveness than related to naturalness.

We believe that the answer to these questions, if it were to be for the law, its entirety should be taken into account: firstly, the law in the plane of sublimation with thought about itself, because this is the case when we refer to it even immediately after legislative activity. It then meets with ennoblement, e.g. proper beginnings, passing through our thoughts born in the need for law, or that its significance is also extra-legal. Well, in times of need, it must be used instrumentally, but with sublimity. Secondly, after the permissible expression of the law in sublimation, which after all goes towards instrumentalization, is also the instrumentalization in of itself, we nevertheless obtain a new version of the law. After all, it is one thing to focus on instrumentality as a product, and another thing to focus on the processes (activities) of arriving at it from the beginning. This separation is fruitful, because the very reflection on origins is generally preceded by the need to conceptualize the existence of law, i.e. instrumental law and natural law. So there it is. It is born, after it has been issued, in versions of e.g. judicial law, or in the pursuit of justice, also in the aspirations of the Ombudsmen, demonstrations, etc. In the understanding of non-legal values, these are also the extra-legal values of rights as something different from superiority, but nevertheless basic (fundamental), especially on a social scale. Therefore, sublimation is not accidental here, but with its instruments enters between the two, creating, perhaps, a new version of the law with its greatness and its superiority. How they are generically legal remains unanswered.

3. As if it naturally coincides with interpretation, learning to understand the law is also important, however, it is more borrowed, less original. Understanding, though not free from sublimation, has only as much of it as needed for a complete interpretation. After all, interpretation is dictated by the need to reproduce in the legal text its meaning in cases, and not in theory. That is, as for the scope, it is one-sided and still does not open. What is more, we also have *the principle of clara non sunt interpretanda*, i.e. a situation that excludes the admissibility of interpretation. Indeed, the interpretation is instrumental, but via a clearly defined need. Meanwhile, sublimation with the ennoblement of law presupposes social aspirations through law, so it is something that is not free from instrumentality. Of course, granting the law instrumentality without sublimation will even become harmful to it and for this reason is unacceptable. Sublimation, in itself, is the effect of its proper instrumentality, simply even instrumentality *per se*, and

the lawyer is supposed to transfer it to the law, not taking anything away from it, but only developing, for the chosen and at the same time the admissible model of law, so that it becomes a pursuit of values (Zirk-Sadowski, Bekrycht 2017, 5; Pietrzykowski 2017, 46–68) of human need and of its other subjects. This is where the fundamentality of law is supposed to be and develop (Nowak 1966, 29). Therefore, the relationship between it and the ethics mentioned here, in clear reference to sublimation as something categorical in law, the empirical nature of law, etc., does not make instrumentality a pursuit of another definition, but a search for (in reconstruction) the assumptions of the study of law's depth in its problematic complexities.

Yes, problematic in not what the law says or does but in how they are used, the significance of which depends not so much on the citation of the law itself, but rather perceiving the consequences of it, especially as developed through momentous issues. It seems that instrumentality, if it is to be different from naturalness, even if it is understood in any way, which is not simple and definitive, includes the depth of thinking about law, that is, the depth of law. Secondly, it seems to be important for law to distinguish between this naturality of the law and this depth of thinking about the law, which could mean establishing the existence of a boundary between them, focusing on the issue of instrumentality. This is because, we think, it can be said that it is common to say with regards to law that: something always borders on something else, and this borderline is sufficient when it is enforced, but by introducing that border in the first place it comes into question all the elements that it is bordered against.

From this distinction, indeed following in its footsteps, one can propose connections and differences among these that determine how both thinking about law as well as how law is formed are developed, and not that law is always made ready-to-use.

4. On the way to identifying instrumentality in the law and how it connects to the law, let us make a reservation that in the instruments found in the law or reproduced from laws, in addition to versions of the law elementary distinguished according to their binding force (higher or lower), we also have "greater laws" that are not only great because they are binding but also because of their historical value, and are therefore historically great. Their example, it seems that indisputably, is the Magna Carta. On this occasion, the question of whether it is formally binding becomes unnecessary (Jabłońska-Bonca 1995). Would it be better if it was in force? After all, the differences between these questions seem to be momentous. While the validity of law is a matter of the existence of evidence rather than essence, this issue is related to the fact that it a matter of instrumentality also in the sense of allowing certain questions in the discourse to be existentially important, while ignoring others, of course under the conditions of what assumptions are adopted.

Whether a great law can also be an exemplification of the great questions in the law still remains unanswered. Undoubtedly, they are suitable starting points for searching for great questions in the law as the basis for the development of legal theory. However, this cannot be done without a thorough examination of the question of whether law is a science. Perhaps a good starting point would be to abandon the attempt to propose a definition or to even consider it in a legal context as something extraordinary, that is, from outside the legal aspect, through research. This is certainly conducive to searching for the construction of the theory of law's beginnings because this construction does not yet exist, at least in the intellectual judgement of what is the law, because such a construction sinks into the social consciousness of great laws' greatness to the point where writing about the greatness of a constitution becomes superficial. Law, thanks to its mechanism, always updates itself both upwards and downwards, increasing in sophistication, becoming something more. And although this is simple and familiar in a lawyer's experience, at least two spheres of law can be distinguished: one with a tendency to actualize itself quantitatively, that is, by appropriating large numbers of sources and another where this appropriation of sources, though distinct, is directed toward instrumentality – for these spheres themselves, though arranged in an order of magnitude, do not always measure themselves strictly as higher or lower.

5. These spheres are acknowledged, in their proper context, as fitting within legal reasoning Law is law, and instruments are instruments. This statement is valid, yet it seems that because neither concept is sufficiently elaborated, they are perceived as both inseparable and distinct. It's just so. Nor can this be rejected, since in certain cases the use of adjectival forms is linguistically necessary. And taking this into account, we make it easier for ourselves to instrumentalize the internal point of view of the law. This point seems to be of greater importance here than in ordinary (natural) cases, because a certain relationship, at least in law, between the natural and instrumental system of successive consequences has not yet been developed. It seems that another issue of emergence arises here, which is much more strongly born in the direction of the instrumental. Its exploration would be of fundamental importance here for the problem we are interested in. Of course, these instrumentalities exist within the law and arise from it, yet they do so through our reflection and the principles, rules, and the like that accompany it. But we must not conflate them with the law itself, for then the law becomes all-encompassing, even in substance, and its differences are submerged within it. We hold that in reflecting on instrumentality, the differences mentioned above become apparent, and therefore it is necessary to make use of them. It is impossible to conceive of instrumentality in law otherwise than in terms of plurality. Thus, we must consider law both as a whole and in the plurality of its differences, assuming that it is then necessary to take into account the relations between those differences. After all, it is from these that one can reconstruct the problems

arising from the complexity of legal matters. It seems that this complexity requires distinct assumptions, methodologically different in character: when we consider law in terms of its entirety, that is its formative whole, and when we reflect on it in terms of differences. Then, bringing together the results of both, any statement about law as a whole may require certain assumptions, for example concerning the correspondence between them. Here it is not sufficient merely to say that there is an applied law and a prior law.

6. After all, these are descriptive approaches. And from a certain point of view, they are necessary, but if they stop there, because of this stopping, they become closed at once, as they do now. This does not mean they are wrong, but rather that they are sufficient only in acknowledging the admissibility of differences, which – without proper treatment of the relations between them – remain fundamentally non-developmental, that is, reduced merely to naming or identifying the difference.

And this is no longer a matter of description. Here arises the problem of assigning significance to differences, and with it the possibility of proposing correspondingly distinct assumptions. And differences must give a new word. They cannot but be used for something more than the mere belief that this and that are also being descriptively expressed. Indeed, even in such a simple way, the differences once expressed lend themselves to a new and rather simple use: namely, to think and speak about law in terms of differences. Methodologically, this opens the possibility of unfolding law into an unprecedented plurality, while preserving its established hierarchy. It suffices to note that there are constitutions of a more fundamental character and others that do not extend beyond the supremacy assigned to them. From this one may derive differences in their respective "powers," not to mention how such distinctions shape the social perception of law, especially in relation to courts or Constitutional Tribunals. Because instrumentality is a matter not only of the law itself and the variety of approaches to it, but also of the variety of contexts in which it can appear as a ready-made creation. That is, taking all this into account, and recognizing at the same time the impossibility of proposing any definite order among the instrumentalities, one may say that they can be grasped as a whole externally related to law. In this sense, law is characterized by instrumentality as its basic feature. Adhering to the notion of a law, as in the case of the "Great Law," it appears that as a higher law it has the peculiarity of being not only supreme but also explanatory. Constitutions, though they possess the highest legal force and the consequent authority of those who govern, likewise possess an explanatory power. One could dispute which of these powers is greater, depending on the criteria: whether in the final analysis we remain within its explanatory function or its hierarchical force. This may also depend on who makes the claim – whether society itself, in its various communities, or the authorities.

7. Thus, we enter the complexity of instrumentality, which is not only structural. By adhering to this and referring to the law, instrumentality can be distinguished, and this in turn can be led to a different nature of the law, if we assume that its nature is to be instrumental. This leads to the question: do we here possess the advantage of naturalness? And this is again fundamental for the inquiry into the meaning of non-instrumental law. Such a claim confers a certain dimension upon law, but first we must distinguish law in the narrative of its sources from law in the narrative of its instrumental plurality. Even a thorough orientation to the law may depend on the depth of this difference, especially after adopting appropriate research assumptions. However, research assumptions can be difficult in their complexity and variation, leading to levels of law close to instrumentality or, on the contrary, less varied and less complex, announcing the achievement of generally simple issues also freed from instrumentality. When we ask about the source, we are satisfied with the fact that the law exists, placing it in the appropriate range of the hierarchical structure. The related area of knowledge is generally simple, most often expressed in statements. This knowledge is simple, because it is both preliminary and sufficient as such. By contrast, when we enter into instrumental plurality, we can rarely avoid accounting for complexity – inspired first by this plurality and then often by the ambiguity of the instrument itself. Interpretation, however, should encompass the final diagnosis. Although it does not directly serve the narrative of the source, its enactment is intended to embody the final result. For this reason, it should not be taken as proof of complexity. Complexity is to be concerned with determining the meaning of a given provision that is unclear, or the state of instrumentality occurring in a certain context. Probably everything. Nevertheless, the context seems to be significant. It is a matter of assumptions: first, assumptions established at the outset as the starting point for the entire interpretation; and second, assumptions for determining the relationship between the envisaged instrument and its dependencies within the provision under consideration.

8. Of course, this does not exhaust interpretation, which after all has a huge literature and at least thematic diversity. On the other hand, when it comes to making an instrument out of law, its interpretation, although it still remains from the internal point of view (Kaczor 2007), goes upwards, because the meaning combined with the performance is important for it in general. This performance, in turn, is first connected with instrumentality, its determination, and being a forerunner in itself, it leads not so much to meaning, because it is fulfilled in the space from the rule, but to the ultimacy related to the final result of the legal norm that is supposed to satisfy it. Therefore, the transition between the regulation and this norm is complex. Because it is not the case, at least not always, that we go directly from the recipe to the finished product, which is supposed to be the norm. If law contains instruments – and it does, for example in the move from

provision to norm, which is itself instrumental – then we should try to distinguish law, as a creation of generally accepted interpretation, from the sphere of what is instrumentally significant yet separate. Of course, this can be combined into one norm, but in practice we make it two and possibly three or more, e.g. in the case of general clauses, unless we take the first one as the final result of interpretation. What follows from this? It seems that first law is stratified within the legal norm, and then within law as a whole, naturally beginning from that norm. The stratification itself is not only a technical procedure, but one that leads to a different appearance of obligation with the possibility of building separate categories out of it. This could connect the legal norm not only to the very basis of individual adjudication, but also to the ability to employ obligation in combination with the normativity of the law (Zirk-Sadowski 2001, 85). And although we understand them separately, we make little cognitive use of this understanding. After all, norms derived from a legal norm may point to the whole, but they prepare it as something complex – for instance, by distinguishing relationships between norms, not simply in terms of their existence (which is given), but in terms of the variety of states of obligation. Exactly – and these states are more important here than stressing the elements as necessary for constructing a legal norm. For construction does not create obligations; it is rather a matter of order, a necessary sign of their occurrence, always within certain limits. Thus, one can speak of a norm as rules within a rule (norms within a norm), especially when it contains instrumentalities marked by separate obligations. This gives rise to an orientation toward the complexity of law, a complexity that would go unnoticed if the norm were always regarded solely as the final result of interpretation.

9. Interpretation can also be considered, as has been mentioned many times, in order to determine its significance in solving a legal issue; let us add that in legal practice. From this it follows that the instrumental approach contained in interpretation is revealed in the language employed there. Here, we are often dealing with the use of observational terms or sentences that can be transformed into observational material, which is also indispensable for an observational decision. It's even simple to do so. After all, this is what every court does. Nevertheless, one thing is to disclose a given procedure of interpretation in a language easily translated into the structures of judicial conduct as required, and another is to relate this conduct to law – not in terms of compliance (for that is assumed), but in terms of instrumentality, as translated into the values of law. That is, the relationship between these values and this instrumentality, leading to contextual rather than observational sentences. While the latter are relatively easily exhausted, the former have the ability to reappear, of course always within the limits of the law-making effect. Naturally, this is presented differently in the court and in legal reflection. Thus, instrumentality does not have to close itself off from reflexivity. After all, reflexivity, with the right assumptions, can lead

thinking about law to the theory of law (Dehnel 2012). After all, a lot depends on how this conduct fits into the chosen assumptions, so that it is possible to derive further instrumentalizations from them – so not subsequent instrumentalizations nor necessarily instruments, unless they are indispensable in reconstructing the instrumentalization process. For the organization of instruments is one thing, and what we want to produce with them is another, especially by enlarging the areas of theoretical significance as something separate from the theory of law. Consequently, there are no obstacles when taking this into account, to distinguishing theoretical instrumentality but justifying it at the theoretical and the dogmatic-legals.

10. It seems that this remark is suitable for a separate exploration in a joint approach, because it is the case that some legal issues, although e.g. theoretical ones, cannot be revealed without interjections of their dogmatism. Besides, it is impossible to maintain that something is only theoretical or only dogmatic, unless we deprive it of contexts (Zeidler 1993). After all, both may derive from the intellect, and in a given case – though not in general – it will be one or the other. At least this can be said from the example of law, in which it follows the case of the individual more than the whole. Perhaps for this very reason, intuitions about instrumentality can be developed more towards something isolated, as a consequence of law, than into its structural units. It is precisely in this way that succession is taken as primary in itself, though it should instead be understood in relation to the instrument. Without going into details, there are fields of knowledge that develop thanks to the development (improvement) of instruments and their characteristics, properly explained, which does not seem to be the case with law, where a case with its consistently closed result is often elevated to the rank of an epistemic standard. Therefore, when writing about the instruments of law, we do not mention, and we certainly do not think, that it would be up to the level of, for example, the progress of legal knowledge. It develops due to intellectual inquisitiveness on the way of searching for consequences and only in it, instrumentality. It theoretically/conceptually becomes the area from which the lawyer derives the justification of his decisions. What is more, for the sake of the equipment of law, which is also transformed into various instruments. The legislator creates legal texts, and their instruments are mainly a matter of accepted legal thinking, which become a necessary superstructure of the law, and in the practical dimension also of the control of the law.

11. Thus, when instrumentalizing we use, to simplify, two visions. The first is aimed at this superstructure for the recollection of law in its various cognitive aspects. The second, most often expressed descriptively as instrumentality in implementation. This seems to be complex in application, because it was also necessary to interpret the law both *qua* law and then solely as a result of established

instruments, in order to bring the whole interpretation to instrumentalization. So, the order of application cannot be ignored due to the impact of the distinctiveness of the mechanism of its implementation. Nevertheless, I think that it is not possible to omit the latter in the end, so that they unite in the whole. They require separate research approaches (assumptions) with the indication of problems in large numbers. These approaches cannot be minimal, simple assumptions, because then the effects of instrumentality will also be such. And for this reason, the importance of the role of assumptions is assumed more than, for example, terms or even definitions. After all, the aim may be to preserve instrumentality from being exhausted. But let's leave it at that: assumptions appearing in their richness seem to give birth to instruments in of themselves, if only from the relationships between them, relationships that are especially fertile, reaching beyond mere description. Here, too, the beginnings of every theory for the chosen subject seem to occur.

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