monograph

ETHICAL DIMENSIONS OF THE THEORY OF LAW

Martin Turčan

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TURČAN, Martin. *Ethical Dimensions of the Theory of Law.* Bratislava: Faculty of Law, Comenius University in Bratislava, 2025, 136 pp.

Department of Theory of Law and Philosophy of Law
Faculty of Law, Comenius University in Bratislava
2025

Based on the Slovak original *Etické dimenzie teórie práva*, 2nd edition (2022).

Reviewers of the original Slovak version:

prof. JUDr. PhDr. Tomáš Gábriš, PhD. LL.M. MA
JUDr. Michal Krajčovič, PhD.
Mgr. Ondrej Ružička, PhD.

Printed by: ARTRON, s.r.o., Czech Republic
The printed version was supported by JURISPRUDENCIA, o. z.

Published by the Faculty of Law, Comenius University in Bratislava in 2025.

ISBN 978-80-7160-743-4 (printed version)
ISBN 978-80-7160-744-1 (e-book)

To my son Bruno,

who will not avoid questions about goodness and justice in his life.

PREFACE

This is an English version of the Slovak monograph Etické dimenzie teórie práva (second, revised edition) written and published in 2022. I want to thank one of my colleagues for encouraging me to provide the English translation. In this version, I sometimes miss or add a word or sentence or correct some of my expressions. Thus, it is not an exact translation of the Slovak original. However, in principle, it is the same book. So, even though the book is being published in 2025, it must be read as a piece from 2022. Initially, it was written for a domestic (Slovak) academic audience. This is visible mainly in the eighth chapter, where I focus on Slovak legal science and education, and in the footnotes throughout the book, where I often cite Slovak or Czech sources (I translate them and their titles into English here; when citing English sources, I often replace their Slovak or Czech translations used in the Slovak version of the book with their English originals; when citing internet sources, I add a web link and a date of my visit to it in brackets, which can be found in the bibliography). I hope the reader – whether domestic or foreign, academic or other – will somehow benefit from the reading.

Bratislava, February 2025.

Author

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INTRODUCTION

This monograph emphasizes the relevance of ethics to legal theory. It points to the interconnection of both disciplines and demonstrates that basically every standard theme of the theory of law (such as lawmaking, implementation of law, application of law, etc.) has an ethical (moral)[1] dimension, the specific grasp and evaluation of which will subsequently affect how the theme is approached.[2] This book aims not only to present this fact but also to outline its consequences for the theory of law as a science and as a part of legal education, with the implication that ethics could be given slightly more attention in the Slovak theoretical-legal environment. In this regard, the monograph provides an analysis of the relevant segment of the local scholarly writing and tries to contribute its own portion to the area as well.

Because many of us count on the ethical dimension of legal theory only subconsciously, it is appropriate to articulate it more explicitly. That is what I am trying to do in this book. In the Slovak educational and scholarly environment, ethical contexts/aspects of law are usually discussed only at the beginning of the curriculum of the teaching subject *Theory of Law* and textbooks devoted to this subject, as well as in standard legal-theoretical (or legal-philosophical) texts, where the concept of law is discussed.[3] In this monograph, however, I want to

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[1] In this monograph, I will not distinguish between *ethical* and *moral*, although this is sometimes done in ethics. For example, the Lutheran theologian Wolfgang Huber considers (with reference to Jürgen Habermas and Ronald Dworkin) ethics as *personal*, concerning what is *good*, while morality as *social*, concerning what is *right* (HUBER, W. *Ethics: The Fundamental Questions of Our Lives*. Prague: Vyšehrad, 2016, pp. 20-21). Because *ethics* is a theory of *morality* (and because it can be divided into individual and social), the difference in adjectives *ethical* and *moral* seems redundant to me.

[2] The ethical dimension of various theoretical-legal themes can be considered at the level of both descriptive and prescriptive theory of law – i.e., one that only describes existing legal phenomena or concepts as ethically determined/interconnected and one that determines how a given phenomenon or concept should be understood and evaluated from an ethical point of view. I do not say that ethics is the only factor that affects the evaluation of the given themes. However, it is one of the essential factors, and this is true in relation to legal science in general. *"If we are to take the moral correctness of law seriously, we must, in principle, distinguish the descriptive question of what the law is from the ethical question of what the law should be. If the law were, by definition, morally correct, then there would be no point in evaluating it from a moral standpoint. The law cannot determine its own moral rightness. If morality is to play the role of a corrective to the law, it must be an independent corrective."* (SOBEK, T. Between Ethics and the Theory of Law. In SOBEK, T. et al. *Legal Ethics.* Prague: Leges, 2019, pp. 26-27).

[3] A relatively new positive fact at the Faculty of Law of Comenius University in Bratislava is the creation of a course on legal ethics for the final year. The course deals mainly with issues of professional ethics.

note also other themes which fall into the sphere of the general theory of law (as part of the legal science and teaching), where their ethical dimension is not always discussed equally clearly in our geographical area. So far, I have not come across a Slovak or Czech publication that would comprehensively and clearly present this issue (although, of course, it cannot be denied that several high-quality texts in legal ethics have been published in recent years).[4] With this monograph, I want to bring my own contribution to the field.

In the following chapters, I will focus on several traditional theoretical-legal themes from an ethical perspective. I will briefly discuss the ethical aspects of the system of law, sources of law and lawmaking, legal relations (implementation of law), application of law, interpretation and argumentation in law, and legal responsibility and sanctions (punishment). I will also touch on the concept of law and the issue of various forms of civil dissent (which should certainly not be missed in a book dealing with law and morality). As for the importance of the very theme of the concept of law for the broader relationship between the theory of law and ethics, it can even be said that no matter how "outworn" this theme is, it is downright paradigmatic. If the concept of law has relevant ethical contexts (which it does) and if it inevitably shines through the entire theory of law (i.e., if it somehow relates to all other theoretical-legal themes because they are always *about the law*), then each of these themes will, quite understandably, also have an ethical dimension (because they will be in some way related to the concept of justice, which is not only a political but at its core mainly ethical category). In this monograph, I want to depict this factuality. In doing so, I will work on the level of normative and (partially) applied ethics. Metaethics will not be the subject of my attention in principle.[5]

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[4] See, for instance, SOBEK, T. et al. *Legal Ethics.* Prague: Leges, 2019. In the context of applied ethics, see, for instance, KRSKOVÁ, A. *Ethical Ten Commandments of a Novice Lawyer (Vademecum of Professional Ethics).* Bratislava: Iura Edition, 2008. Concerning ethical argumentation in legal theory or legal philosophy, see, for instance, SOBEK, T. *Legal Reason and Moral Emotion: The Axiological Fundaments of Legal Thinking.* Prague: Institute of State and Law of the Czech Academy of Sciences, 2016 and SOBEK, T. *Legal Thought: A Critique of Moralism.* Prague: Institute of State and Law of the Czech Academy of Sciences, 2011. On the relationship between ethics and law, see also ČIPKÁR, J. *Ethics and Law (the history of ethics, ethics as a system, the social ethics, the environmental ethics, and the professional ethics of the lawyer).* Košice: University of Pavol Jozef Šafárik in Košice, 2010.

[5] Ethics can be divided into three basic levels: metaethics, normative ethics, and applied ethics. Metaethics deals with the questions of knowing the moral good (moral epistemology), its essence (moral ontology), and the truth value of moral judgments (moral semantics). Or, as Radim Brázda puts it: *"Metaethics does not tell us what we should do, what is good/bad, whether an action is right or wrong, what is forbidden or allowed. The object of metaethics is moral discourse itself.* [...] *A metaethicist, i.e., a philosopher who*

From the ethical dimension of the theory of law outlined in the first seven chapters covering the mentioned themes, I will subsequently draw several implications for the theory of law as a science and as a part of Slovak legal education in the eighth chapter. In addition, in the ninth chapter, I will offer my own contribution to one ethical-legal discussion that is currently taking place among Czecho-Slovak legal theorists. The value of the monograph should, therefore, lie in a relatively coherent elaboration of the relationship between the theory of law and ethics and in the outlined consequences of this intersection for the theory of law as a science and as a part of academic legal education, together with author's own partial contribution in the given field.

So, as I have just indicated, the monograph is divided into two parts: In the first part, I briefly outline and analyze the ethical context of various theoretical-legal themes, and in the second part, I try to bring an explanation of the consequences of this factuality for the legal science and legal education in Slovakia. Since the aim of the book is to point out the need to deal more with ethics within Slovak legal science, in the second part, I offer an analysis of scholarly papers published in legal journals and conference proceedings in the Slovak and Czech environment (due to the interconnectedness of both countries) in the last 30 years, and I ask to what extent ethics has been paid attention in here so far. I will show that there are certain reserves and a need to devote a little more attention to this sphere. Finally, as I have mentioned, in the ninth chapter, I will offer my own partial contribution to the scholarly writing in

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specializes in the problems of the language we use to talk about morality, is interested in morality in a different way than a neuroscientist, biologist, anthropologist, sociologist, psychologist, or historian. In metaethics, it is mainly about the meanings of moral concepts, terms, and moral statements. Metaethics is interested in sentences and statements that say something about what we mean when we ask moral questions or when we answer them. Whether these sentences are true or false depends on the meaning of certain words and expressions. Different metaethical theories are closely connected with different schools in the philosophy of language." (BRÁZDA, R. *Ethicum.* Zlín: VeRBuM, 2010, p. 85). Normative ethics deals with the general criteria that distinguish the morally good/right from the morally bad/wrong, and normative-ethical theories in this sense have traditionally been divided into three categories – deontological (ethics of duty), consequentialist (ethics of consequences) and aretaic (ethics of virtue). The first category of normative-ethical theories is based on the concept of moral duty, the second on the desirable consequences of human action, and the third on the idea of a model to follow (a character noted for certain virtues). Applied ethics builds on normative-ethical (and metaethical) foundations and deals with specific ethical problems in various areas of human activity (especially in professions). In the words of Branislav Fábry: *"Applied ethics, in turn, deals with the ethical aspects of the behavior of individuals or groups in practical life, ethical reflection on cases of practical interest, and professional ethics."* (FÁBRY, B. Ethics and Law. In *Current Questions of Legal Theory.* Bratislava: Wolters Kluwer, 2018, p. 259).

the given area, and I will join the current Czecho-Slovak discussion on the idea of human rights (a special category of rights that has its importance for the concept of law and other legal-theoretical issues).

The book, which aims to be a scientific monograph, captures some of the problems that I have been dealing with for some time. As a rule, I will basically only outline them here, but the descriptions, analyses, and comparisons that I will offer, as well as the implications that I will draw, together with the arguments presented, should be conducive.[6]

[6] From a methodological point of view, I will mainly use analysis, comparison (especially when reflecting on the possible implications of various ethical approaches to the discussed themes), and also synthesis (within the overall narration of this monograph and especially within the discussion of the importance of ethics for the theory of law as a science and for academic education of lawyers). In the eighth chapter, I will also analyze a relevant part of the domestic scholarly literature and present quantitative research I conducted in the summer of 2022. Of relevance should also be the last, ninth chapter, which provides my own philosophical argument against the utilitarian justification of human rights in the theory of Martin Hapla.

PART ONE
The Relationship of Theoretical-Legal Themes to Ethics

1.

THE CONCEPT OF LAW, CIVIL DISSENT, AND ETHICS

Disputes about the concept of law have been going on in legal theory or legal philosophy (the boundary between the two disciplines is not entirely clear) for a long time. As I suggested in the introduction, a "worn-out" but eternally fascinating theme for many legal theorists is the relationship between the validity of positive law and its moral quality. This is an interesting philosophical problem, the practical significance of which is expressed primarily by asking what state authorities (especially courts) should apply if the positive law comes into sharp conflict with (a certain notion of) morality[7] (principles of justice).[8] Should they stick to the formally valid law or go against it? *Radbruch's formula,*[9] which has become a kind of icon of iusnaturalistic or non-positivist approach to law since the second half of the 20th century, requires that in such a case judges deny the validity of the positive law (and apply the natural or non-positive law).

However, the line between legal positivism and natural law (or, more generally, non-positivist) approaches to law has largely been blurred over the past decades (there are different types of legal positivism and various non-positivist theories that support the same conclusions in practical consequences, and even on a theoretical level, the differences between them are often only relatively subtle).[10] With a bit of simplification, it can be said that this fact

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[7] Apparently, few of the supporters of the *connection thesis* (i.e., the claim that the concept of law is principally connected with the concept of morality) think that a complete harmony between legal and moral norms is necessary. Rather, it is an idea of ethical minimum in law (see FÁBRY, B. – KASINEC, R. – TURČAN, M. *Theory of Law.* 2nd ed. Bratislava: Wolters Kluwer, 2019, pp. 36-41; see also BÁRÁNY, E. *Concepts of Good Law.* Žilina: Eurokódex, 2007, p. 94 ff.).

[8] See, for instance, HARVÁNEK, J. et al. *Theory of Law.* Pilsen: Aleš Čeněk, 2008, pp. 91-92.

[9] RADBRUCH, G. *On the Tension Between the Purposes of Law.* Prague: Wolters Kluwer, 2012, pp. 130-131.

[10] SOBEK, T. *Immoral law.* Prague: Institute of State and Law of the Czech Academy of Sciences, 2010, p. 6. However, we can also quote Pavel Holländer, who states: *"The decisive part of the tradition of non-positivism (from Thomas Aquinas through Kant to Radbruch) is based on a standpoint that does not deny reason, rationality, but only points to its incompleteness. The world is thus perceived in the tension of poles, in the search for proportions. For a lawyer, this conclusion implies the perception of the application of law in the tension between rational and voluntary elements of decision-making, and it implies the measurement of the content of positive law by the values with which the individual and the community identify. The difference between the positions of positivists and non-positivists is twofold: the first concerns the aspects of the evaluation of positive law, and the second concerns the consequences of the extreme contradiction between them and positive law for its validity. According to positivists, these viewpoints are discursive and rational; according to*

basically testifies to the importance of morality to law (and thus ethics as a discipline in relation to legal theory). In the following lines, I will briefly elaborate on this fact.

We may begin by arguing that if we start (let's say with a slight touch of legal realism or pragmatism) from the thesis that what the courts apply in practice (whatever the norms may be) is what they understand to be *the law* (because otherwise the concept of *law* would lose or weaken its applicability), then we must recognize the importance of ethics for legal decision-making in the given context because the key question is: *How can we reach a just decision?* Even looking at the doctrinal basis of European constitutional courts, it seems quite obvious today that the concept of justice has been widely accepted as (co)determining the concept of law. Justice is a philosophical category falling within the field of ethics and political philosophy (whereas political philosophy is basically also derived from ethics). In theory (and in practice), one can therefore ask as follows: Would it be just if norm Y, which formally applies to the issue, even though it is morally problematic, was applied in situation X, or would it be rather just to ignore the norm Y? A question of this type is definitely an *ethical* one and it fundamentally demonstrates the importance of ethics as a discipline for law.

In practice, of course, it is not so hot with moral invalidation or non-application of the positive law. However, the seriousness of the ethical question of *how to reach a just decision* (i.e., *what system of norms to apply regarding certain essential moral claims*) persists. In relation to the problem of invalidity or inapplicability of the positive law, the seriousness of this question remains (undoubtedly, at least from the theoretical point of view) fundamental. A judge who decides to refuse to apply an immoral law in an imaginary situation needs reasons for such a step – ideally, some ethical theory that contains (formulates) these reasons. He should consistently define the moral good (right) or moral bad (wrong), from which the idea of justice[11] he wants to protect is derived, or on the

non-positivists, they are transcendent to positive law; according to positivists, an extreme contradiction between them and positive law does not have consequences for its validity; according to non-positivists, this eventuality is given." (HOLLÄNDER, P. The Tyranny of Good? Maybe, not necessarily. In HOLLÄNDER, P. et al. *Law and Good in Constitutional Democracy: Polemical and Critical Reflections.* Prague: Sociology Press, 2011, p. 52).

[11] Eduard Bárány defines justice as *"compliance with moral norms that regulate the distribution of values (goods and burdens) in social relations."* (BÁRÁNY, E. *Concepts of Good Law.* Žilina: Eurokódex, 2007, p. 96).

basis of which he conceives the idea of injustice[12] he wants to avoid by his decision. The definition of moral good and evil is primarily a matter *of normative ethics* (although, of course, it also has its *metaethical*[13] basis and the level of *applied ethics* is practically very important as well). Therefore, if we consider the *connection thesis*[14] and claim that the concept of law is in some way fundamentally connected with the concept of morality, then the question of a more detailed definition of the moral good (from which the idea of justice is derived) comes to the fore and normative ethics (and subsequently political philosophy based on it) has its say. At this level, deontology, consequentialism or virtue ethics can traditionally be used.[15]

It is worth noting here that utilitarianism, as the best-known and most prominent consequentialist theory,[16] usually refuses to accept the connection thesis. As is known, its founders, Bentham and Mill, protested against the idea of natural law.[17] However, even a utilitarian who is a legal positivist (no matter

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[12] This, of course, does not mean that any tolerance of moral evil is necessarily unjust. On the contrary, a strictly paternalistic state that does not tolerate any immoral action is, in fact, unjust. I am convinced that the state should not interfere in certain spheres of people's private lives, even if people behave deeply immorally in them. However, this thesis is, of course, an ethical one and, as such, can be criticized from the position of some (radically paternalistic) theory of social ethics.

[13] Metaethical issues of law are addressed, for example, by Tomáš Sobek in his monograph *Immoral Law,* which I have already referred to. On metaethics, see also MÁHRIK, T. *Metaethics: A Comparative Analysis of Current Trends.* Bratislava: Porta libri, 2018.

[14] ALEXY, R. *The Argument from Injustice: A Reply to Legal Positivism.* Oxford: Oxford University Press, 2002, p. 20 ff.

[15] There are other approaches as well. For example, Donald Nicolson and Julian Webb add to this tripartite also the *ethics of care* and *feminist ethics*, as well as the postmodern *ethics of alterity* (NICOLSON, D. – WEBB, J. *Professional Legal Ethics.* Oxford: Oxford University Press, 2005, p. 34 ff.; On the relationship between feminist ethics and the idea of natural law, see, for instance, TRAINA, C. L. H. *Feminist Ethics and Natural Law.* Washington: Georgetown University Press, 1999). For other postmodern ethics and their critiques, see, for instance, BLAŽKOVÁ, M. *The History of Ethical Theories from Bergson to Tugendhat.* Prague: Karolinum, 2022, p. 168 ff.

[16] *"Utilitarianism is essentially based on the plausible thesis that the distinction between good and bad, just or unjust action depends on whether it has desirable or undesirable consequences. Morally good is that which benefits the greatest number of people. The mutual discussion of utilitarians and their disputes with the proponents of other theories show that this principle, at first glance so plausible, is not without problems."* (WEINBERGER, O. *Norm and Institution: Introduction to the Theory of Law.* Pilsen: Aleš Čeněk, 2017, pp. 231-232).

[17] HLAVINKA, P. *Ethics: An Overview of Philosophical and Religious Concepts.* Olomouc: Iuridicum Olomoucense, 2013, pp. 68-69. However, as I have already pointed out elsewhere, the concept of natural law is (following the example of 1789 *La Déclaration des droits de l'homme et du citoyen*, with regard to which Bentham criticized the idea of natural

how much of a "hard-positivist" he or she might be) can and should ask, under what circumstances should one refuse to abide by the positive law (say, in the position of a judge). Their answer will, of course, be based on the thesis that obedience to positive law should be refused if respecting it (applying it) in a given situation would cause more harm than good (overall).[18] Mill's *rule utilitarianism* (as traditionally understood) requires respect for the formal rules regulating human behavior up to this limit.[19]

Deontological approaches, on the other hand, place primary emphasis on rational principles (the most famous is Kant's categorical imperative), which are today transformed into the catalogue of human rights, while it is precisely the violation of one of the (non-positive, natural) human rights by an immoral law that will be considered as crossing the imaginary line. In many practical consequences, however, a deontological approach does not have to differ at all from a utilitarian approach.[20] Utilitarianism also values the idea of human rights, although it does so not for *reasons of principle* but only *for pragmatic reasons* (that is, because of the usefulness of this idea for maximizing the utility consisting in the increase of pleasure and/or decrease of pain). On the other hand, however, it must be said that there may be differences, and not negligible

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law) also part of Slovak legal order and we can explicitly find it in the Slovak Constitution (see TURČAN, M. Iusnaturalistic Basis of the Constitution of the Slovak Republic. In *Historia et theoria iuris*, 2009 (vol. 1), no. 1, pp. 19-28).

[18] An oft-quoted passage concerning Mill's utilitarianism as *rule utilitarianism* reads as follows: *"According to the greatest happiness principle, as above explained, the ultimate end, with reference to and for the sake of which all other things are desirable—whether we are considering our own good or that of other people—is an existence exempt as far as possible from pain, and as rich as possible in enjoyments, both in point of quantity and quality.* [...] *This, being according to utilitarian opinion the end of human action, is necessarily also the standard of morality, which may accordingly be defined 'the rules and precepts for human conduct,' by the observance of which an existence such as has been described might be, to the greatest extent possible, secured to all mankind; and not to them only, but, so far as the nature of things admits, to the whole sentient creation."* (MILL, J. S. *Utilitarianism.* Indianapolis: BOBBS-MERRILL, 1957, p. 16).

[19] However, there are also attempts to reconcile utilitarianism and natural law (see, for example, EPSTEIN, R. A. The Utilitarian Foundations of Natural Law. In *Harvard Journal of Law and Public Policy*, 1989 (vol. 12), no. 3, pp. 711-751).

[20] After all, as Derek Parfit has shown, different ethical theories are capable of "climbing the same mountain" from different sides (see his work *On What Matters*). In relation to the idea of human rights, Martin Hapla approaches the idea of human rights in a similar way, trying to show that the current concept of human rights is basically consistent with utilitarianism (see HAPLA, M. Utilitarianism and Human Rights. In *Časopis pro právní vědu a praxi*, 2020 (vol. 28), no. 3, pp. 321-336).

(in some cases even fundamental – for example, in the case of absolute human rights, which I will get to later in this monograph).

As for the approaches based on virtue ethics, it can be said that they understand the moral good as a reflection of a model to follow, a character distinguished by certain virtues.[21] However, their answers to specific ethical questions are often vague (and this is, let's say, also due to the fact that the main question of virtue ethics is not *what I should do* but *what kind of a person I am supposed to be*)[22] and in order to be more precise, they often need to use some deontological concepts, such as the concept of natural law, as developed, for instance, in Aristotelian or Thomistic tradition.[23]

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[21] On virtue ethics, see, for instance, KUNA, M. *Introduction to Virtue Ethics.* Ružomberok: Catholic University in Ružomberok, Faculty of Philosophy, 2010. *"There is a consensus that the key impetus for the turn to virtue in Anglophone ethics was given by Elisabeth Anscombe's article Modern Moral Philosophy (1958), in which she explained the reasons for the impasse of modern moral theory (the ethics of rules) and pointed out the need for a turn to classical ethical theory associated with the concept of moral virtue. It can also be argued that Alasdair MacIntyre was the first to elaborate on such a theory in a more fundamental way and, in this sense, formulated the first systematic response to Anscombe's challenge in his work After Virtue (1981). While no one today questions the legitimacy and necessity of normative ethics, the answer to the question of which version of it is rationally defensible or the most convincing is a topic of interest to moral philosophers. In other words, it is a question of whether virtue ethics is an alternative or merely a complement to the ethics of rules. Answers to this question vary depending on the broader philosophical beliefs of specific authors."* (Ibid., pp. 18-19).

[22] However, one might ask what the difference actually is. Karen Stohr criticizes such a common distinction as somewhat distorted. (STOHR, K. Contemporary virtue ethics. In *Philosophy Compass*, 2006 (vol. 1), no. 1, pp. 22-23). In the end, however, she states: *"This is not to say that there is no truth to the general agent-centered/act-centered distinction, but given how the landscape of normative theory has changed since this distinction came into use, it seems appropriate to set it aside in favor of more nuanced descriptions of each of the theories."* (Ibid., p. 23).

[23] See, for instance, TURČAN, M. On the Concept of Natural Law and the Perverted Faculty Argument in the Contemporary Christian Thought. In *Testimonia theologica*, 2020 (vol. 14), no. 1, pp. 10-30. Karen Stohr adds: *"Historically, the torch of virtue ethics has been carried most consistently by writers in the broadly Thomist tradition, and certainly Aquinas is one of the most important historical figures in the development of the virtue tradition. The relationship between virtue and the natural law in Aquinas, however, is a complicated one, and as a matter of current practice, natural law theory and virtue ethics are usually treated as separate kinds of ethical theory."* (STOHR, K. Contemporary virtue ethics. In *Philosophy Compass*, 2006 (vol. 1), no. 1, p. 23). It can be mentioned that some people have placed certain hopes in the ethics of virtue for a long time in connection with the crises that the world is facing or may face in the future. The Catholic thinker Michael Novak optimistically said in the 1990s that even progressives know that they need to appeal to the moral categories of loyalty, integrity, sacrifice for the cause, friendships, honesty, and personal initiative. According to him, many former socialists expressed a newfound joy in practicing

Thus, every legal theorist who recognizes the connection thesis (the connection between law and morality) needs some ethical theory that defines the criteria of *boni et aequi*. Even those who do not recognize the connection thesis but assume that at least in the case of an extreme contradiction between positive law and morality, it is necessary not to obey such a law (not for reasons that are somehow metaphysically *legal*, but purely *moral*), needs such a theory.[24] Certainly, many people use some kind of moral intuition when determining what is good/right in life. Legal theorists should, however, also deal with ethical (and consequently political-philosophical) *theories*. From this perspective, the theory of law intersects to some extent with theories of justice, which is a logical consequence of recognizing the importance of the idea of justice in law.[25]

In the context of the relationship between law and morality, the outlined connection between legal theory and ethics does not concern only the issue of the concept of law as such. It is also important in the issue of civil dissent, as evidenced by the above-mentioned considerations of the judge's refusal to obey an immoral (unjust) law. After all, such a refusal of obedience can be perceived as a form of implementation of some form of civil dissent – whether civil

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the old prosaic virtues of the working class for a long time – loyalty, honesty, devotion to wife and family, patriotism, self-sacrifice, and moderation – even though they forgot to talk about them for two or three decades. In his view, when we were listening to the British Labour leader Tony Blair talking about virtue, it was as if we were listening to former Prime Minister Margaret Thatcher. (NOVAK, M. *Business as a Calling.* Bratislava: Charis, 1998, p. 99).

[24] I assume that such a proponent is nonetheless a supporter of moral objectivism, i.e., believes in the objectivity of the moral good/justice, regardless of what specific idea of morality he or she has.

[25] See, for instance, OSINA, P. *Legal Theory.* Prague: Leges, 2017, p. 114 ff. From an anthropological (descriptive) perspective, the link between the law and the morality of society (and thus also the understanding of justice) is quite obvious. For example, Fernanda Pirie states in this context: "*What is expressed by the laws is significant, and so is the implicit promise of justice and the affirmation of a superior moral order. The legal form seems to be particularly appealing as a means of representing, not just a higher set of values, but also a sense of participation in a large, maybe more sophisticated or global order.* [...] *Of course, to say that law expresses moral values must not be taken to imply that it cannot be used as an instrument of centralized government or oppression.* [...] *It may have been created under the influence of a ruler's activities, or borrow heavily from well-known and highly regarded models, but in many cases the impulse for emulation was an internal one. To borrow laws or legal forms is implicitly to recognize that their authority is rooted elsewhere, at least partially, and that the law, itself, might stand apart from or transcend the power of a ruler.*" (PIRIE, F. *The Anthropology of Law.* Oxford: Oxford University Press, 2013, pp. 186-187).

disobedience, the right of resistance, or conscientious objection.[26] These are issues that traditionally belong to the field of the theory of law and typically fall under the issue of the relationship between the law and morality. Here, we can and should ask not only what forms of human action belong in this or that form of dissent but also whether its performance or a certain way of its application is morally legitimate. All these issues (the concept of law, civil disobedience, the right of resistance, conscientious objection) have something to do with ethics (and so ethical theories come to the fore).

Concerning the right of resistance, it is worth noting that the use of violence in its application interferes with ethics in various ways. For instance, it has to do with the ethics of just war (as a form of applied ethics) and raises even the question of pacifism versus legitimate defense, as well as questions about the definition of a legitimate defense. Although theories of just war are usually oriented toward the problem of international conflict, their principles are, of course, also applicable to civil war, the outbreak of which might be a consequence of the exercise of the right of resistance (but, of course, the usurper against whom the right of resistance may be exercised may also be a foreign state).

It can be said that within the ethical and legal category of *ius ad bellum*, from the point of view of the conventional theory (or conventional theories)[27] and some revisionist theories, the initiation of fights by citizens exercising their right to resist is legitimate (not only because it is based on an existing constitutional provision that enshrines the right of resistance, but also from a purely ethical reason – because it is a *defense* – supposing that no one can be denied the moral right to defend themselves against injustice). Pacifists will, of course, be of a different opinion, and they will consider the use of any armed violence immoral (they will encourage instead the use of passive resistance and reject the concept of a right to resist as a legal license to use the violence).[28]

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[26] Civil disobedience is an illegal act. The right of resistance is, on the contrary, a legal institution. However, it may also represent an action against a certain positive law – one that contradicts the objective pursued by the constitutional clause on *ius resistendi*. It is *"the last legal opportunity to oppose external or internal entities that are removing fundamental rights and freedoms in the state, which thus threaten the foundations of a democratic state regime."* (KASINEC, R. *Citizen Versus State Power: Miscarriage of Justice, Civil Disobedience, Right to Resist.* Bratislava: Wolters Kluwer, 2017, p. 148). Conscientious objection may be legally recognized, but it may also be illegal, like civil disobedience.

[27] On the issue of just war theories, see, for instance, KONIAR, I. *Just War Tradition: Theory or Theories?* Ružomberok: Verbum, 2011.

[28] As is well known, Carl Schmitt held a quite opposite view. He considered war of aggression a legitimate means of foreign policy, which is why he is sometimes referred to as a *bellicist*. This was (also) due to his understanding *of the political* (*der Begriff des Politischen*) as

Even within the category of *ius in bello*, some serious ethical questions will arise. According to conventional theory, soldiers of the aggressor are neither legally nor morally responsible for fighting because they only carry out orders. However, according to some revisionist theories, like that of the eminent contemporary American philosopher Jeff McMahan, it is not so. The ethical theory that McMahan espouses holds that there is no morally significant difference between fighting against an individual attacking us in normal life and a member of the aggressor's armed forces on the battlefield. According to McMahan, if the attacker does not have a moral right to use violence against us after we have produced a gun against him in self-defense (i.e., any act of violence on his part will still be *an aggression*), neither does a soldier who fights for the illegitimate side.[29] This revisionist theory of just war differs not only from the conventional theory but, understandably, also from pacifism. Unlike pacifism, it considers the use of defensive violence morally legitimate. Unlike the conventional theory, it explicitly identifies a soldier who merely obeys commands as a person morally responsible for continuing in the fights that were started without a just cause (McMahan does not, however, argue that these soldiers should be put on trial after the war for mere participation in the fights unless they have committed atrocities).

Concerning the means of fighting as part of the *ius in bello*, various cruel methods are considered inadmissible in the current international law and ethical theories on which the law is based (e.g., the use of means that cause excessive suffering). This prohibition is somewhat reminiscent of the prohibition of torture, which is an absolute human right under contemporary human rights documents (i.e., a right that knows no exception). Theoretically, it can be considered a partial victory of Kantian ethics (although there is some controversy about how exactly the absolute prohibition of torture follows from the second formulation of the categorical imperative – *the prohibition of using human beings as a means;*[30] or from other formulations).[31] On the contrary, some forms of consequentialism should not have a problem with torture or cruel or

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defined by the concepts of *friend* and *enemy* (see, for instance, BENHABIB, S. Carl Schmitt's Critique of Kant: Sovereignty and International Law. In *Political Theory*, 2012 (vol. 40), no. 6, pp. 688-713).

[29] McMAHAN, J. The Ethics of Killing in War. In *Ethics,* 2004 (vol. 114), no. 7, p. 698 ff.

[30] KANT, I. *Groundwork of the Metaphysics of Morals.* Bratislava: Kalligram, 2004, p. 57.

[31] See BARRY, P. B. The Kantian Case Against Torture. In *Philosophy*, 2015 (vol. 90), no. 354, pp. 593-621. Barry concludes that the doubt as to whether the second formulation of the categorical imperative is sufficient for the absolute prohibition of torture is well founded (ibid., p. 611). In the end, however, he tries to argue in favor of an absolute legal prohibition of torture on the basis of Kantian principles.

inhumane treatment under certain circumstances (including war crimes). Utilitarianism, which seeks to maximize utility, should allow for any action that averts worse consequences. Of course, it is questionable what utilitarian implications there are for the very *legal* aspect of the means of fights within the framework *of ius in bello* (and in our context, specifically concerning the question of legal evaluation of the means of exercising the right of resistance), but one may suspect that the existence of any absolute prohibition (i.e., also the absence of any exceptions to the prohibition of cruel or inhumane behavior during fights) is doubtful from a utilitarian perspective (including rule utilitarianism).[32]

Civil disobedience also raises ethical questions concerning its implementation. Classical proponents of this form of civil dissent, such as Henry David Thoreau or Mahatma Gandhi, advocated for the idea of passive resistance and assumed the willingness of the dissident to accept the imposed penalty for violating the law.[33] However, current forms of civil disobedience no longer count

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[32] As Robin Celikates states: *"To the question of whether there are rights that must not be restricted under any circumstances – however serious the consequences – utilitarianism – and therefore Mill – must answer in the negative. Utilitarians see this as a positive thing because it not only takes into account the fact that there are situations in which it is necessary to weigh between the disputed rights or the fundamental interests that are protected by these rights, but it also offers a procedure in deciding on legal conflicts. The assumption that we would respect rights not because it has positive consequences, but because we owe it to rights holders – regardless of the consequences – still calls into question Mill's demand for a liberal theory of rights based on utilitarianism."* (CELIKATES, R. John Stuart Mill. In POLLMANN, A. – LOHMANN, G. (eds.). *Human Rights. An Interdisciplinary Handbook.* Bratislava: Kalligram, 2017, pp. 66-67). Utilitarianism, of course, is not the only consequentialist theory. One can point out, for example, the *ethics of social consequences* of Vasil Gluchman (see GLUCHMAN, V. et al. *Values in the Ethics of Social Consequences*. Prešov: Grafotisk Prešov, 2011), in the perspective of which the issue of just war is elaborated by Lukáš Švaňa. He states that, given the non-utilitarian nature of the theory, it represents *"less threat of justifying actions whose sole motive is to obtain a benefit, regardless of circumstances or other associated motives and consequences that often occur in human actions."* (ŠVAŇA, L. *The "Ethics" of War and Terrorism.* Bratislava: Veda, 2016, p. 169).

[33] Even some contemporary legal philosophers emphasize the idea of passive resistance and the willingness to bear punishment. Natural law theorist John M. Finnis might be an example. *"Finnis limits justifiable acts of civil disobedience to a manifest violation of the law that is an expression of protest against it and is linked to a readiness to submit to a possible sanction. An act of civil disobedience should not bring any personal advantage to its actor. It should be a symbol of resistance. Finnis's concept of civil disobedience takes the form of passive resistance since the active concept may involve the use of violence, and therefore, we do not encounter this second form in his texts. Finnis also emphasizes the importance of respect for the law. This means that a person who commits civil disobedience must be prepared to accept the consequences of his actions, such as arrest, trial, and punishment. At the same time, such a person should avoid hatred or contempt for others. He should also not jeopardize his family or other important commitments. Civil disobedience always involves a*

on such a willingness (for example the phenomenon of *cyber disobedience* is characterized by anonymity; the dissident thus hides his identity) and often contain violence against property (*modern civil disobedience*).[34] Thus, some pacifists will reject this form of civil disobedience (although it is not an attack against persons, but only against property),[35] and the proponents of virtue ethics might dislike the unwillingness of the dissenters to publicly take responsibility for their actions (bravery, as one of the four cardinal virtues, whether in Plato or Aquinas, should perhaps imply a different attitude). On the contrary, from the perspective of consequentialism, this can be an acceptable attitude if it leads to sufficiently good consequences.

As I have already indicated, the refusal to obey the applicable law does not have to be a matter of social appeal manifested in the exercise of the right of resistance or in civil disobedience. It also has its morally important place in the personal life of an individual. Conscientious objection (another form of expressing disagreement with the positive law) represents an institution of special ethical significance due to the nature of conscience as a fundamental moral apparatus in man. Conscience can be defined as *"the ability of a person to consciously, freely, intellectually and responsibly make decisions in the field of interpersonal relations, and at the same time an instance in the case of an accusation of moral guilt.*[36] In the case of conscientious objection, the individual

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set of limitations, including the guiding principle of passive disobedience, which is the proper form of civil disobedience." (OSINA, P. The Concept of Justice in the Work of John Finnis. In KLUKNAVSKÁ, A. – GÁBRIŠ, T. (eds.). *Ad Iustitiam per Ius.* Bratislava: Wolters Kluwer, 2018, p. 110).

[34] KASINEC, R. *Citizen Versus State Power: Miscarriage of Justice, Civil Disobedience, Right to Resist.* Bratislava: Wolters Kluwer, 2017, pp. 123-127. Kasinec states that *"violence against material goods is beginning to be accepted, even required as part of accepting (respecting) new members. However, the degree of acceptable violence cannot be clearly determined, which is why there are also opponents of violent acts."* (Ibid., p. 123).

[35] This is the so-called *absolute* or *total* pacifism (see, for instance, CONSIGLIO, M. The Problem with Pacifism: How Pacifism Can Lead to Genocide and Why One Should Fight to Combat Evil. In *HSOG 2022 Conference*, available online: https://digitalcommons.liberty.edu/cgi/viewcontent.cgi?article=1261&context=hsgconference [31-08-2022]).

[36] VADÍKOVÁ, K. M. *The Issue of Conscience in the Context of Dialogical Personalism.* Trnava: Faculty of Arts of Trnava University, 2011, p. 162. Katarína Vadíková also states that *"the history of the concept of conscience reflects the struggle of the human spirit for self-knowledge and self-identification"* and notes that *"as a guarantee of the morality of the person, conscience has an irreplaceable function as a moral instance."* (Ibid., pp. 103 and 156). She concludes her exploration of the issue of conscience with these words: *"The definition of the concept of conscience, as we have observed in the study of this concept in the history of philosophy, depends substantially on the application of the conceptual apparatus of a*

does not promote some public conception of justice but merely realizes his or her personal moral convictions that diverge from the applicable law, while civil disobedience means appealing to justice as it is understood by society, or aims to convince the public of the injustice of a certain political or legal action. An individual who exercises conscientious objection does not seek anything like that. He or she is only interested in avoiding an act that is contrary to their conscience.

Conscientious objection can take both legal and illegal forms (depending on whether and to what extent it is recognized by the applicable law). One of the fundamental questions with an ethical dimension here is whether conscientious objection should be legally/constitutionally enshrined and how far to go in protecting individual conscience. In liberal democracies, the limit to the exercise of conscientious objection is the protection of the rights and freedoms of others. As Lucia Madleňáková (referring to Carolyn Evans) puts it: *"For some individuals (believers), the dictates of religion or conscience are absolute. These people follow the norms of their religion or beliefs, regardless of whether they break the law and what awaits them for this violation, including torture or death. On the other hand, it is the duty of the state, while maintaining pluralism, to restrict or prohibit certain religious rituals (for example, ritual murder) for the protection of other members of society or social order."*[37] It is worth noting that such a liberal-democratic understanding of the limits of conscientious objection (as part of the freedom of thought and religion) is based on certain ethical premises.

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particular philosophical anthropology. Based on our research, we have come to the conclusion that the concept of conscience in the history of philosophy has not yet been sufficiently defined. [...] *An etymological analysis of the word 'conscience' has shown that it is a compound descriptive expression of the experience of the conclusion of the decision-making process, which results in the formulation of the decision.* [...] *We found that the difficulty in defining the concept of conscience in the history of philosophy probably results from the lack of primary information about its position, roles, functions, and actions in the decision-making process. The inner world of man, to which the conscience belongs, is not directly recognizable by the scientific methods known so far."* (Ibid., p. 162). *"The concept of freedom of conscience, which has been recognized as a fundamental natural right of man, is in fact related to the acceptance of responsibility for oneself, one's loved ones, neighbors and loved ones (Cohen). From the point of view of law, in society (the type of I-We relationship), every objectively observable conscious and free decision of a person is respected as autonomous. However, in an interpersonal dialogic relationship (Me-You type), such a characteristic cannot be clearly attributed in time. Until the entire decision-making process has been examined, the decision in question not only cannot be described as autonomous but also cannot be considered as final. Only the response of the person – the whole human being – can be judged as autonomous."* (Ibid., p. 165).

[37] MADLEŇÁKOVÁ, L. *Conscientious Objection: As part of Freedom of Thought, Conscience and Religion*. Prague: Linde, 2010, p. 64.

Thus, all the issues outlined above have an ethical dimension. Concerning themes such as the concept of law or civil dissent, the importance of ethical theories is visible. The chosen ethical perspective is able to influence a lot in theory and practice, which means both legal scholars and law students should pay attention to it. In the following chapters, I will briefly focus on other theoretical-legal themes where the ethical dimension may not always be equally obvious but is of no less importance.

2.

SYSTEM OF LAW AND ETHICS

Law is a set of norms (issued in a state-approved form, enforceable by the state power, etc.) that constitute a certain *system,* and it is possible to distinguish between its various branches.[38] As Jozef Prusák puts it: *"The dual structure of relations between public and private law characterizes all legal systems belonging to the continental legal system."*[39] As just mentioned, the fundamental division of law as a system (in the continental legal culture) is its division into *public law* and *private law*,[40] and there are several theories justifying this duality.[41] The oldest of them is the so-called *interest theory* that we find already in Roman jurisprudence. In the words of Zuzana Mlkvá Illýová: *"Notorious is Ulpian's distinction of law based on benefit, which is expressed as follows: 'This science (law) has two parts: public and private. Public law relates to the Roman state, while private law relates to the interest of individuals: for there are things beneficial to the public and things that benefit private persons.' Ulpian's distinction represents the so-called interest theory, according to which to distinguish whether a public or private right is concerned, it is decisive whose interest is protected (the interest of*

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[38] In this context, Eva Ottová states: *"Any system, its structure, is made up of a set of its elements, which are purposefully arranged in a certain way and interconnected by certain relevant relationships. The structure of a system cannot, therefore, consist only of a random, chaotic cluster of its individual elements. A prerequisite for the functionality of the system is a purposeful form of its organization. The legal system consists not only of a set of legal norms but also of a set of their mutual relations."* (OTTOVÁ, E. *Theory of Law.* Šamorín: Heuréka, 2006, p. 227).

[39] PRUSÁK, J. *Theory of Law.* Bratislava: Publishing Department of the Faculty of Law, Comenius University, 2001, p. 252.

[40] Branislav Fábry and Daniel Krošlák state that *"if we look at the Anglo-American legal system, we find that the division of law into public and private law is not known by the legal science. Although it is familiar with the concepts of public law and civil law, or private law, they are not understood in the same way as in continental law. Civil law is used to name the system of continental law; private law should be understood as general civil law. The term public law, on the other hand, is understood more as a common name for constitutional and administrative law (and not as a general term under which we hierarchically subsume constitutional and administrative law). Thus, although the terms public and private law are known to Anglo-American jurisprudence, they are not used to classify concepts, forming a dualistic understanding of law. In this sense, legal science uses other, in our country historically unestablished, classifications (e.g., division into common law and equity or statutory law and judge-made law)."* (FÁBRY, B. – KROŠLÁK, D. Public and Private Law – New Challenges in the Systematics of Law. In *Acta Facultatis Iuridicae Universitatis Comenianae*, 2007 (tomus XXV), p. 52).

[41] OTTOVÁ, E. *Theory of Law.* Šamorín: Heuréka, 2006, pp. 231-232.

the state or the interest of the individual), and this theory is still used today."[42] But how do we determine what falls under the private interest and what under the public interest? Why should we understand X as a public matter while Y is a purely private matter? The definition of what is private and what public is necessarily associated with a certain notion of justice – it is a matter of determining what should be *rightly* left to the autonomy of individuals (or their groupings) without the intervention of the state,[43] and what should be subject to authoritative regulation of the state as a "matter of all" (this is associated with another, later, theory of the difference between public and private law – we can call it *the theory of norms* – according to which private-law regulation is typical by optional rules, while public-law regulation is typical by mandatory rules, and we can also mention the other two well-known theories – *the theory of sanctions*, according to which public-law sanctions cause pain while private-law sanctions heal the pain, and the theory of subjects, which says that the state has a superior position at the level of public law and can impose its will on others, while at the

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[42] ILLÝOVÁ, Z. Private and Public Law. In *Comenius*, 2017, available online: https://comeniuscasopis.flaw.uniba.sk/2017/10/15/pravo-sukromne-a-verejne/ [15-02-2022].

[43] *"The essence of autonomy of the will, or private autonomy* [...] *is the competence and right of an individual to conduct his or her own private affairs independently and on his or her own responsibility according to his or her own will. In this sense, we find the characteristics of the autonomy of the will in the literature from different jurisdictions. However, it is not just about the emphasis on the possibility of organizing one's affairs oneself. Logically linked to this is the right to defend oneself against interference in one's own private sphere. It is threatened or even broken by other individuals and by public authorities.* [...] *By recognizing the private power of every citizen* [...] *public power vacated a substantial part of the private space at the beginning of the nineteenth century, and the former police states gradually turned into liberal ones during the nineteenth century, limiting at first their role to the function of the 'night watchman'* [...]*. That the conditions thus established led to numerous injustices was most convincingly described by novelists: Victor Hugo's Les Misérables, Charles Dickens's Oliver Twist, Charles Dickens's Little Dorrit, Gerhart Hauptmann's The Weavers, and numerous other literary works, not only pointed out the injustices and misery that were destroying human dignity but moved social thinking and eventually legislators to moderate what they could by legal means. In this way, the classical liberal environment was transformed into the welfare state* [...]." (ELIÁŠ, K. The First Principle of Private Law (The Principle of Autonomy of the Will: Respect for the Ability of Man to Create His Own Living Conditions). In *Právny obzor*, 2019 (vol. 102), no. 5, pp. 379-380 and 382). Ernest J. Weinrib, in a publication devoted to the moral foundations of private law (in the Anglo-American context), argues that private law is autonomous and non-political, but at the same time, it is not separate from social reality and that corrective justice that determines it can be public without being political. (WEINRIB, E. J. *The Idea of Private Law.* Oxford: Oxford University Press, 2012, p. 204 ff.).

level of private law, the subjects are equals).[44] The issue of public versus private law brings us to the realm of political philosophy and ethics because we can hardly avoid the question of the relationship between the values of freedom and justice here.

One can even ask whether anything should be understood as a public matter (as a matter of public interest). That is, whether everything should not be considered rather a matter of private interest. The difference between private and public law (at least in the context of the theory of interests) would thus be lost. This brings us to the question of the legitimacy of the state as such.[45] In this respect, we may consider a distinct right-libertarian doctrine called *anarcho-capitalism* (perhaps the best elaborate theory of anarchism) – a purely individualistic theory, which differs from other right-libertarian theories by its rejection of the state. Here, the state is viewed as the result of unjust violence (imposing the will of some on others and infringing on their property rights). Anarcho-capitalism is based on the idea of private property taken to the extreme and is a *par excellence* example of the thesis that basically everything is a private matter.

Thus, this theory criticizes and rejects the phenomenon of the state as it has historically evolved. It must be said, however, that it does not oppose the emergence of an imaginary "private state" that would be the result of an actual, not just fictitious, *social contract* (thus, there is a noticeable influence of John Locke's ideas that anarcho-capitalists are trying to carry to their ultimate consequences). The norms of such a "legitimate" state would apply only to its citizens (voluntary contractors), and no one would be forced to be subject to its authority unless they have consented to it (or harmed a citizen of that state by violating some of their negative rights). Anarcho-capitalism thus admits the existence of legislation, but essentially only "private" legislation – one that binds only those who have expressed their free consent with submission to it. Otherwise, we are told, we have to do with a fundamentally immoral, ethically unjustifiable violence against free persons. Anarcho-capitalists compare the current state to an extortionist and claim that just as the extortionist unilaterally

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[44] OTTOVÁ, E. *Theory of Law.* Šamorín: Heuréka, 2006, pp. 231-233.

[45] As Matěj Gregárek states, the essence of the legitimacy of state power *"is to find harmony between the private and political spheres so that there are no normative contradictions between them* […]." (GREGÁREK, M. Justification of the State: Legitimacy, Justification, and the Non-Radical Framework of Philosophical Anarchism. In GREGÁREK, M. – KOSEK, J. *State, Law and (In)Justice: Two Studies in Legal Philosophy.* Prague: Faculty of Law, Charles University, 2012, p. 87).

enforces the payment of ransom, the state enforces taxes (and demands other duties from us).[46]

In this theory, all are subject to natural law regardless of whether they have consented to a "private" state or not. The natural law consists of the requirement to respect the freedom of the other, provided that he or she does not infringe on someone's life, health, personal freedom, or property (while life, health, and personal freedom can theoretically be reduced to property as well, since anarcho-capitalists build on Locke's idea of self-ownership, i.e., ownership of one's person, one's body).[47] This requirement to respect the freedom of the other is called *the non-aggression principle.* Aggression is defined as an interference with someone's *negative rights* to life, health, personal freedom, or property, while *negative rights* are understood as rights *from something* (*to be let alone*) and not *to something* (*to be done unto*). In anarcho-capitalism, we are not entitled to the help of another person in a situation of some unfortunate circumstances (even in danger of life) through no fault of his. If we had such a claim, it would be a positive right (the right "to something"). In anarcho-capitalism, there is only a claim that no one should harm us (*neminem laedere*). According to many anarcho-capitalists, of course, it is true that a person behaves as characterless and evil if they do not help another in a critical situation (especially in danger of life), even though they could do so. But this doesn't mean anyone should be forced to do so if they have not previously voluntarily committed themselves to it or if such an obligation does not arise from their own previous wrongdoing.[48]

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[46] URZA, M. *Anarcho-Capitalism: The State Is a Bad Servant, But an Evil Master.* Published by Tereza Sladkovská, 2018, pp. 29 and 31.

[47] ROTHBARD, M. N. *The Ethics of Liberty.* New York: New York University Press, 1998, p. 21 ff. Locke associates this idea with the acquisition of ownership (by mixing one's own labor with *res nullius* or transferring ownership by a contract). Locke's natural-law understanding of property is considered fiction by critics; for example, David Hume, in his reflections on law and property, took this skeptical approach (HUME, D. *On Law and Politics.* Bratislava: Kalligram, 2008, p. 19 ff.).

[48] So, for example, if our guest, in anger for some insult, throws us from our private pier into the sea, he will be obliged to help us not to drown because his act violated the principle of non-aggression (the mere insult is not understood as aggression in anarcho-capitalism; anarcho-capitalists uphold the idea of absolute free speech – see, for instance, TURČAN, M. Freedom of Speech In the Context of Libertarianism. In MÉSZÁROS, T. – KASINEC, R. (eds.). *Vault Films – An Interdisciplinary View.* Bratislava: Faculty of Law, Comenius University, 2019, pp. 47–69). However, if the pier belongs to him and we, as a guest, do not obey his call to leave the pier, then the very act of throwing us out will only be a means of protecting his property rights, which means he will not violate the non-aggression principle in such a case.

This demand to respect the freedom of others, even at the cost of grossly immoral behavior, is a typical feature of anarcho-capitalist social ethics and, to some extent, of libertarianism in general (libertarians, after all, are convinced of the key value of considerably broad individual freedom).[49] Anarcho-capitalism even rejects the legitimacy of punishing another for the cruelty towards his own or wild animals (whereas this crime is now commonly found in criminal law as a branch of public law in Western democracies).[50] This is due to the fact that this doctrine (like other libertarian doctrines) recognizes only negative rights, besides which there are no legally protected values. This is also due to the fact that the animal is not considered a bearer of negative rights because it is not a person (when defining the concept of rights, anarcho-capitalism is based on the so-called *will theory of rights*, which attributes rights only to persons capable of exercising their will). It is worth mentioning that some non-anarchist libertarians view this question in the same way.

It can also be noted that with regard to the idea of self-ownership (i.e., ownership of one's body), some libertarians today hold, for example, that the transfer of human organs (transplants) should not be subject to state regulation (a special public law regime in which it is currently found), but should be free as part of the free market (i.e., it should be possible to trade in voluntarily provided bodily organs). This, in turn, is considered immoral in Kantian ethics because of the use of another person as a (commercial) means – i.e., a violation of the second formula of the categorical imperative (the so-called *formula of humanity*).[51] Libertarians usually recognize the freedom of action also in other

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[49] Besides *rights-oriented* libertarianism based on the Lockean natural law tradition, *utilitarian* libertarianism based on the tradition of J. S. Mill can be mentioned. Both agree that one should not do anything that harms the other. However, the question is whether the definition of harm to the other through the concept of negative rights is sufficient from a utilitarian perspective. Perhaps in this very sense, Paul Kurtz criticizes Mill's requirement *not to harm the other* as too general and vague (KURTZ, P. *Forbidden Fruit: The Ethics of Humanism.* Bratislava: Rastislav Škoda Publishing House, 1998, p. 177). On the relationship of liberalism to the issue of (non)enforcement of morality, see, for instance, POSTEMA, G. J. Public Faces—Private Places: Liberalism and the Enforcement of Morality. In DWORKIN, G. (ed.). *Morality, Harm, and the Law.* Boulder: Westview Press, 1994, pp. 76-90.

[50] See, for instance, TURČAN, M. On the Negative View of M. Rothbard on the Idea of Animal Rights. In *Filozofia*, 2020 (vol. 75), no. 7, pp. 539-544.

[51] Perhaps it is in this (Kantian) spirit that the current legal possibility of surrogacy in the Czech Republic, which has the aforementioned economic limit, should be understood. *"Undoubtedly, it is the issue of commercialization as a key dispute regarding the ethical aspects of surrogacy while there is a ban on commercial surrogacy in the Slovak Republic, but also in the neighboring Czech Republic, whose legislation does not prohibit surrogacy, although the clear legislation that would regulate it as a legal option still lacks. It is based on the general principle that the use of human body parts must not be a source of financial benefit*

areas in which certain acts are now considered illegal (criminal), even if they were done with the free consent of the injured party.[52]

Thus, the key ethical and political concept of libertarianism is *the negative freedom*.[53] Consequently, in the context of continental law, at least with respect to the theory of interests or the theory of norms, it also affects the sectoral

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or other benefits either for the person from whose body the parts are to be taken or for anyone else, including the medical establishment that carried out the removal." (ERDŐSOVÁ, A. Surrogacy as a Bioethical Problem from the Perspective of the Protection of Fundamental Rights and Freedoms. In *Justičná revue*, 2020 (vol. 72), no. 4, p. 479). In the words of Katarína Račková: *"Staunch opponents of the institute of surrogacy are especially concerned about the potential commercialization of this process, and the associated development of the black market for children, where the child is considered a tradable commodity more than a dignified human being. A significant threat is also posed by the abuse of this institute by women who, although fertile and able to carry a child to term in their bodies, are not willing to undergo the discomfort associated with pregnancy and childbirth and thus prefer to find a substitute who will undergo this process for them in return due to their life situation. On the other hand, supporters of this form of assisted reproduction believe that the state should not hinder the reproductive freedom of the individual and the related possibility of raising one's own offspring even when the woman is not able to carry the child to term in her body."* (RAČKOVÁ, K. Surrogacy and Its Current Legislative Limits. In JÁNOŠÍKOVÁ, L. – OSTRÓ, N. (eds.). *Human Rights Forum – Medical Law Interdisciplinary.* Bratislava: Eurokódex, 2012, p. 205).

[52] A particular issue in restricting ownership rights is, for example, the disposal of objects of cultural value. As stated by Rudolf Kasinec and Marián Šuška, these objects represent *"unique manifestations of the human mind and spirit, and thus become a certain source of information about a certain society at a certain time and place. It is for this reason that society is interested in dealing with these items in a special, more qualified way, as these items cannot be multiplied or subsequently produced, and so their destruction irreversibly destroys important information. This is also the main reason why the law regulates several restrictions on rights and establishes more strict and exact obligations regarding the possession and ownership of objects of cultural value, which we could see, for example, in the case of permanent export or import of objects to/from abroad. It is precisely such interventions that point to the fact that (not only) in the private law sense it is a partial res extra commercium."* (KASINEC, R. – ŠUŠKA, M. The Significance and Concept of the Object of Cultural Value as a Thing in Law. In *Historia et theoria iuris*, 2020 (vol. 12), no. 3, p. 95.

[53] The concept of *negative liberty* (which corresponds to the idea of *negative rights*) is drawn from the work of Isaiah Berlin. However, the concept of *positive liberty* was probably used slightly differently by Berlin compared to libertarians who criticize the concept of *positive rights* (see BERLIN, I. *Four Essays on Liberty.* Prague: Prostor, 1999, p. 213 ff.; see also PUTTERMAN, T. L. Berlin's Two Concepts of Liberty: A Reassessment and Revision. In *Spills*, 2006 (vol. 38), no. 3, pp. 416-446; HEJDUK, T. Three Concepts of Liberty. In *Filozofia*, 2021 (vol. 76), no. 2, pp. 110-124).

distribution of the legal system (its division into public and private law or the scope of public law).

Although anarcho-capitalism is originally an "American" doctrine, it has found its adherents all over the world (in our geographical area, a relatively well-known example may be the Czech author and activist Martin Urza, to whom I have already referred in this book). The American economist Murray N. Rothbard, who is considered the father of anarcho-capitalism, has systematically presented his theory in his book *The Ethics of Liberty*. Rothbard develops his own understanding of the idea of natural law and tries to apply it to various problems, such as monopoly business, the definition of crime and appropriate punishment, the question of children's and animal rights, etc. At the same time, he tries to come to terms with competing theories or objections to the theses on which his theory is based. Rothbard's ideas were later taken up and variously modified by other anarcho-capitalists.[54]

A well-known opponent of anarchism was Robert Nozick, who, in his work *Anarchy, State and Utopia,* defended minarchism, i.e., the idea of the minimal state as the only legitimate form of the state: *"The minimal state is the most extensive state that can be justified. Any state more extensive violates people's rights."*[55] Nozick argued that the existence of the state was a natural necessity and that the state would always emerge from the state of nature.[56] Thus, he did not agree with Rothbard's approach but he shared with him the libertarian emphasis on negative rights ("rights from something") and the rejection of positive rights ("rights to something"). He argued that the state should be reduced to the necessary minimum – i.e., it should be referred to the role of a "night watchman".[57] By doing so, he significantly trimmed the sphere of public law (especially if we approach it through the prism of the theory of interests or the theory of norms).

Other libertarians view it similarly. Although they accept the idea of the state (they consider it necessary), they promote its significant reduction into the form of a guardian of elementary rules of the free market and the basic security of citizens. An example of this is the prominent American economist Milton Friedman, the leader of the Chicago School, who emphasized the equality of possibilities as equality before the law and, like Nozick, advocated for the

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[54] Among contemporary anarcho-capitalists, Hans-Hermann Hoppe can be pointed out, for instance (see HOPPE, H.-H. *Democracy, Anarchy, and the Errors of Economics*. Prague: Alfa Nakladatelství, 2009).

[55] NOZICK, R. *Anarchy, State, and Utopia.* New York: Basic Books, 1974, p. 149.

[56] Ibid., p. 10 ff.

[57] Ibid., pp. 26-27.

minimal state. He claimed that the elite has no right to impose its will on others, and neither does any other group, even if it is the majority. Each person is to be his own master, provided he does not infringe on similar rights of others. The institution of government was created to protect this right – from the citizens of the same country and from external threats – not to give unlimited power to the majority. Just like personal equality, equality in possibilities cannot be interpreted literally, according to Friedman. He held that its true meaning is perhaps best expressed by a French phrase that dates back to the French Revolution: *une carrière est ouverture aux talents* – a career is open to talent. No bureaucratic obstacles should prevent people from achieving a position that corresponds to their talents and to which their hierarchy of values leads them. Neither birth, nationality, skin color, religion, gender, nor any other irrelevant traits should predetermine the possibilities that are open to a person – only his or her personal abilities. This interpretation of equality of possibilities is, according to Friedman, simply a more detailed interpretation of personal equality or equality before the law. He insisted that equality of possibilities and personal equality are not incompatible with freedom; on the contrary, they are essential elements of freedom.[58]

[58] FRIEDMAN, M. – FRIEDMAN, R. *Freedom of Choice.* Prague: Liberal Institute, 2020, pp. 145-148. Of course, this is not an exclusively "liberal" position. Similarly, conservative historian Richard Pipes states that the main threat to freedom is not tyranny but equality, which is defined as equal reward and the associated pursuit of social security. He insists on the claim that freedom is inherently inegalitarian because people differ in their physical strength, intelligence, ambition, courage, perseverance, and other qualities that lead to success. According to him, equality of opportunity and before the law is not only compatible with freedom but essential to it. However, this is not the case with equality of reward. Pipes sees the "right" to equal reward as unattainable and, in any event, detrimental to private rights. He says we must reject the idea of the Enlightenment, which is inextricably linked to the ideal of equality, which sees people as infinitely malleable beings. (PIPES, R. *Property and Freedom.* Prague: Argo, 2008, pp. 281-283). Among the prominent conservatives who defend capitalism and the free market, we may also mention the Catholic thinker, Michael Novak. He considered capitalism and democracy as essentially interconnected concepts. According to him, a free capitalist economy requires democracy, and democracy requires a free capitalist economy. He emphasized that these two statements are not ideological; they are empirically confirmed and can only be refuted by facts to the contrary. (NOVAK, M. *The Philosophy of Freedom: A Program for the People on the Road to Freedom.* Bratislava: Charis, 1996, p. 113; on the problem of capitalism in the Catholic social ethics, see also SUTOR, B. *Political Ethics.* Trnava: Dobrá kniha, 1999, p. 212 ff.). Novak emphasized the moral essence of right-wing economics and its realistic view of humans as moral beings. According to Novak, we only had to listen to the classic economists of the day – such as Milton Friedman – and we would find *"unmistakable tones of moral seriousness."* (NOVAK, M. *Business as a Calling.* Bratislava: Charis, 1998, p. 144). The well-known centrist Amitai Etzioni, who was looking for a third way between

We can also mention Friedrich August von Hayek, who *"limits the concept of justice to the correcting justice, which coincides with the moral responsibility of individuals."*[59] Jarmila Chovancová states that Hayek starts from the principle that *"the rules of the game are the basis of justice, which he views as immutable rules that are primary, and external models of social justice are rejected as a violation of individual freedom,"*[60] and that, according to him, *"in fact, individual moral responsibility for action is incompatible with the realization of an all-encompassing pattern of distribution."*[61]

From what has been given so far, it is clear that those libertarians who in principle accept the institution of the state as necessary, reject public regulation in some areas, such as social care, as well as any positive discrimination (which is also a matter of public law).[62] Thus, what socialists, for example, perceive as morally desirable,[63] libertarians (classical liberals) consider morally unacceptable.[64] In their view, no public interest in these areas has legitimacy

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individualism and collectivism (although, it must be said that finding a balance between the two was also Novak's effort), argued to some extent against the tradition of "Whigs" (which is the name given to the proponents of right-wing economic emphases, which Novak used when he described himself as a "Catholic Whig"). Under the influence of Buber's personalism, Etzioni spoke of the so-called *responsive community* based on the acknowledgment of the value of "I-We" relations. (ETZIONI, A. *The Moral Dimension: Toward a New Economics.* New York: The Free Press, 1990, p. 6 ff.).

[59] CHOVANCOVÁ, J. *Liberalism Versus Communitarianism.* Bratislava: Publishing Department of the Faculty of Law, Comenius University, 2009, p. 78.

[60] Ibid., p. 79.

[61] Ibid., p. 74.

[62] It is worth noting that Milton's son, David Friedman, is a consequentialist anarcho-capitalist. He is interested in justifying broad liberty with good consequences, not with ethical obligations (unlike deontological anarcho-capitalists).

[63] On the socialist critique of Nozick, see, for instance, XIAOPING, W. From Principles to Contexts: Marx, Nozick, and Rawls on distributive justice. In *Filozofia*, 2006 (vol. 61), no. 3, pp. 247-260.

[64] In the words of the classical liberal thinker of the 19th century, Frédéric Bastiat: *"The chimera of today is the enrichment of all classes at the expense of some for the benefit of others, the generalization of robbery under the guise of organizing it. By the way, legal robbery can be carried out in a number of different ways – tariffs, protection, subventions, subsidies, progressive taxation, free education, the right to work, the right to profit, the right to wages, the right to social assistance, the right to work tools, free loans, etc. And it is the totality of all these plans, the set of legal robberies that bears the name of socialism. What other war would you like to wage against socialism, thus defined, creating a doctrine, if not a war of doctrines? If you consider this doctrine to be erroneous, absurd, or terrifying, then refute it. It will be all the easier the more erroneous, frightening, and absurd this doctrine is."* (BASTIAT, F. *On Laws.* Bratislava: Kalligram, 2002, p. 59).

(exists), and the application of mandatory norms has no moral justification. Those who start from the idea of natural law claim that such positive legal norms collide with negative natural human rights. They consider criminal law (which is to prosecute mainly, if not exclusively, violent crimes and property fraud), constitutional law, as well as administrative and tax law as legitimate parts of public law (especially if grasped through the prism of the theory of interests), all of which are significantly trimmed down by libertarians (in proportion to the idea of a minimal state).

Thus, given the theory of interests and the theory of norms (at the least), the division of the legal system (the relationship between public and private law or the very existence of a distinction between public and private law) depends on the socio-ethical doctrine chosen.

It is worth noting that when the concept of *public law* explicitly appears in the legislation, it tangibly demonstrates the importance of legal theory for practice since it is the theory of law that assigns content to this concept. As I have already indicated, this is done using one of the existing theories, such as the theory of interests, the theory of norms, the theory of sanctions, or the theory of subjects. In a given legal system, each of those theories may give a potentially different answer to the question of which sub-branch belongs to the branch of private law and which to the branch of public law. Giving preference to one of those theories and relating it to a legal provision explicitly mentioning public law can have (un)just consequences on a broad scale, not just in an individual case. The already discussed questions of why X should be considered an object of public interest, why mandatory norms should be applied to it, why the sanction should be repressive, or why the state should be granted a superior position in the given relation will come to the fore. The point is that the issue of the desirable content of the applicable law and the form of any prescriptive legal theory simply cannot be separated from ethics.

Within this chapter, it is good to mention that the second (perhaps even more basic) way of dividing the law as a system is the distinction between branches of national and international law.[65] As is known, concerning the relationship of these branches, theories that prefer either international law to national law or, conversely, national law to international law have been profiled.[66] The question of the primacy of one or the other system as such does

[65] A special type of dualism is the relationship between national and European law (see, for example, RYCHETSKÝ, P. Dualism of Community and National Law (Current Crossroads of Doctrine). In HAVLÍČEK, K. (ed.). *Dual Law (New Dualism of Law).* Prague: Havlíček Brain Team, 2014, pp. 9-13).

[66] VEČEŘA, M. et al. *Theory of Law.* 2nd ed. Bratislava: Bratislava College of Law, 2008, pp. 143-144.

not seem to be ethically fundamental (in practice, the theory of the primacy of international law has prevailed in principle, with the position of the constitution remaining disputed in such a relation), but rather the question of the enforceability of international law in cases of human rights violations. The question is whether the idea of state sovereignty (and thus, a system of national law in this sense) or the idea of universal human rights (i.e., international human rights regulation) should take precedence.

Different forms of utilitarianism and deontology can give different answers to this question. For example, some utilitarians may argue that greater stability in the international community, and thus greater overall prosperity, will be achieved by respecting state sovereignty, even if some people suffer unjustly under a cruel regime. Sovereignty should, therefore, be prioritized in this view. On the contrary, some deontologists may argue that human rights violations are such a serious issue that humanitarian intervention is, in principle, always permissible or even desirable (who will stand up for an abused population when the international community does not stand up for them and how else can they be shown respect and helped, if not by a military intervention, when economic embargoes or other non-violent sanctions fail?).

In this respect, legal theorists are divided into the so-called *internationalists* and *universalists*. While the former prefer the idea of state sovereignty as determining in the system of international law, the latter prefer the idea of human rights.[67] The universalist position can also be called cosmopolitan (or at least it can be considered intertwined with some form of cosmopolitanism – especially with the so-called *moral cosmopolitanism*). Concerning the idea of cosmopolitanism and its relationship to universal human rights, Czech authors Ivo Pospíšil, Petr Preclík, and Hubert Smekal state that *"in cosmopolitan theory, it is not necessary to advocate a mere 'export' of human rights and democracy, but to assert them as a natural part and essence of the world order. Human rights are the bearers ('torch') of this global justice."*[68] The goal of political cosmopolitanism is the creation of a world state or some other significantly integrated global entity that will protect human rights (which, however, could theoretically mean the disappearance of the difference between

[67] On this issue, see, for instance, TURČAN, M. The Legitimacy of Military Interventions for the Protection of Human Rights in Today's World. In BEZÁK, M. – HAUERLANDOVÁ, I. (eds.). *Academic Accents.* Bratislava: Pan-European University, 2011, pp. 159-163.

[68] POSPÍŠIL, I. – PRECLÍK, P. – SMEKAL, H. Democratization and Human Rights from the Point of View of International Relations Research. In HOLZER, J. – MOLEK, P. et al. *Democratization and Human Rights: Central European Perspectives.* Prague: Sociology Press, 2013, p. 142.

international and national law).[69] In political-philosophical and ethical discussions, there are disputes about whether the idea of universal human rights, when well considered, leads to the conclusion that we need to create such an entity or not.[70] However, whatever the answer to this question, the fundamental thesis in support of the legitimacy of humanitarian interventions is the moral-cosmopolitan assumption that our moral obligations to anyone in the world are as important as our moral obligations to our fellow citizens (locals, compatriots).[71] This thesis has traditionally been rejected by some proponents of narrative-ethical approaches, who argue that a man has greater moral obligations to those with whom he shares a common story and with whom he has common roots (i.e., members of his own nation, city, or family).[72]

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[69] Henryk Skolimowski speaks (in a somewhat more abstract sense) of *cosmocracy* (SKOLIMOWSKI, H. Cosmocracy as a New Stage in the Development of Democracy. In *Filozofia*, 2006 (vol. 61), no. 3, pp. 234-246).

[70] See, for example, LAFONT, C. *Global Governance and Human Rights*. Amsterdam: Van Gorcum, 2012, p. 45 ff. See also DUFEK, P. Why a World State is Unavoidable in Planetary Defense: On Loopholes in the Vision of a Cosmopolitan Governance, available online: https://www.academia.edu/38159375/Why_a_World_State_is_Unavoidable_in_Planetary_Defense_On_Loopholes_in_the_Vision_of_a_Cosmopolitan_Governance [21-02-2022]. From older contributions, see, for instance, WENDT, A. Why a World State is Inevitable. In *European Journal of International Relations*, 2003 (vol.9), no. 4, pp. 491-542.

[71] One can also quote Jürgen Habermas, who similarly states: *"We are all intimately familiar by nature with the everyday situations in which, without any connotation of self-affirmation, we feel obliged to solidarity with strangers, with everything that has a human face. Only this moral universe of all responsible persons, Kant's 'realm of purposes', is completely inclusive: it excludes no one. An injustice that happens to anyone, an injury that is inflicted on anyone, irritates our moral sensitivity and encourages us to be morally indignant or to give help. Moral judgments are fed from these emotions, which, if only the mutual assumption of perspective leads to a sufficiently decentred perception of the conflict and to the equal consideration of all interests at the moment, can be rationally justified."* (HABERMAS, J. *On the Constitution of Europe.* Bratislava: Kalligram, 2012, p. 100). In a similar vein, the well-known humanist Paul Kurtz once wrote that efforts to create a viable system of world laws and a federal system to defend human rights are still a dream of the future because the United Nations is based on the idea of a union of sovereign states, which means rights can only be protected within a defined area. According to Kurtz, even though only some of the large states are truly democratic, giving people freedom and trying to protect human rights, we have reached a situation where the ideal of the world community has a special meaning and strength, whereas the intended ideal community is ethical because it is based on the recognition that there are universal human rights, which apply to all people without distinction and regardless of where one resides. (KURTZ, P. *Forbidden Fruit: The Ethics of Humanism.* Bratislava: Rastislav Škoda Publishing House, 1998, p. 173).

[72] Michael Sandel, referring to Alasdair MacIntyre, states: *"To live a life is to enact a narrative quest that aspires to a certain unity or coherence. When confronted with competing paths, I try to figure out which path will best make sense of my life as a whole, and of the things I care*

It can be added that although the idea of state sovereignty is covered not only by national but also by international law, the conflict between state sovereignty and human rights implicitly involves a tension between hypothetical inhumane national law and the international law of human rights. Intervention is (also) a form of elimination of inhumane domestic law by implicit preference for international law (or, let's say, a chance for those judges who do not want to apply the inhumane law to oppose it and declare it invalid because it conflicts with the international law).

The point of all that has been given in this chapter is that the importance of ethics is also shown in connection with some problems arising from the division of law into public and private, national and international. Thus, even the issue of law as a system has (either directly or indirectly) significant ethical dimensions.

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about. Moral deliberation is more about interpreting my life story than exerting my will. It involves choice, but the choice issues from the interpretation; it is not a sovereign act of will. At any given moment, others may see more clearly than I do which path of the ones before me, fits best with the arc of my life; upon reflection, I may say that my friend knows me better than I know myself. The narrative account of moral agency has the virtue of allowing for this possibility. It also shows how moral deliberation involves reflection within and about the larger life stories of which my life is a part. As MacIntyre writes, 'I am never able to seek the good or exercise the virtues only qua individual.' I can make sense of the narrative of my life only by coming to terms with the stories in which I find myself. For MacIntyre (as for Aristotle), the narrative, or teleological, aspect of moral reflection is bound up with membership and belonging." (SANDEL, M. *Justice: What's Right to Do*? London: Penguin Books, 2010, pp. 221-222). In the context of a lawyer's professional ethics, Ľubomír Batka speaks of the value of the story and the relationship, referencing David Luban: *"Being the subject of a story is more than informing of the facts. It is a perspective that recognizes that everyone is a person involved in a network of other relationships and obligations, but also the commitment of oneself to other people. From the point of view of legal ethics, it is then possible to explain why the lawyer will not paternalistically negate these relationships from the position of a professional who knows best what the client wants and needs. A paternalistic approach is not problematic in disrespecting the client's choice, but* [...] *when it does not respect the story, obligations and what matters to the client."* (BATKA, Ľ. Human Dignity as a Goal of Legal Ethics. In SZAKÁCS, A. – HLINKA, T. (eds.). *Bratislava Legal Forum 2020: Legal Professions in Paradigms.* Bratislava: Faculty of Law, Comenius University, 2020, p. 13.

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SOURCES OF LAW, LAWMAKING, AND ETHICS

The theory of law traditionally divides the sources of law into three groups – material, formal, and gnoseological. Material sources of law are factors influencing the content of the positive law; formal sources are concrete forms of expression of the positive law, and gnoseological sources are sources of knowledge of the positive law (sources of information about the law).[73]

Ideas about morality are among the factors influencing the content of the law (they are, therefore, one of the material sources). For example, differences in religious convictions, which to a large extent shape society's ideas about what is morally right and wrong, can lead to differences in legislation (for instance, Catholic Poland has a different abortion policy than the liberal Netherlands, the Islamic world recognizes a different status for women than contemporary democratic Europe, etc.). Of course, this is not true on an absolute scale, but there is undoubtedly a certain impact.

In every culture, the intelligentsia tries to grasp moral questions through the prism of some ethical theory. Even within religious thinking about morality, various religious-ethical theories are usually competing. So, the *theories* are relevant even in a religious context, and it is not all about pure revelation here. For example, suppose a person accepts the classical Thomistic theory of natural law and the so-called *perverted faculty argument*.[74] In that case, they will probably consider the legalization of homosexual marriage inadmissible because the concept of marriage, in this understanding, represents a permanent *sexual* union. In contrast, homosexual relationships are, according to this idea, a perverse use of sexual capacity, which means, *by definition,* they cannot be a marriage. Anyone who is not convinced by this theory can potentially agree to a change in the legislation on marriage while remaining a conservative Christian (he can theoretically satisfy those who do not profess conservative values in their personal life). However, in the case of abortion, for example, the possibility of supporting liberalization will become noticeably harder for a conservative compared to the issue of registered partnerships or homosexual marriages because the rights of the third (unborn) are clearly involved in such a case. He, as a Christian, will want to protect the unborn in the same way as born. Therefore, satisfying those who do not profess conservative values will be hard.

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[73] OTTOVÁ, E. *Theory of Law.* Šamorín: Heuréka, 2006, pp. 184-185; FÁBRY, B. – KASINEC, R. – TURČAN, M. *Theory of Law.* 2nd ed. Bratislava: Wolters Kluwer, 2019, p. 110.

[74] See, for instance, TURČAN, M. On the Concept of Natural Law and the Perverted Faculty Argument in the Contemporary Christian Thought. In *Testimonia theologica*, 2020 (vol. 14), no. 1, pp. 10-30.

On the other hand, utilitarianism as an ethical theory will lead in a completely opposite direction. Not only does it generally have no problem with homosexual marriages and abortions, but under certain circumstances, it even allows infanticide (killing a newborn). The most famous proponent of this theory, Peter Singer, in contrast to the traditional Christian understanding, refuses to recognize the fetus as a human being and even rejects that it would be absolutely morally unacceptable to cause the death of a born innocent human being.[75] Thus, as already indicated, utilitarianism allows for the active sacrifice of an innocent person in order to achieve a greater overall good. On the other hand, the Kantian tradition rejects this as a disrespect for the idea of human dignity. At the same time, a yet different position is proposed by some anarcho-capitalists who base their theory on the non-aggression principle and argue that while the fetus has a negative right to life, the mother owns her body (I am alluding to the so-called *evictionism*). This means it is not allowed to kill the fetus directly, but it is allowed to remove it from the mother's body gently. If, due to the lack of viability, the fetus dies after being removed from the mother's body, according to the proponents of this theory, no crime deserving a punishment occurred (there was no violation of the *negative* right to life of the fetus because no one *killed* the fetus, it was just *let to die*; according to this idea, the fetus has no right to stay in the mother's womb, since it is her property, not of the fetus).[76]

In some respects, then, of course, it will make a big difference whether one or another way of ethical thinking will prevail in a particular society. This means that as a material source of law, ideas about morality (in connection with various ethical theories) in specific areas will have a perceptible impact on the content of the legislation.

Concerning the issue of formal and epistemological sources of law and lawmaking, the theme of legal certainty is important from an ethical perspective. Under the influence of Radbruch's formula, the concept of legal certainty is sometimes (perhaps somewhat artificially) separated from the concept of justice. However, the requirement for legal certainty is also one of the requirements of justice (in the broad sense), and a legal system in which legal certainty is not warranted must be described as unjust because a person cannot be sure about the protection of their legitimate expectations.

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[75] SINGER, P. *Writings on an Ethical Life.* Bratislava: Publishing House of the Association of Slovak Writers, 2008, p. 144 ff.

[76] See, for instance, BLOCK, W. E. Evictionism is Libertarian; Departurism is Not: Critical Comment on Parr. In *Libertarian Papers*, 2011 (vol. 3), art. no. 36.

The requirements of the principle of legal certainty were neatly summarized by the eminent American legal theorist of the 20th century, Lon L. Fuller, in his book *The Morality of Law*. The well-known eight requirements[77] that he defines here, which are sometimes referred to as the so-called *formal (procedural) natural law*, go as follows: The first, trivial, requirement is the very existence of general rules (laws) that will be applied in practice so that each case does not have to be decided *ad hoc*. The second requirement is the publication or making available of the adopted legal rules to the citizens (i.e., the existence of epistemological sources of law; without them, one would not learn about the applicable law, whereas the existence of primary – i.e., official – epistemological sources of law is essential here). The third requirement is the principle of non-retroactivity, i.e., the requirement to exclude the retroactive effect of laws. As Fuller suggests, retroactivity does double harm: on the one hand, it represents an unfair punishment of a citizen for something he did at a time when it was legal, and on the other hand, it creates general uncertainty about how to behave according to the current rules, since they can be retroactively repealed in the future (retroactivity thus undermines the integrity of the rules for the future). The fourth requirement is the demand for clarity of the adopted rules since the lack of clarity causes uncertainty about how to behave (i.e., what is allowed and what duties one has). The fifth requirement is the internal non-contradiction of the legal system, i.e., the avoidance of adopting such legal rules that contradict each other (since it is not possible to do X and non-X at the same time). The sixth requirement dictates that only such rules that are feasible should be adopted. That is, it is inadmissible to demand conduct that the person to whom the rule applies is not objectively capable of. The seventh requirement concerns the frequency of legal (legislative) changes. It prescribes that the law should not be changed too often because then its addressee will not be able to orient himself sufficiently in it. Lastly, the eighth requirement concerns the correspondence between the legal rules promulgated and their application in practice. If the law is ignored in practice, or if it is applied selectively (i.e., only in part, or only in some cases, or in relation to some random subjects), legal certainty is lost. Fuller calls these eight requirements *the intrinsic morality of law.* According to him, a system that does not meet them has no right to be called *the law* (which brings us back to the issue of the concept of law).

It is worth mentioning that Fuller's legal philosophy is influenced by virtue ethics (Fuller also speaks of the so-called *morality of aspiration*),[78] however, the above eight requirements are the necessary minimum and are of a

[77] FULLER, L. L. *The Morality of Law.* Prague: OIKOYMENH, 1998, pp. 41-42.

[78] See also ibid., p. 12 ff.

deontological nature (in his theory, they belong to the so-called *morality of duty*).

The issue of legal certainty as part of a broader concept of justice, which is a moral category, can also be thematized directly in connection with individual formal sources of law, which include normative legal acts, normative precedents, normative treaties, legal customs, or some other sources of law. The Anglo-American system is sometimes (perhaps somewhat unfairly) criticized for the lack of emphasis on legal certainty since the (decisive) source of law here is not considered to be the statutory law but precedent. The continental system, on the other hand, suffers from the problem of sometimes inconsistent application of the law caused by the fact that judicial decisions are not seen as universally binding. However, it is precisely in the interest of increasing legal certainty as part of a broader idea of justice, as well as in the interest of justice as a certain equality (in the spirit of the principle according to which *the same should be treated equally, the different differently*), that the position of the case law in the legal system has been strengthened in recent years in Slovakia (which in principle also testifies to the convergence of legal cultures that is taking place). This step can be evaluated positively (unless we accept some radical consequentialist theory, it certainly cannot be described as fair if the courts decide similar cases differently). Therefore, strengthening the importance of case law as a source of law clearly has its ethical dimension.

Of the formal sources of law, legal custom has a relatively close link to ethical standards. Although it is not an official source in our environment, it can be found in an intermediary form in institutes such as good manners (*boni mores*), principles of fair business, or business customs. Above all, the first of these terms reflects the general social ideas about morality (the second two are narrower and relate to the business environment). The content of this concept, of course, evolves with time, which indicates the practical importance of the formation of moral thought for law. As is well known, the concept of good manners has a relatively important place in the Slovak and Czech civil codes because it is one of the conditions for the validity of a legal act, and it is also important in other respects.

As for the legislative process as part of the broader issue of lawmaking,[79] this issue also has ethical contexts. In a democratic state characterized by the

[79] *"Lawmaking is a complex legal process concerning the parameters that are 'in play': It is necessary to combine professional (substantive) requirements for solving current social problems, legislative skill consisting in the ability to generalize and formulate normative expression accepting the factual side of problems as well as the interests of political representations."* (GAJDOŠÍKOVÁ, Ľ. What is Current in Law. In BÁRÁNY, E. (ed.). *How the Law Responds to Novelties.* Bratislava: Veda, 2015, p. 29).

rule of law, certain demands are placed on the legislative process, which has an ethical dimension (so, the legislative process should also be *fair* in a sense). Its form depends to a large extent on the political regime of the state[80] (this is connected, for example, with the question of the existence of the opposition and the possibility of commenting on the government bill, the question of the public nature of the discussion of the law, the question of the appropriate speed of the legislative process, etc.). Branislav Fábry, referring to Gunnar Schuppert, lists five indispensable characteristics of the legislative process that must be present in a democratic state. They are: the existence of discussions and consultations on draft laws, i.e., consideration of arguments (even though "only" in committees), the provision of empirical basis for rational decision-making, pluralistic openness, i.e., the possibility of changing the submitted proposal on the basis of the arguments heard, the principle of publicity of the process, which will allow its (eventual) control, and finally decision-making based on the majority principle.[81] Violating any of these requirements can be criticized as unfair.

In connection with the issue of lawmaking, it is interesting that the utilitarian Jeremy Bentham already considered it necessary to pay special

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[80] The theory of state distinguishes between democratic and non-democratic regimes or democratic versus autocratic or totalitarian forms of government. (KLÍMA, K. et al. *Theory of State.* 2nd ed. Pilsen: Aleš Čeněk, 2011, p. 129). The very concept of democracy has a moral dimension. The essence of normative theories of democracy is *"the establishment of values and ideals towards which democracy should be directed.* [...] *The normative ideals in question establish the criteria of the relationship to which we compare the actually functioning regimes that are referred to as democratic."* (MRVA, M. Democracy and the Rule of Law. In *Current Questions of Legal Theory.* Bratislava: Wolters Kluwer, 2018, p. 92). Radoslav Procházka and Marek Káčer state that democracy *"presupposes and at the same time creates one basic axiom: all members of the people (citizens) are born with the same moral value, and all of them have the right to have the others respect this equality."* (PROCHÁZKA, R. – KÁČER, M. *Theory of Law.* Bratislava: C. H. Beck, 2013, p. 78). They state that *"the purpose of democracy is to morally justify the power of one over the other and the power of the people over all who make it up,"* and that the coercive power of the state is *"morally justified only if all those subject to it have the opportunity to participate in it* [...]*."* (Ibid.). Daniel Krošlák and Daniel Šmihula note that *"it must always be remembered that in reality, political democracy, civil liberty and social equality must be preserved through active and targeted interventions by the state and civil society institutions. In fact, the natural form of human society (which prevailed until the 20th century) was authoritarian and hierarchical: the strong ruled the weak, the rich ruled the poor, men ruled women (usually), and so on. With the disintegration of modern states and the weakening of state power, society almost automatically slides into such a natural and often violent order."* (KROŠLÁK, D. – ŠMIHULA, D. *Fundamentals of the Theory of State and Law.* Bratislava: Iura Edition, 2013, p. 81).

[81] FÁBRY, B. *Theoretical Problems of Lawmaking.* Bratislava: A-medi management, 2018, p. 136.

attention to the formal aspect of the legal regulation and introduced the concept *of nomography*, which *"presents legislation as the art of composing and stylizing a legal regulation."*[82] Like Fuller, he also criticized the incomprehensibility of legal texts consisting of, for example, unstable terminology, the ambiguity of the terms used, the excessive use of technical terms, and he criticized, for example, also the lengthiness of legal texts, emphasizing the use of the shortest possible sentences, non-repetition of what has already been said, a clear formal structure, etc.[83] Of course, these are primarily "technical" problems of the art of legislation, but their practical significance in relation to legal certainty and, thus, to justice is beyond doubt. It can be suspected that Bentham's interest in the formal aspect of legal texts, as well as his interest in their material aspect, was influenced by his utilitarian paradigm, which strives for the greatest possible usefulness (after all, the legal system can function much better when it meets certain formal standards which help the citizens and state authorities understand and use it).

Ethical dimensions can, therefore, be clearly seen in the issues of sources of law and lawmaking. In the next chapter, I will touch on the ethical aspects of legal relations (implementation of law) and then on the ethical aspects of the application of law.

[82] SVÁK, J. – KUKLIŠ, P. *Theory and Practice of Legislation.* Bratislava: Bratislava College of Law, 2007, p. 54.

[83] Ibid.

4.
LEGAL RELATIONS AND ETHICS

Law is implemented in legal relations understood as legally regulated social relations in which the participants act as holders of rights and obligations.[84] According to the established theory, legal relations have their prerequisites, which are subject, object, and legal facts, as well as their elements, which are subject, object, and content. In short, we can summarize that legal facts are divided into volitional and non-volitional, whereby in the first of them, we include legal and illegal conduct, and in the second, legal events and illegal states. Traditionally, natural and legal persons are considered the subjects, while objects are mainly things, intellectual property, immaterial values, etc. The content of a legal relation is specific rights and corresponding obligations, such as giving, doing, omitting, or tolerating something. Each of the above concepts of the theory of legal relations has different connotations. In this chapter, I will focus on the ethical aspects of three of them – the subject and object of the legal relation, and the concept of rights (whereas I will focus specifically on the concept of *human rights*).[85]

The concepts of subject and object are logical opposites because what is a subject of a legal relation cannot be its object and vice versa.[86] The subjects of legal relations have rights, while objects do not. Objects of legal relations can,

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[84] OTTOVÁ, E. *Theory of Law.* Šamorín: Heuréka, 2006, p. 248.

[85] Ibid., pp. 249-250. In addition to volitional and non-volitional legal facts, legal presumptions and fictions can also be mentioned as a third (special) category of legal facts (PRUSÁK, J. *Theory of Law.* Bratislava: Publishing Department of the Faculty of Law, Comenius University, 2001, p. 269), whereby, of course, just like any legal regulation, the specific regulation of legal presumptions (especially irrefutable ones) and fictions can be evaluated and criticized from the point of view of achieving (or not achieving) the desired degree of justice.

[86] Although Tomáš Mészáros states: *"However, technological development causes a gradual approximation, intertwining and even merging of these two elements (in this spirit, we can point out the bridging of Heidegger's reproach, which consisted in our distance from things, which leads to the obstruction of the possibility of knowing the thing). On a legal level, the first 'swallow' in this area was the decision of the Supreme Court of the United States in the case of Riley v. California, in which the court prohibited the search of the contents of the mobile phones of detainees without a court order, stating in the justification of its decision that 'modern cell phones are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.' This decision – although it may cause skepticism or a grin on the face at the moment – points to a significant shift in the perception of the matter. As our historical-philosophical excursion has shown, a thing has been defined by default as something that exists outside the sphere of the human being. However, this thesis is now beginning to have*

therefore, only be understood as legally protected values. As I have already stated, natural and legal persons are considered subjects. By default, natural persons are understood as human beings. Legal persons are a form of grouping of human beings (legal persons that are formed by other legal persons are ultimately also reducible to natural persons that make up these persons). The decisive concept is, therefore, the concept of a natural person, and it can be asked whether it should be understood exclusively as a human being in the current world or whether other entities should also be included. Some activists are currently promoting the idea of granting legal personality to (some) animals, and there have already been cases of granting legal personality to certain parts of nature, such as a river or a lake.[87]

It can be said that the basic concept associated with the idea of legal subjectivity in the case of humans as natural persons is the concept of *human dignity*. This is actually the basis of their moral subjectivity, from which their legal personality is subsequently derived.[88] The concept of human dignity has been the subject of clear philosophical criticism in recent years or decades.[89]

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significant gaps." (MÉSZÁROS, T. Philosophical-Theoretical Determinants of the Revision of Property Rights. *Historia et theoria iuris*, 2019 (vol. 11), no.1, p. 127).

[87] However, they need not be understood as a special kind of natural persons (beings). They might also be understood as artificial (legal) persons.

[88] While, of course, *"one of the political, ethical, and legal evergreens of the contemporary world is a debate about what moral and legal status applies to human embryos. Abortion and other interventions against embryos, such as their use to obtain stem cells, depend on the resolution of this issue. Embryos are increasingly handled in a way that is typical of the thing, especially when used for therapeutic purposes, and therefore, we must ask ourselves what criteria should be used to assess the moral status of the embryo in the ethical debate and how the law should approach ethical dilemmas.* [...] *The question of the status of the embryo remains open, and, in particular, the proponents of the various criteria for granting protection are still unable to agree on common conclusions. However, the debate about the use of embryos for scientific purposes continues and will only intensify. The fundamental question is this: On the one hand, there is the human embryo with its potential to develop into a human individual, with the value of human dignity playing an extremely important role. On the other hand, it is an expansion of scientific knowledge, which can lead to new ways of treating serious diseases of adult living beings, which today we do not yet know how to treat effectively. This dilemma partly overlaps with current topics of political and legal decisions, and it is also a serious problem of global bioethics. In Slovakia, this topic is still being discussed, especially in the light of abortion, but the issues of interference with the human genome and embryo will be increasingly urgent legal problems."* (FÁBRY, B. A Few Notes on the Status of the Embryo from the Point of View of Ethics and Law. In *Historia et theoria iuris*, 2021 (vol. 13), no. 3, pp. 27-34).

[89] See, for instance, GISELSSON, K. Rethinking Dignity. In *Human Rights Revue*, 2018 (vol. 19), no. 3, pp. 331-348; SCHROEDER, D. Human Rights and Human Dignity: An Appeal to Separate the Conjoined Twins. In *Ethical Theory and Moral Practice*, 2012 (vol. 15), no. 3,

This concept has traditionally been defined through the concept of autonomy (free will), or through the concept of human nature.[90] A critique of the criterion of autonomy (whereas the criterion is elaborated mainly in the Kantian tradition) is based on the claim that this criterion excludes the moral (and consequently legal) subjectivity of some people who lack certain mental abilities (people with dementia, people in an irreversible coma, etc.). The criterion of human nature (essence) is criticized as discriminatory (*speciesist*) because belonging to an animal species is not a morally relevant trait of a being, according to critics.

Thus, the question of why humans should have a different status than (some) animals comes to the fore (i.e., the question of the moral and legal subjectivity of animals). Of course, not all critics of speciesism propose to accord animals moral and/or legal subjectivity.[91] Many only appeal to the need for their (better) legal protection without necessarily granting them rights,[92] i.e., legal personality (the so-called *animal welfarists*).[93] However, some argue that

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pp. 323-335; GEBREMARIAM, K. M. Human Rights and Human Dignity: A Case Against Separating the Conjoined Twins. In *Ethiopian Journal of the Sciences and Humanities*, 2020 (vol. 16), no. 1, pp. 103-123; SULMASY, D. P. The varieties of human dignity: a logical and conceptual analysis. In *Medicine, Health Care and Philosophy*, 2012 (vol. 16), no. 4, pp. 937-944; LOHMANN, G. On the Methodological Issues of Anthropology and the "Image of Man" with "Human Dignity". In *Filozofia*, 2018 (vol. 73), no. 8, pp. 660-674; TURČAN, M. Critique of the Concept of Human Dignity in the Conception of Suzy Killmister. In *Filozofia*, 2022 (vol. 77), no. 1, pp. 36-47; and perhaps also KLEINIG, J. – EVANS, N. G. Human Flourishing, Human Dignity, and Human Rights. In *Law and Philosophy*, 2013 (vol. 32), pp. 539-564.

[90] Or in some religious way (*imago Dei*). See, for example, TURČAN, M. *Human Rights in the Context of Christian Theology Today.* Prague: Advent-Orion, 2021, p. 39 ff.

[91] Mark Rowlands argues in an interesting way in favor of the moral subjectivity of animals (but without emphasizing the legal context). He argues that animals sometimes act for reasons that can be described as moral. According to him, although they are not moral agents in the true sense of the word (i.e., they are not able to evaluate their actions like humans are), he is convinced that they are moral subjects (he distinguishes between the concepts of moral agency and moral subjectivity). He concludes: *"If animals can, and sometimes do, act for moral reasons, then they are worthy objects of moral respect. That is why it matters."* (ROWLANDS, M. *Can Animals Be Moral?* Oxford: Oxford University Press, 2012, p. 254).

[92] It is worth mentioning that the legal regulations of the countries of the continental legal system and common law usually still consider animals as *objects* of legal relations. However, there is a clear trend to exclude animals from the category of *things* and consider them a special type of object of legal relations.

[93] See, for example, TURČAN, M. Animal Welfarism or Animal Rights? In *Comenius*, 2020 (vol. 5), no. 2, pp. 50-59.

animals should have rights and be understood as subjects, with the most fundamental right being the right not to be treated as an object (which reminds us of the second formulation of the categorical imperative).[94] It is, therefore, some form of *dignity*.[95] From this, we can derive, for example, the right of animals to life or freedom, which will result not merely in their protection in the sense of animal welfare (enough living space, quality feed, prevention of cruelty, etc.) but their complete liberation (i.e., a ban on keeping animals in captivity, let alone killing them). This will also result in a ban on the use of animals as a means of saving human life, and any active sacrifice of an animal for the sake of saving a human being will actually be the same as actively sacrificing one person for the benefit of another. As has already been indicated, for example, the Kantian ethical tradition (and the legislation based on it) rejects such human sacrifice as inadmissible,[96] while utilitarianism may accept it under certain conditions. It can

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[94] FRANCIONE, G. L. Sentience and Personhood, available online: https://www.abolitionistapproach.com/sentience-and-personhood/ [13-02-2022].

[95] On the issue of animal dignity, see, for instance, ZUOLO, F. Dignity and Animals. Does it Make Sense to Apply the Concept of Dignity to all Sentient Beings? In *Ethical Theory and Moral Practice*, 2016 (vol. 19), no. 5, pp. 1117-1130; EBERT, R. Are Humans More Equal Than Other Animals? An Evolutionary Argument Against Exclusively Human Dignity. In *Philosophia*, 2020 (vol. 48), no. 5, pp. 1807-1823; BERNET KEMPERS, E. Animal Dignity and the Law: Potential, Problems and Possible Implications. In *Liverpool Law Review*, 2020 (vol. 41), no. 2, pp. 173-199; JABER, D. Human Dignity and the Dignity of Creatures. In *Journal of Agricultural and Environmental Ethics*, 2000 (vol. 13), no. 1, pp. 29-42.

[96] This tradition is followed by the famous decision of the German Constitutional Court (2006), according to which it would be unconstitutional to shoot down a plane with innocent passengers onboard in the interest of saving the lives of residents in the place where the plane is supposed to be crashed by the terrorists. One of the reasons for such a decision was the claim that the human dignity of passengers does not allow for their involuntary sacrifice. In the words of Alexander Bröstl: *"So the basic question is whether a Luftwaffe pilot can shoot down an airliner hijacked by terrorists and thus cause the death of other people. The Federal Constitutional Court assessed the legal permission for such an act as interference with human dignity, among other things: 'The hopelessness and impossibility of escape, which characterizes the situation of the affected passengers of the aircraft as victims, also exists in relation to those who order and carry out the blasting of an air vehicle. The crew of the aircraft and the passengers cannot avoid this action of the state on the basis of circumstances beyond their control, but they are helplessly at their mercy with the consequence that they will be deliberately shot down together with the plane, and thus with a probability bordering on certainty they will lose their lives (they will be killed). Such treatment does not respect the persons concerned as subjects who have dignity and inalienable rights. By using their death (killing) as a means of saving others, they are objectified and deprived of their rights; while the state unilaterally disposes of their lives, since as passengers on the plane, who as victims themselves need protection, they are denied the dignity (value) that belongs to them as human beings for their own good.'"* (BVerfGE 115, 118 (124) quoted from: BRÖSTL, A. Human Dignity Categorically Commands Respect as the

be mentioned that, for example, the utilitarian Peter Singer does not emphasize the idea of *animal rights* (and thus their subjectivity).[97] Animal deontologist Gary Francione, on the other hand, considers it essential.[98]

Implicit or explicit attempts to grant legal personality to certain animals have already occurred. In this regard, Tomáš Mészáros and Nikola Švrčková state: *"In the context of modern case law, the 'Monkey Selfie Case' is interesting.* [...] *The Crested Macaque found David Slater's camera in the Tangkoko Reserve on the Indonesian island of Sulawesi and accidentally took a self-portrait. The owner of the camera later published this image in his book about animals. However, the American organization PETA was of the opinion that D. Slater had usurped the intellectual property rights of the monkey that made the image. It is for this reason that the organization filed a lawsuit for infringement of the copyright of the aforementioned macaque. Although the court dismissed that action, stating that a 'non-human animal' could not own copyright, PETA was of the opinion that the legislative act governing copyright did not explicitly state that this right applies only to humans. Despite this, the lawyer claims that this was a significant step towards opening the issue of the legal personality of animals."*[99]

In addition to the question of the legal personality of animals, I have also mentioned the issue of granting it to certain parts of nature, such as a lake or a river. In this context, Olexij Meteňkanyč points out, for example, the New

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Framework of All Interpersonal Relationships. Are We Children Raised by the Childless Immanuel Kant? In BRÖSTL, A. – BREICHOVÁ LAPČÁKOVÁ, M. (eds.). *New Dimensions of Legal Argumentation Methodology: The Role of Legal Principles in a Multilevel Legal System.* Prague: Leges, 2021, pp. 153-154). In connection with this topic, we can also mention the *principle of double effect.* It is an idea that tries to define legitimate killing (foreseen but unintended). As David Černý puts it: *"According to the principle of double effect, it is possible to carry out actions with both good and bad effects, provided that certain conditions are met. Four are most often mentioned: 1. The action itself, regardless of its consequences, is at least morally indifferent (it is morally good or indifferent). 2. Only a good effect is intended; a bad effect must not be intended. 3. A bad effect must not be a means of achieving a good effect. 4. There is a compelling reason to carry out an action that has both types of effects (good and bad)."* (ČERNÝ, D. *The Principle of Double Effect: Killing Within the Limits of Morality.* Prague: Academia, 2016, pp. 13-14; for a justification of the individual requirements of the principle of double effect, see, for instance, BESSONG, B. *An Introduction to Ethics: A Natural Law Approach.* Eugene: Cascade Books, 2018, pp. 127-129).

97 SINGER, P. *Writings on an Ethical Life.* Bratislava: Publishing House of the Association of Slovak Writers, 2008, p. 45.

98 FRANCIONE, G. L. Sentience and Personhood, available online: https://www.abolitionistapproach.com/sentience-and-personhood/ [13-02-2022].

99 MÉSZÁROS, T. – ŠVRČKOVÁ, N. Name, City, Animal, Thing: A Social Game with Legal Personality? In DRUGDA, J. – TITTLOVÁ, M. – ŽOFČÁK, M. (eds.). *Pan-European Legal Forum.* Bratislava: Pan-European University, 2017, p. 517.

Zealand Whanganui River, to which the state has recently granted legal personality. A significant reason for this step was the influence of the Maori religion, which has a special relationship with nature: *"The Maoris believe that even the river has its own soul, personality, pulse and is a being that includes all the living elements of the surrounding environment. At the same time, they believe that there is a certain mystical and psychological connection between them and these natural phenomena."*[100] Meteňkanyč suggests, however, that the reason for granting subjectivity to the river was partly also ecological.[101] The second example that Meteňkanyč points to is the recent granting of legal personality to Lake Erie.[102] He notes that these are far from the only two cases: *"We are witnessing that subjectivity is gradually being declared, or that selected rights and entitlements are being granted with varying degrees of success to: a) rivers (the Atrato River in Colombia in 2016; the Whanganui River in New Zealand in 2017; the Ganges and Yamuna rivers in India in 2017; the Klamath River in the USA in 2019; the Magpie River in Canada in 2021); b) lakes (our 2019 analysis of the Lake Erie case in the USA); (c) a national park (Te Urewera in New Zealand in 2014); d) the entire ecosystem or Mother Nature (Ecuador in 2008; Bolivia in 2010); (e) or it is planned to confer legal subjectivity on the mountain (Mount Taranaki and the associated Egmont National Park in New Zealand)."*[103]

The reasons for such steps are often ecological, and from an ethical point of view, they can theoretically (although not necessarily) be understood as consequentialist (the goal is to achieve good consequences for humans and other living creatures, not necessarily to protect the intrinsic value of nature). However, in the case of some religiously motivated granting of subjectivity to parts of nature, one can also speak of a clear deontological aspect, which consists in the ethical requirements of a given religion to respect, for example, the river as a person with a soul. Mészáros and Švrčková state that *"an interesting concept of legal subjectivity is also the Bolivian' law of Mother Earth', which provides equal rights to people and nature (i.e., also animals). The law is part of a complete overhaul of the Bolivian legal system after the constitutional change in 2009 and is influenced by the philosophy and thinking of the natives and their spiritual world. In this country, more than 60% of the population falls under natural*

[100] METEŇKANYČ, O. M. Granting Legal Personality to the River – The Case of the Whanganui River. In *Comenius*, 2019, no. 11, p. 19.

[101] Ibid., p. 22.

[102] METEŇKANYČ, O. M. Granting the Rights and Legal Personality to the Lake? The case of Lake Erie. In *Projustice*, 2021, available online:

https://www.projustice.sk/sites/default/files/Erijske_jazero_priznanie_pravnej_subjektivity_Metenkanyc.pdf [23-02-2022].

[103] Ibid., p. 7.

ethnicities and indigenous tribes, which consider the deity of the Earth – Pachamama – to be the center of all life. Humans are understood here as equal to all other organisms. Although the law is stylized in accordance with the above ideas, it will be interesting to see how it will be applied in practice because, due to the high abstractness of these laws, the subsequent interpretation will probably be difficult, but the possible circumvention of this law may not be so difficult."[104] Thus, in such a step, one can see a certain ethical (and metaphysical) justification for it, which lies in the moral demands of the religion of the natives. Of course, it may be asked whether such a law really makes sense and whether it will do more good than bad in a broader context. Regardless of the answer, this question is based on different (ethical) presuppositions from those held by the native tribes.

Animals and parts of nature are thus real examples of the existing effort to confer legal personality on non-human entities. In connection with the future, the question of the legal subjectivity of artificial intelligence is also at hand.[105] As Zoltán Gyurász points out, AI systems can be candidates for moral status, although so far, there is a general consensus that current AI-based machines do not have moral status. This means that whenever we want, we can change or even delete their algorithms. However, if we consider the disposition of higher cognitive abilities and/or the ability to suffer (receptivity) as a criterion of moral status, then we would be faced with the challenge of granting artificial intelligence moral and legal subjectivity at the moment when it acquires these abilities.[106]

With regard to thinking as a property of artificial intelligence, Gyurász, referring to J. Copeland, points to decades-long non-religious trends in the philosophy of mind, which allow for such an understanding of intelligence that leads to the conclusion *"that properly programmed and properly functioning Turing machines could qualify as things with consciousness, or, in the words of*

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[104] MÉSZÁROS, T. – ŠVRČKOVÁ, N. Name, City, Animal, Thing: A Social Game with Legal Personality? In DRUGDA, J. – TITTLOVÁ, M. – ŽOFČÁK, M. (eds.). *Pan-European Legal Forum.* Bratislava: Pan-European University, 2017, pp. 517-518.

[105] *"From the use of virtual personal assistants to traveling in autonomous vehicles, the topic of artificial intelligence is becoming a very popular and, at the same time, a natural, integral part of our lives. The growth of computing power, the availability of data, and advances in algorithms have turned artificial intelligence into one of the most strategic technologies of the twenty-first century. However, the topic of artificial intelligence is not new, even in the field of law. We can encounter this topic since the fifties of the twentieth century in legal sources, and a few decades before that on the screens of films."* (GYURÁSZ, Z. – MÉSZÁROS, T. Artificial Intelligence in Film. In *Law in Film: Special Part.* Šamorín: Heuréka, 2020, p. 219).

[106] GYURÁSZ, Z. Ethics in the Age of AI. In SZAKÁCS, A. – HLINKA, T. (eds.). *Bratislava Legal Forum 2020: Disruptive Technologies: Regulatory and Ethical Challenge*. Bratislava: Faculty of Law, Comenius University in Bratislava, 2020, p. 65.

John McCarthy, as 'artificial intelligence.'"[107] He simultaneously adds: *"In the classical sense, in AI-based devices, intelligence and intentionality are often perceived as a technical feature of a program that is the result of algorithms. However, it must not be forgotten that many theories still insist that consciousness and intentionality are the ontological property of privileged human existence, and therefore, this phenomenon cannot apply to machines."*[108] He concludes by stating: *"Machines today, even though they are based on artificial intelligence, work on the basis of precisely defined rules and instructions. For these reasons, questions about free will and intentionality will be hardly compatible with such machines. Although there is no doubt that we are not far from these qualities, since in areas such as rationality, these machines have already been able to beat us. However, it should not be forgotten that artificial intelligence research itself will push our knowledge of the human mind further and further. And the more we know about the human mind, the closer we will get to the possibility of the perfect reproduction of the phenomenon that is our mind."*[109]

Similarly, Cennydd Bowles, who approaches applied ethics from a futuristic point of view, argues that the indications of artificial personas already exist: Saudi Arabia gave citizenship to a robot named Sophia, and the EU has also discussed granting the status of a legal entity to robots. Bowles holds that from an ethical point of view, recognizing personality to corporations, rivers, or today's robots is absurd because they do not meet any philosophical criteria. However, the legal definition has been significantly loosened. According to him, it won't be long before a country decides to make robots legal entities in order to better resist the pressure of an industry that is trying to avoid responsibility for the actions of its machines. An artificial moral personality is still a long way off, but future technologies with some kind of consciousness or highly sophisticated intelligence could meet the standards. This decision is especially important for a deontologist: if you want to always treat people as an end rather than a means, you have to know who belongs to them. If we consider a machine to be a person, it probably deserves similar privileges to humans, for example (based on the Universal Declaration of Human Rights), the right to legal recognition, non-discrimination, and asylum. However, some rights will not adapt so easily: for example, we will not want machine-persons to marry or reproduce. These differences could include parallel categories of artificial persons, although the idea is disturbingly reminiscent of Jim Crow's racist laws.

[107] GYURÁSZ, Z. The Issue of "Body – Mind" in the 21st Century (The Importance of the Philosophy of Mind for the Modern Form of Artificial Intelligence). In *Comenius*, 2021 (vol. 6), no. 1, p. 22.

[108] Ibid.

[109] Ibid., p. 23.

Because of the status of the person, the property becomes a particularly delicate issue: the ownership of persons is, of course, slavery. It follows that the recognition of human status to AI may be hindered by commercial interests or that the advent of sufficiently conscious or intelligent AI will shake our understanding of property rights.[110]

It is, therefore, clear that the definition of legal subjectivity is an important issue with an ethical context and that ethical theories (and, of course, also the related metaphysics) play a role in it.[111] Besides the issue of the moral and legal status of non-human entities, the ethical and legal implications of transforming people through technology may also become a challenge soon. Ondrej Ružička, for example, sees potentially serious consequences of transhumanism for the legitimacy of power and law. He points to the fact that we are witnessing the efforts *to "incorporate technology into a living organism. Heart machines, hearing aids, and artificial joints have become common parts of our bodies, but the effort to create a connection between a human and a computer, for instance, is the topic of the day. For example, Elon Musk's vision of neural lace and streamlining the possibilities of communication. The potential incorporation of electronics into the living human neural network will actually provoke (and this potential is already provoking) philosophical debates, and almost certainly, an adjustment at the level of law will be necessary. Take, for example, the case of elections. Digitalization is very advanced in some countries, and you can vote from the comfort of your home. The process is as follows (in a considerable simplification): The decision is made using technology. The executor is de facto mostly the hands of the voter, so there is no organic connection between the computer and the voter's brain. In the case of inserting electronics directly into the voter's neural network, several hypothetical problems can occur, such as the possibility of manipulation of the elections. We can already see this, for example, in the last US presidential election (the direct*

[110] BOWLES, C. *Future Ethics.* Prague: Academia, 2021, pp. 220-221. Karel Beran, on the other hand, refers to Lawrence B. Solum, who, three decades ago, presented the idea of the subjectivity of artificial intelligence, which, unlike animals, can perform simple tasks at the level of a human administrator. However, Beran states that this fact does not require any responsibility on the part of the entity, so it does not make much sense to claim that artificial intelligence should have (in the current technological state) rights and obligations. (BERAN, K. *The Concept of Juristic Person.* Prague: Wolters Kluwer, 2020, p. 149).

[111] Concerning the moral status of technological devices, Tommaso Barbetta wrote an interesting paper, which introduces theories such as instrumentalism, actor-network theory, or information theory, and in their light, deals with the question of moral subjectivity of autonomous vehicles (BARBETTA, T. Is My Car Evil? A Review of Non-Anthropocentric Theories of Moral Agency, available online: https://www.academia.edu/38651526/Is_My_Car_Evil_A_Review_of_Non_Anthropocentric_Theories_of_Moral_Agency [31-03-2022]).

relationship between the brain and electronics is missing here), where accusations of interference by the Russian Federation on their results were made. Direct influencing voters can become a reality. This would undoubtedly lead to a significant rethinking of electoral mechanisms and thus democratic legitimacy."[112]

Concerning the theme of legal relations (or the implementation of law), to which this chapter is primarily dedicated, it can be said that, besides the issues of legal personality, the principle of *pacta sunt servanda*, on which the entire contract law is based, also has an important ethical dimension. This principle is based on the idea of the morally binding force of the promise. The ethical question is also whether time plays any role in it. In fact, the legal regulations of lapse (expiration of legal claims) are based on the assumption that, from the point of view of social ethics, the existence of such a legal institute is fair, although, at the individual-ethical level, the moral obligation to fulfill the promise persists (*obligatio naturalis*). It may also be mentioned that there are other examples of ethically relevant institutes in legal relations, like the protection of good faith and weaker parties (employee, tenant, consumer, etc.). Both can be justified by some form of deontology, consequentialism, or virtue ethics.

I have stated that in a legal relation, the parties act as holders of rights and duties (the content of the legal relation). The most fundamental rights are generally those that we refer to as *human rights* (as follows also from the discussion on legal subjectivity outlined above). We distinguish this type of rights into absolute and relative, and this division is of a moral nature. The practical difference between these two types of human rights lies in the *possibility or impossibility of restricting them* (it is, therefore, a different concept

[112] RUŽIČKA, O. *Quo Vadis Legitimacy?* In ANDRAŠKO, J. – HAMUĽÁK, J. (eds.). *Bratislava Legal Forum 2018: Constituent Power versus Constitutional Review.* Bratislava: Faculty of Law, Comenius University in Bratislava, 2018, pp. 114-115. Of course, the idea of transhumanism raises questions for various disciplines. For example, from a theological point of view, a protestant theologian, Michal Valčo, asks about the limits of our God-given mandate to cultivate the created world and about the relationship of the problem of transhumanism to the concept of *imago Dei*. He states that good intentions will never guarantee us protection against the misuse of a step that we as humanity are taking, and from a purely secular point of view, the idea of transhumanism seems to him to be quite risky, requiring strict legal regulation. From a theological point of view in particular, however, a correct and profound understanding of what it means to be the image of God is the key idea that guides our creativity, helps us to enhance the creation, and at the same time safeguards the idea of human dignity. (VALČO, M. Transhumanism as a Challenge for the Christian Theological Understanding of 'Imago Dei'. In PETKOVŠEK, R. – ŽALEC, B.(eds.). *Transhumanism as a Challenge for Ethics and Religion.* Zurich: LIT Verlag, 2021, p. 115).

of absolute and relative rights than their division with regard to *erga omnes* and *inter partes* relations). Absolute human rights do not allow for exceptions and must be respected in all circumstances (they can, therefore, also be described as *unconditional*), while this is not true of relative human rights that can be limited under certain circumstances (thus, they can be described as *conditional*).

Most human rights are relative because in democratic states, there may be various circumstances that legitimize their limitation. Relative human rights include, for example, freedom of expression, the right to privacy, the right to property, freedom of movement and residence, as well as all rights falling under the category of economic, social and cultural rights.

Absolute human rights are considered the following: freedom from torture or other cruel, inhuman, or degrading treatment or punishment, freedom from slavery and servitude, the right not to be imprisoned for the inability to fulfill a contractual obligation, freedom from retroactive criminal norms to the detriment of the criminal, the right to recognition of one's legal personality, freedom of thought, the right to maintain human dignity and, by some, the right to life.

I have already mentioned freedom from torture or other cruel, inhuman, or degrading treatment or punishment (simply "the right not to be tortured") in one of the previous chapters. This right represents a typical example of an absolute human right.[113]

As far as freedom from slavery and servitude is concerned, this is actually one of the expressions of the rejection of the degradation of human beings to objects of legal relations (which is relatively closely linked to the right to recognition of one's legal personality as another absolute human right). The non-degradability of a human being into an object is one of the key requirements arising from the concept of human dignity (which means that the freedom in question is inseparably linked to the right to the preservation of human dignity as well, although the right to the preservation of human dignity contains a different concept of dignity – an *aspirational concept* – from the one that is the basis of human rights as such – *the concept of intrinsic dignity*). Concerning the question of the absolute nature of freedom from slavery and

[113] It finds its legal expression mainly in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In addition, the right is enshrined in other important documents (in Article 7 of the International Covenant on Civil and Political Rights, in Article 3 of the European Convention on Human Rights, and in our domestic context in Article 16(2) of the Constitution of the Slovak Republic and in Article 7(2) of the Charter of Fundamental Rights and Freedoms). The Convention against Torture explicitly states that no circumstances whatsoever may serve to justify torture or other cruel, inhuman, or degrading treatment or punishment.

servitude, it must be said that a certain implicit limit to the truly absolute nature of this freedom is the existence of the punishment of forced labor, which is now commonly enshrined in democratic legal systems. Although the punishment of forced labor is usually associated in human rights documents with the prohibition of forced labor as a separate relative human right,[114] the prohibition of forced labor can be considered a certain subset of the prohibition of slavery and servitude, or all three rights can be considered variations of the same principle, which is the prohibition of being forced to work for another against one's will. Freedom from slavery and servitude is, therefore, an absolute human right only if we understand the concepts of slavery and servitude in a narrower sense. These practices are currently forbidden even if bound to a limited period of time, whereas the limited time period is a typical feature of the penalty of forced labor. The difference between slavery and servitude, on the one hand, and the punishment of forced labor, on the other, is therefore not in the time aspect but in *the legitimacy* or *illegitimacy of* the requirement to work for another. While slavery and servitude are imposed illegitimately, the punishment of forced labor is imposed legitimately. Thus, the difference in the definition of both terms is value-based and stands and falls on a certain understanding of justice (i.e., ethics).

The right not to be imprisoned for failing to perform a contractual obligation can undoubtedly be regarded as an absolute right. Enshrining this right in modern catalogs of human rights represents a refusal of ancient and feudal practices (those laws allowed for the imprisonment of the debtor as a punishment or as a means of securing the fulfillment of the obligation).The difference between falling into slavery for non-fulfillment of a monetary debt, which was also known in ancient times, and imprisonment for such insolvency dwells in the fact that while the first institute was not only punitive but also reparative in a direct way (the slave worked for his master-creditor, or could be sold to another master), the second institute was mainly punitive and only indirectly reparative (from the imprisonment of the debtor the creditor did not directly obtain any economic advantage; the creditor could, at best, create a pressure on him to find resources to be able to pay). The fact that such a possibility is not allowed in the legal systems of democratic states today reflects a certain understanding of the concept of human dignity (human beings are the ends in themselves and must be treated with a certain respect despite their failures).

[114] This is also evidenced by the scheme of the International Covenant on Civil and Political Rights, where the prohibition of slavery is found in Article 8, paragraph 1, the prohibition of serfdom in paragraph 2, and the prohibition of forced labor in paragraph 3.

Freedom from retroactive criminal norms that are to the detriment of the criminal is an elementary ethical requirement that I have already mentioned in connection with the concept of the *internal morality of law* as conceived by Lon Fuller. To punish a person for an act that was not punishable at the time of its commission is, in this perspective, actually to deny the very essence of the law.[115] Let us recall that Fuller can be considered a representative of secular

[115] Retroactivity is, of course, problematic in every branch of law, not only in the branch of criminal law. In criminal law, however, retroactivity to the detriment of the accused is a very serious problem. Viktor Knapp makes a "logical" argument against retroactivity, arguing that the key is *"the fact that a legal norm acts forward results from the fact that the legal norm acts on the human will and determines what should be. If put together, it means that the legal norm determines what should be and what is achievable by human volitional behavior, i.e., what man has the power to cause by his will to be. It is, therefore, not in the power of legal norms to establish, i.e., to command or prohibit that something should have been. Man cannot influence the past with his will. It is rightly said that what has happened cannot be undone, and no law can change anything about it. A retroactive legal norm, therefore, does not have the basic characteristics of a legal norm but is a legal fiction that something in the past was lawful that was not lawful, or that something was not lawful that was lawful."* (KNAPP, V. *Theory of Law.* Prague: C. H. Beck, 1995, p. 210). He notes, however, that from what he describes as *legal policy*, retroactivity is permissible in exceptional cases and that history also shows that *"exceptionally, it is allowed that retroactivity occurs to the detriment of the subject of the law, especially the perpetrator of the crime. There are situations where legal certainty would come into sharp conflict with social certainty and legal consciousness, as was the case in the Nuremberg trial of Nazi war criminals in our country according to the retribution decrees of 1945 and in the subsequent renewal of the limitation period under § 5 of Act no. 198/1993 Coll. The Federal Constitutional Court in Germany came to interesting conclusions, which in a fundamental decision (Leitentscheidung) admitted the retroactive effect of the law for the four demonstrative reasons, all of which are interesting, some are more convincing and others less. One of the convincing ones is the justification based on the fact that the inadmissibility of retroactivity is – among other things – the result of the above-mentioned respect for the citizen's trust in the law. However, it is a matter of protecting legitimate trust in the law, so unjustified reliance on the law does not deserve to protect trust, especially when the citizen (depending on the legal situation at the time to which the retroactive norm applies) must have been aware of its moral objection, etc., and therefore had to take into account the possibility of its retroactive change. Less convincing is another reason justifying retroactivity by the primacy of the 'common good' over legal certainty. The contradiction between the common good and legal certainty is theoretically very dubious and, moreover, it places the very unclear (blurred) concept of the 'common good', which history has more than once shown to be easy to abuse, above the rather sharp concept of legal certainty. And besides, legal certainty is itself part of the common good."* (Ibid., p. 211). The exceptional choice of true retroactivity is related to the understanding of the concept of law. In the words of Pavel Holländer: *"The question of choosing between natural law and positive law instruments in overcoming the totalitarian system arises especially, or exclusively, in those cases where it is not enough to create a new legal environment with false retroactivity (i.e., with the derogation of the existing law and its replacement by a new law), but it is necessary to resort to true retroactivity, or to a different*

iusnaturalism[116] (or, more broadly, a non-positivist approach to law), which in this way connects the concept of law with the concept of justice.

Freedom of thought, belief and religion is absolute only in the sense of the internal sphere of the individual, not in the sense of its external sphere (where it intersects with the freedom of speech).[117] This means a person can hold any opinion, think, and believe whatever they want, but it does not mean they can outwardly express whatever they want. The outward manifestation of their thought, belief, or religion is subject to certain legal limits.

As far as the right to life is concerned, it cannot be considered an absolute human right. The legal regulations of democratic states normally limit it by the right to self-defense.[118] In self-defense, it is permissible to violate the aggressor's right to life if it is proportionate (if lethal defense is the only means of protecting the legitimate interests of the victim of aggression). Therefore, the right *not to be killed* is not absolute. For example, only the right *not to be murdered* (or *not to be actively sacrificed as an innocent person*) is absolute. Likewise, Ján Svák, who first classifies the right to life as an absolute human

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procedure responding to the injustice of the previous period." (HOLLÄNDER, P. *Philosophy of Law.* 2nd ed. Pilsen: Aleš Čeněk, p. 20).

[116] *"Lon L. Fuller can be described as the most important Anglo-Saxon iusnaturalist thinker of the 1950s and 1960s. In his theory, Fuller proceeds from the thesis that the concept of law cannot be defined completely independently of the reasons for which people accept and observe the law."* (Ibid, pp. 23-24).

[117] On this, see, for example, SVÁK, J. *The Protection of Human Rights in Three Volumes.* Volume I. Žilina: Eurokódex, 2011, p. 31.

[118] However, Tatiana Machalová believes that the uniqueness of the right to life lies, for example, in the fact that this right (although not absolute) represents the very basis for a critical reconstruction of the ethical reflection of law as such. *"The reason for this methodological requirement is that the current development of biological and medical sciences and the technologies based on them make the right to life a non-obvious. The questioning of the right to life thus forces us to ask again: Who has the right to decide about our lives? Who has the right to life? And what kind of life do we have a right to?"* (MACHALOVÁ, T. The Place of Legal Ethics in the Contemporary Legal Thought. In MACHALOVÁ, T. et al. *Current Issues in the Methodology of Legal Thinking.* Prague: Leges, 2014, p. 270). The last question, (*What kind of life do we have the right to?*) perhaps takes a similar approach to the problem as Jakub Trojan, who states: *"The right to life is not only the right to bare survival but the right to life, which in the context of a given society is associated with unquestionable dignity."* (TROJAN, J. S. *The Idea of Human Rights in the Czech Spiritual Tradition.* Prague: OIKOYMENH, 2002, pp. 244-245). Trojan also asks: *"To what extent, precisely with regard to the mentality of society and economic efficiency, can this dignity be ensured and guaranteed?"* (Ibid., p. 245). However, I believe that talking about quality of life is a different thing than talking about the right to life as such. The right to life is the right to exist. The rest is a matter of other rights (social rights).

right, later notes that as such, it cannot be considered absolute and that *"the European Convention itself in its Article 2 defines the reasons for the legal killing of a person."*[119] Radical pacifists would certainly disagree.

The absolute or relative nature of all of the above rights is a consequence of certain ethical presuppositions. Different ethical theories can give different answers to the question of which rights (if any) should be absolute and which should not, whereas the recognition of a particular human right as absolute fundamentally affects the form of the legal relation in which the right exists.

[119] SVÁK, J. *The Protection of Human Rights in Three Volumes.* Volume I. Žilina: Eurokódex, 2011, p. 31.

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APPLICATION OF LAW AND ETHICS

The application of law is the use of legal norms by administrative or judicial authorities in administrative or judicial proceedings.[120] From an ethical perspective, a fair trial is one of the essential issues that can be considered in the given context. If we look at it through the theory of individual stages of the application of the law, then concerning the initiation of the proceedings as the first stage (especially with regard to the first-instance proceedings, but possibly also appellate or enforcement proceedings), we encounter the ethical dimension of the two key procedural principles – *the principle of disposition* and the *principle of officiality*. While the former makes the initiation of the proceedings dependent upon the party to the proceedings, who may or may not exercise their right to initiate (or stop) it, the latter lays down an obligation on the state authority to act *on its own motion.* This distinction and its actual application are related, inter alia, to the private-law versus public-law nature of the legal relation that is being considered by the administrative or judicial authority (and thus to the problem of the dualism of law – the already discussed issue of freedom versus state paternalism).

At the hearing stage, the preliminary questions of *res judicata* and *lis pendens* may be pointed out. Both are expressions of the principle that the same thing should not be solved twice (*ne bis in idem*). The procedural obstacle of *res judicata* refers to the impossibility of re-hearing a final case, while *lis pendens* refers to the impossibility of proceeding in the case that is already pending before another authority. If the theory did not know these two general procedural obstacles, then legal certainty would be seriously undermined. The participant would never know which verdict is final and would not be sure of her legal position (her legitimate expectations would not be protected). If I have already stated that the requirement for legal certainty is part of the broader idea of justice, then these two procedural principles are an important element in the concept of a fair trial. They represent one of the important guarantees of legal certainty and, thus, of (procedural) justice.

However, when we talk about the principle of *ne bis in idem*, the question is (1) what it means to deal twice with the same thing and (2) what the same

[120] Radoslav Procházka and Marek Káčer define the application of law as *"a process in which the competent authorities authoritatively apply the legal norms contained in generally binding legal regulations to specific factual situations. It consists in the adoption of individual legal acts which transform generally formulated orders, prohibitions, and authorizations into orders, prohibitions, and authorizations addressed to specific persons."* (PROCHÁZKA, R. – KÁČER, M. *Theory of Law.* Bratislava: C. H. Beck, 2013, p. 249).

thing is. Concerning the first question, it should be noted that to deal twice does not mean to preclude extraordinary appeals. The idea of justice, as it is generally accepted in this sense, requires not only the existence of appeals (i.e., the principle of basic reviewability of the decision) but also the possibility of opening an already settled case (a typical example is when after years, new evidence is found that will testify in favor of the innocence of a convicted person). As for the question of what the same thing is, an interesting legal-theoretical problem with an ethical context is the definition of the concept of an act. The principle of *ne bis in idem* is sometimes interpreted as not allowing a person to be punished twice for the same illegal act. In this regard, the legitimacy of simultaneous infliction of criminal and administrative penalties is discussed. For example, a person who causes a traffic accident commits a traffic offense and, at the same time, also a criminal offense (serious bodily harm to an injured party). In such a case, is the double penalty legitimate, or is it a violation of the *ne bis in idem* principle? The difference in the object (traffic protection versus health protection) of the two offenses supports the conclusion that such a double penalty is legitimate (and therefore is not contrary to the *ne bis in idem* principle), while the identity of the act seems to testify against its legitimacy (it was *one* act – say, a car crash). If we assume that the definition of the act is decisive, then what understanding of the concept of act we choose will undoubtedly depend (also) on our ideas about justice (so we will first solve the question of whether it is fair to punish a person for a given matter under criminal and also administrative law, and depending on this, we will define the concept of an act). Ethics will, therefore, have its say again, whether directly or indirectly. From the point of view of deontology, it might perhaps be considered that a person can be punished twice in a given case because by causing a traffic accident, they have violated two of their duties (the obligation to respect the rules of the road and the obligation not to harm others). At the same time, some version of utilitarianism can theoretically argue that the criminal punishment is sufficient. An unnecessary harm (damage) to the offender will be caused when imposing an extra administrative sanction (or vice versa: that the administrative sanction is enough, if the person acted out of negligence, and the criminal penalty is unnecessary).

The second important issue at the stage of hearing the case is the application of the principle of *material truth* versus the principle of *formal truth* (or their possible variations) when dealing with evidence. These are principles that differ in terms of the criteria for clarifying the facts of the case and the possibilities for the administrative or judicial authority to take evidence.[121] The

[121] See, for example, TURČAN, M. Note on the Philosophical Context of Material and Formal Truth. In ČIČKÁNOVÁ, D. – HAPČOVÁ, I. – MIČÁTEK, V. (eds.). *Bratislava Legal Forum*

first principle requires the authority to ascertain the facts of the case as they really are (the authority is therefore also required to take evidence that has not been proposed by the parties if this is necessary to establish the truth of the case). The second lays the burden solely on the parties, with the authority deciding only on the basis of the evidence submitted by the parties. It is clear that the principle of formal truth serves the efficiency of the procedure, while the principle of material truth seeks primarily to serve the truth[122] (however, one might ask whether it does not represent an excessive burden for the judicial or administrative authority and whether it is actually capable of serving the stated goal). Thus, the first of these principles fits, for instance, into a utilitarian context (and is promoted, for example, by the school of Law and Economics), while the second can be supported by some deontologists who understand the relationship between truth and justice as requiring the maximum possible effort of the state to establish the true state of affairs.

Concerning the stage of hearing the case, we may also mention the importance of *free assessment of evidence*. The idea of a fair trial requires that judges decide cases based on their best knowledge and conscience without any prescribed way of assessing the evidence (like giving the testimony of a man more weight than the testimony of a woman, of an adult more than of a child, etc.). In this context, it is possible to point out not only deontology and utilitarianism, which will consider the correct evaluation of evidence and correct legal qualification of the case either as an obligation related to the fact that human beings are subjects worthy of respect, or they will consider it as an instrument of the overall good, but also to virtue ethics, which is manifested today, for instance, in the so-called *virtue jurisprudence*. In the words of Tomáš Gábriš: *"Its essence is the idea that a lawyer applies his intellectually acquired virtues (abilities, skills, and experience) to various legal situations, which can and should be developed in each individual."*[123] Although Gábriš speaks of virtues as

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2015: Fair Trial and Its Forms, Guarantees and Human Rights Dimension. Bratislava: Faculty of Law, Comenius University, 2015, pp. 860-868.

[122] FÁBRY, B. – KASINEC, R. – TURČAN, M. *Theory of Law.* 2nd ed. Bratislava: Wolters Kluwer, 2019, p. 200.

[123] GÁBRIŠ, T. *Prescriptive Theory of Law: A Methodology for the Application of Law for Current Times.* Bratislava: Veda, 2020, p. 101. In addition, in connection with the philosophical view of the application of law and its relationship to ethics, Tomáš Gábriš also points to the ethics of discourse (as known from the work of Jürgen Habermas and other authors), where the value of dialogue comes to the fore, in connection with which we can even speak of dialogical logic. According to Gábriš, it has its relevant place in law as an informal, non-deductive way of reasoning (ibid., p. 91 ff.). In this context, Gábriš states: *"The non-deductive approach specifically claims that Aristotle correctly stated the impossibility of axiomatizing ethics, and the same applies to law. Both disciplines belong to the so-called*

abilities, skills, and experiences, they also include traits of character (which is an idea drawn precisely from virtue ethics – for example, judicial moderation, judicial courage, or, of course, judicial justice are commonly spoken of).[124] In this context, we can also point to the statement of Lucie Berdisová that *"ethics comes to us through the experience gained from rules, imitation of authorities, and reflection, but at a certain stage it is already an instinct, not a deliberation according to rules or principles."*[125]

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practical (phronetic) sciences, which, compared to the natural sciences, emphasize experience and learning 'virtue' rather than systematics." (Ibid., p. 100).

[124] Emphasis is also placed on judicial intelligence and wisdom, which is as *expertise* traditionally considered a prerequisite for the personal independence of the judge (on the independence of the judge, see, for instance, OTTOVÁ, E. *Theory of Law.* Šamorín: Heuréka, 2006, p. 81). The independence of judges is one of the key prerequisites for the independence of the judiciary, and the independence of the judiciary is, of course, one of the key elements of the idea of the rule of law. It is part of the material core of any democratic constitution. *"The above principle must therefore be understood as a core constitutional norm (principle); it should shine into other legal regulations, and those should also be interpreted in its light."* (KRAJČOVIČ, M. Independence of the Judiciary from the Point of View of the Legal Principle. In *Justičná revue*, 2016 (vol. 68), no. 8-9, pp. 836-837). Michal Krajčovič also points out that *"the weakening of the position of the judiciary initiates the process of destruction of the rule of law,"* and notes that *"if this is implemented at the current onset of a crisis of morality in society, then it is questionable to what extent it is possible to effectively regulate social relations while maintaining the minimization of state interference in the private sphere of the individual. The decline of the state and the weakening of the influence of social (ethical) values in daily life leads to natural tension in society because it is no longer possible to distinguish right and just from wrong and unjust. The law of nature is slowly being enforced – the stronger wins,"* whereas, as Krajčovič states, such a state of affairs subsequently leads to state paternalism (ibid., p. 851). Concerning the issues of access to justice, which is the very *purpose* of the judiciary, Krajčovič elsewhere emphasizes the moral integrity of the judge, which he characterizes as *"a condition in which the judge is a mature person from the moral point of view, possessing knowledge of moral norms, the observance of which is naturally expected in personal and professional life.* [...] *The moral way of life of the judge must, therefore, go hand in hand with a high standard of expertise because otherwise, the material fulfillment of the right to a fair trial is jeopardized. That right would thus become purely formal – as a form with a lack of content; ergo, from formal sources, it would not be transformed into the field of social relations – the material conditions of the life of society."* (KRAJČOVIČ, M. Access to Justice. In *Justičná revue*, 2017 (vol. 69), no. 2, pp. 182-183).

[125] BERDISOVÁ, L. Law and Ethics: Reflection of Ethical Models in Codes of Ethics of Legal Professions. In BÁRÁNY, E. (ed.). *Creation and Interpretation of Law in the Conditions of Legal Pluralism.* Prague: Wolters Kluwer ČR, 2021, p. 229. On the other hand, however, as Helena Hrehová points out, virtue *"is far from just a simple habit. Virtue differs from habit qualitatively; it is always good. The habit can also be bad (e.g., smoking). Between virtue and habit stands freedom. A virtuous person freely and definitively decides for the good. Their attitude is timeless in this sense. The actions of virtuous people are free and conscious, not*

Concerning the issuing of the decision, which is the next stage of the proceedings, it is appropriate to mention the requirement for convincing substantiation of the decision, which also follows from the requirements of legal certainty. It is, therefore, a requirement, the violation of which constitutes a failure to respect the principles of justice (a decision that is not convincingly substantiated can hardly be described as fair, and even if it happens to be objectively just, in the absence of a convincing substantiation, it will make the parties or other authorities uncertain about its fairness). The convincingness of a decision is also important concerning its reviewability, which, as I have already mentioned, is also understood as a requirement of justice.[126]

As far as the individual requirements of a fair trial are concerned, Ján Svák defines six general requirements and nine specifically criminal-procedural requirements for a fair trial. The general ones include the principle of equality of arms, the adversarial nature of judicial proceedings, the right to be personally present at the trial, and the prohibition of incriminating oneself. Svák also mentions the demands of the public nature of the proceedings and its expediency. Criminal-procedural requirements include the right to be acquainted with the accusation, the right to prepare the defense, the right to defense as such, the right to proper evidence procedure, the right to the free assistance of an interpreter (translator), the presumption of innocence, the principle of legality of criminal offenses and penalties and the prohibition of their retroactivity, the right not to be tried and punished twice for the same criminal offense, and the right to appeal.[127]

Let us briefly touch on the prohibition of incriminating oneself, which means that *"no one may be forced to provide evidence, for example, by his own testimony."*[128] Where does the idea that society cannot require anyone to incriminate themselves or to testify at all come from? It is obvious that the idea is somehow related to the idea of justice. Michael S. Green has analyzed and

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mechanical, but justified. The actions of virtuous people are the result of their prudent wisdom and moral maturity, and they are capable of judging and evaluating correctly while not forgetting the priority of the person and his inner world, which we can never capture objectively enough." (HREHOVÁ, H. *Ethics – Social Relations – Society.* Bratislava: Veda, 2005, p. 110).

[126] On this issue, see TURČAN, M. On the Precept of Convincingness of the Decision. In *Právny obzor*, 2017 (vol. 100), no. 5, pp. 503-512.

[127] SVÁK, J. *The Protection of Human Rights in Three Volumes.* Volume II. Žilina: Eurokódex, 2011, p. 182 ff.

[128] Ibid., p. 224.

critiqued *the instrumentalist* and *rights-based* justifications for this right(s).[129] He states that Jeremy Bentham has already pointed to the fact that the prohibition of incriminating oneself does not have a coherent justification.[130] Traditional instrumentalist justifications are, for example, arguments from a more likely discovery of the truth, from the protection of the innocent from possible unjust pressure and harm, from a better balance of advantages in the relationship between the accused and the state. Traditional rights-based justifications include, for example, the argument from privacy, the argument from autonomy, and personal identity. Green criticizes all these arguments (and also some contractarian arguments). Whatever the answer will be (i.e., whether we find any of these or some other arguments convincing or reject the rationality of the prohibition of incriminating oneself), the discussion will be based on certain moral justifications.

Finally, in connection with the issue of a fair trial, the problem of miscarriage of justice cannot be overlooked. As Rudolf Kasinec states: *"It is precisely when a miscarriage of justice is committed that the right to a fair trial, which is an integral part of constitutional and international documents relating to fundamental rights and freedoms, is violated."*[131] Kasinec points to different definitions of the concept of *miscarriage of justice*.[132] I prefer to define a miscarriage of justice exclusively as an injustice committed against an innocent person in criminal proceedings, especially his conviction for an act he did not commit (although, of course, judicial errors are a serious problem in non-criminal cases as well). Courts and law enforcement authorities, as well as the legislator may be responsible for a miscarriage of justice (if they have not minimized the possibility of it by constitutional and statutory guarantees).[133] Of course, false witnesses, authorized experts, or other persons who may cause a miscarriage of justice must be mentioned as well. Kasinec even mentions a lawyer who may make a mistake and cause such a thing.[134] A miscarriage of justice has consequences not only for the injured person but also for their close surroundings and the whole society. *"Every illegal decision directly or indirectly affects every member of society. With direct involvement, we can be the victim of*

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[129] GREEN, M. S. The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State. In *Brooklyn Law Review*, 1999 (vol. 65), no. 3, pp. 627-716.

[130] Ibid., p. 628.

[131] KASINEC, R. *Citizen Versus State Power: Miscarriage of Justice, Civil Disobedience, Right to Resist.* Bratislava: Wolters Kluwer, 2017, p. 20.

[132] Ibid., pp. 13-14 and 29-23.

[133] Ibid., pp. 15-22.

[134] Ibid., pp. 41-42 and 49-53.

error (unjustly convicted), close relatives of the victim (also friends, colleagues, neighbors, and other persons who maintained social contact with the injured party), or part of the judicial machinery (jury members, witnesses in the trial, employees of the court or penitentiary facility). With indirect involvement, we are only distant observers who learn about the details of a miscarriage of justice through the media and play with the idea in their minds that instead of this unjustly convicted person under certain conditions, they could also stand before the court. These negative moods always arise after the discovery of every judicial error and reduce our confidence in achieving justice before an independent judicial authority. Before revealing a mistake, we, as members of society, treat the person in a reserved manner (we assume that they committed the act), we despise them, and worst of all – we inflict non-legal sanctions of a social nature against them (breaking off contacts, making them unable to find employment, making it difficult to for them to succeed in society, causing their inability to interact with other members of society)." [135]

Thus, a system that lacks sufficient guarantees against miscarriage of justice cannot be described as fair. This conclusion can be drawn from both deontological ethics and virtue ethics, as well as consequentialism. The insufficiency of guarantees of this kind represents disrespect for human beings as ends in themselves and an ignoring of justice as a virtue (say, reflecting the attitude of *suum cuiqeu tribuere*). From a consequentialist (and particularly utilitarian) point of view, it is quite clear that the good consequences will not be maximized in the absence of safeguards against miscarriage of justice (on the one hand, damage will be caused on the part of the innocent convict, on the other hand, the real perpetrator may continue to pose a threat to society, and, finally, the legal certainty of all will be weakened). In this case, therefore, all three basic kinds of ethical theories should, in principle, point to the need for such safeguards.[136]

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[135] Ibid., pp. 60-61. Kasinec proposes the following as means of preventing miscarriages of justice: introduction of a jury system in particularly serious crimes, double expert opinions and random selection of experts, the use of state-of-the-art technological means and procedures of evidence, severe penalties for the perpetrators of miscarriages of justice, insistence on the principle of *in dubio pro reo* (in doubt in favor of the accused). (Ibid., pp. 65-66). He also proposes the legislative introduction of a definition of miscarriage of justice in the Slovak legal order as follows: *"A miscarriage of justice is a deficiency in the administration of justice that arose at some stage of criminal proceedings. As a result, the person who did not commit the crime was wrongfully detained, imprisoned, or suffered other criminal sanction, by which harm was caused."* (Ibid., p. 84).

[136] Although in consequentialism, an occasional miscarriage of justice may potentially be evaluated as beneficial – for example, if a dangerous person cannot be proven guilty for the acts he is committing, coincidentally, some evidence will point to him regarding a

crime he has not committed. If he is wrongly convicted for such a crime, the consequence of this individual injustice will paradoxically be the protection of society from his further actions. In utilitarianism (act utilitarianism), one can also consider other situations in which a judicial error may be exceptionally beneficial. For instance, when it comes to eliminating a politician who has not committed any crime yet but seems to stir up some unnecessary war conflict. By attributing guilt to him and convicting him for an act he did not commit, he may be silenced and stopped. Of course, the consequences may theoretically be the exact opposite, and he may gain even more supporters. However, if the consequences are such that the politician is silenced and, as a result, an international military conflict or civil war does not break out, committing a judicial error is an ethically desirable action from a consequentialist point of view, while from the point of view of Kantian deontology or virtue ethics, it is still unacceptable. However, even from a utilitarian perspective, this factuality of the potential usefulness of an isolated judicial error does not indicate the acceptability of the absence of sufficient guarantees against it. In general, it is definitely desirable to have such guarantees under utilitarianism.

6.

INTERPRETATION AND ARGUMENTATION IN LAW AND ETHICS

As is well known, in the theory of legal interpretation, we distinguish between different objectives and methods, the purpose of which is to serve as tools for clarifying the meaning of a legal text (especially the text of a statute or constitution).[137] Concerning the interpretative objectives, it is possible to speak of the school (or schools) of originalist and modernist (progressive, evolutive) orientation. While the schools of the first kind emphasize the historical context of the creation of the legal text, the schools of the second kind emphasize the needs of today's society in its application. Concerning the very methods of interpretation, it is necessary to point out, in particular, the lingual, teleological, and systematic methods based either on the rules of language, the purpose of the text, or its structure and the relationships between various parts of the text.[138]

The choice of a specific interpretative methodology, both in relation to the interpretative objectives and in relation to the interpretative methods as such, has an ethical dimension because it is (also) based on the idea of a just application of the law.[139] The question of whether we should look at a legal text through the eyes of its author, or through the eyes of the time of its adoption, or whether we may, or even should, reinterpret it with regard to the current meaning of certain expressions or the value orientation of contemporary society, is obviously related to our understanding of the concept of justice. The originalists consider the progressive interpretation to be a violation of the principles of the separation of powers (for the preference of the judicial power at the expense of the legislative power) and thus unjust. The modernists, on the other hand, consider it unjust to ignore the current context, which, according to

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[137] FÁBRY, B. – KASINEC, R. – TURČAN, M. *Theory of Law.* 2nd ed. Bratislava: Wolters Kluwer, 2019, pp. 211-212.

[138] However, the comparative method based on the comparison of legal regulations, their interpretation and application in different countries is undoubtedly of some importance today, and it is from comparison that the proposed interpretation of the current domestic text can emerge (see, for instance, TURČAN, M. The Concept of Comparative Interpretation in the Jurisprudence of the Constitutional Court. In BÁRÁNY, E. (eds.). *Creation and Interpretation of Law in the Conditions of Legal Pluralism.* Prgue: Wolters Kluwer ČR, 2021, pp. 155-168).

[139] It can also be said that *"if the text of a legal regulation allows for more than one interpretation, then the interpreter, at least in some cases, cannot avoid the question of which of these interpretations shows the current law in the best light in relation to what it should be."* (SOBEK, T. Between Ethics and Theory of Law. In SOBEK, T. et al. *Legal Ethics.* Prague: Leges, 2019, p. 27).

them, in some cases, requires (even a relatively radical) reinterpretation of the text of a statute or constitution.[140] It is, therefore, not surprising that conservatives often tend towards originalism, while liberals and progressives lean towards modernism (but this is not an absolute necessity, of course).

The tension between lingual and teleological interpretation, or even the tension between formal-systematic and material-systematic interpretation, is the tension between the emphasis on the text of the legislation and the emphasis on the values that the legislation protects (or is intended to protect). Not only does the choice of specific values in the light of which a legal text is interpreted but also the very solution to the question of the relationship between linguistic and teleological interpretation (or more generally between text-oriented and value-oriented interpretations) has an ethical dimension (it is related to some notions of justice) and the choice of a concrete (prescriptive) interpretative theory in principle interferes (at least partially) with the issue of the concept of law.[141]

Here, too, various schools of law can be pointed out, such as iusnaturalism or the school of Law and Economics. While the first will be based on, for example, Kantian deontology or the ethics of Thomas Aquinas, the second will

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[140] Tomáš Gábriš notes that the polemic between the originalist and modernist perspectives *"undoubtedly represents a challenge to axiomatic legal thinking and to legal certainty,"* and notes that *"interpretative pluralism applies to all modern legal systems, and the system of permissible interpretative approaches is still growing."* (GÁBRIŠ, T. *Prescriptive Theory of Law: A Methodology for the Application of Law for the Current Times.* Bratislava: Veda, 2020, pp. 160-161). Gábriš polemizes with the possibility of creating a general hierarchy of methods of interpreting the law and seems to be skeptical about it. He concludes: *"In our opinion, the pluralism of methods and procedures of interpretation of law, as well as interpretation in law, should therefore be preserved in the future – provided that the final tertiary guide (and thus the interpretative corrective) of casuistic justice of decisions and protection of rights is maintained. On the other hand, however, it is also true that the choice between possible interpretations should be – in the interest of legal certainty and, consequently, the authority of the law and the decisions of the competent bodies applying the law themselves – stable, convincing, and acceptable. The plurality of instruments of interpretation in law can continue to be preserved as an instrument of casuistic justice, but the persuasiveness and acceptability of its conclusions must be required. This is ultimately the purpose of rational reasoning of decisions, which was introduced in our territory in the 19th century as a tool for controlling the judiciary and combating arbitrariness and legal uncertainty. This goal is achieved by the body of the application of law in particular by using generally accepted, established principles, methods, and procedures of interpretation and argumentation in law."* (Ibid., p. 182).

[141] The importance of the concept of law for legal interpretation is also discussed, for instance, by Filip Melzer (MELZER, F. *Methodology of Finding Law: An Introduction to Legal Argumentation.* 2nd ed. Prague: C. H. Beck, 2011, p. 18).

be based on Benthamian consequentialism. The question of interpretative methodology will, therefore, be linked to the notion of justice and, to the very concept of law, and thus to ethics.[142] It is probably not possible to determine unambiguously and generally what methodology of interpretation a deontologist will hold and what a utilitarian. However, their ethical bases will play a role in it.

As for the methods of argumentation as such, at the level of applied ethics, the issue of assertiveness versus aggressiveness can be pointed out, and also the problem of the so-called argumentative fallacies.[143] In the words of Martina Urbanová: *"Assertive conflict resolution is basically a variation on the motifs of competition within the circle of entities involved in the conflict, external intervention in the circle of these entities or motifs of cooperation between these entities.* [...] *Assertiveness is one of the negotiation methods; it leads to an increase in self-confidence, and it forces you to take responsibility for your actions."*[144] Assertive behavior in a dispute is something like a desirable middle ground between non-assertiveness (submission, self-humiliation) and aggressiveness (coercion, manipulation). In the case of aggressiveness, Urbanová points to

[142] A special ethical issue (a matter of professional ethics of a judge) that comes to the fore here is the question of methodological consistency of the judge (see, for instance, TURČAN, M. Note on the Problem of Methodological (In)Consistency of a Judge. In SZAKÁCS, A. – HLINKA, T. (eds.). *Bratislava Legal Forum 2020: Legal Professions in Paradigms.* Bratislava: Faculty of Law, Comenius University, 2020, pp. 26-32. On the ethics of the legal professions, see, for instance, BERDISOVÁ, L. Law and Ethics: Reflection of Ethical Models in Codes of Ethics of the Legal Professions. In BÁRÁNY, E. (ed.). *Creation and Interpretation of Law in the Conditions of Legal Pluralism.* Prague: Wolters Kluwer ČR, 2021, pp. 225-246.

[143] The practical power of moral argumentation can also be pointed out. As the well-known negotiator Herb Cohen stated, most of us who grew up in Western society are marked by similar ethical and moral practices. We adopted them in the schools and churches we attended, or we observed them directly in family situations, or we took them from our friends from the world of business and from the street. Either way, our concept of justice tends to be very similar. Few of us can go through life without believing that what we are doing is not for the good of humanity. This is also the reason why it often works if you call for human morality in any way. (COHEN, H. *You Can Negotiate Anything: How to Get What You Want.* Prague: Pragma, 1998, p. 68). The reference to commonly recognized ethical values (and a certain intersection of our ideas about justice) is, therefore, a relatively relevant argument in practice, not to mention the legal institute of *boni mores*.

[144] URBANOVÁ, M. et al. *Rhetoric for Lawyers.* Pilsen: Aleš Čeněk, 2009, p. 146. With reference to Novák and Capponi, Urbanová also speaks of the so-called "assertive human rights," which include, for example, the right to judge one's behavior and thoughts and bear responsibility for them, the right to change one's opinion, the right to say "I don't know," the right to say "I don't understand," the right to be indifferent in a certain controversial matter, etc. (ibid., pp. 147-148).

various ways of manipulative behavior, such as the roles of a "poor man" or "dependent on others," the attitude of a "dictator," a "calculating one," etc.[145] These are actually ways of dishonest argumentation. Argumentative fallacies (or argumentative fouls), i.e., practices that violate the ethics of argumentation, are usually considered those that exhibit characteristics, such as a violation of the rules of logical reasoning, a reference to facts that are not relevant, an appeal to emotions or prejudices.[146] The most typical examples of argumentative fallacies include escaping from the topic (which can either take the form of the so-called *straw man* tactic consisting in caricaturing or simplifying the opponent's opinion, or the so-called *red herring* tactic consisting in planting another topic to distract attention), as well as a whole group of *ad hominem arguments* (consisting in pointing out the mistakes or interests of people involved in the dispute, not the facts about the dispute as such),[147] and finally, various errors of logical reasoning (incorrect inference from premises, overestimation of inductive reasoning and improper generalizations, etc.), or confusion of correlation and causation, or even emotional manipulation.[148]

If the use of a fallacy is conscious, it is obviously an ethical problem (we have to do with the so-called *eristic argumentation*).[149] In the words of John A. Gealfow: *"The aim of argumentation is not only to convey some information but above all to form an opinion on a given problem or question. Since it is a mutual influence of people's opinions that can be abused, this communicative behavior should also be subject to basic ethical rules. In their textbook, the Czech authors M. Jauris and Z. Zastávka list the actions that we should refrain from in order not to commit dishonest argumentation: to consciously argue with false arguments, to*

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[145] Ibid., pp. 149-150.

[146] GEALFOW, J. A. Argumentative Fallacies. In MACHALOVÁ, T. et al. *Academic Writing for Lawyers.* Pilsen: Aleš Čeněk, 2018, p. 165.

[147] However, in certain circumstances, there is also room for an *ad hominem* argument in law – for example, when it comes to filing an objection of bias against a judge/official (see, for instance, KÁČER, M. On the Permissible Use of the Ad Hominem Argument. In *Právny obzor,* 2016 (vol. 99), no. 6, pp. 455-465.

[148] GEALFOW, J. A. Argumentative Fallacies. In MACHALOVÁ, T. et al. *Academic Writing for Lawyers.* Pilsen: Aleš Čeněk, 2018, p. 167 ff. See also MRVA, M. – TURČAN, M. *Interpretation and Argumentation in Law.* Bratislava: Wolters Kluwer, 2016, p. 152 ff.

[149] Eristic argumentation includes various tricks by which one side wants to gain an advantage in a dispute or negotiation by confusing the other. Jerzy Stelmach and Bartosz Brożek point to eristic techniques in legal negotiations, and in addition to the already mentioned "red herring fallacy," they mention several others (e.g., "the trial balloon," "the low balling," "the false BATNA"). However, they state that some tricks, such as the well-known "playing on good and bad negotiator" may, in fact, be ethically neutral (STELMACH, J. – BROŻEK, B. *The Art of Legal Negotiations.* Warsaw: Wolters Kluwer Polska, 2013, p. 86).

distort or ignore statements that are unfavorable to us, to conceal facts of fundamental importance, to falsely declare that what we said was already meant differently than the adversary thinks, to impute something to the adversary, what he did not claim, to intimidate the opponent, to win supporters in the debate with the promise of an alliance or some advantage in order to compensate for the inadequacy of our argumentation, to take away the opportunity from the opponent (especially the accused opponent) to express himself, i.e., to violate the principle of 'auditur altera pars' ('let the other side be heard'), to involve non-factual attacks ad personam in the debate, thereby reducing his prestige and damaging the purposefulness of the debate, to shift our burden of proof (onus probandi) unjustifiably to the opponent, to divert the debate from its original goal to a goal that is more hopeful for us (especially by trying to quietly replace the original thesis with another), to break up the debate (by moving to quasi-argumentation, by moving to inappropriate relativism and agnosticism), by demanding impossible performance, etc., to put the opponent in a situation that is unsolvable for him and to demand a solution (for example, to blame him, that he intends something, that he thinks something, that he has done something in secret that only he himself knows about)." [150]

The common understanding of the ethics of argumentation, therefore, counts on certain rules for the correct handling of the dispute, which include the rejection of argumentative fallacies. Such an ethic, as a concrete form of applied ethics, may appear fundamentally deontological. However, this is not necessarily the case. For reasons of usefulness, even a utilitarian can (and usually will) agree to such rules of ethical argumentation. Unlike the Kantian deontologist, however, a consequentialist will not consider it *absolutely inadmissible* to apply any of the argumentative fallacies in a more-or-less exceptional situation (at the individual-ethical level, he will probably be morally motivated to occasionally violate the recognized rules of ethics of argumentation), because it may serve greater utility. Kant is notorious for his rejection of lying, even in times of emergency or for the sake of helping the neighbor, and he argues that the categorical imperative always condemns a lie as immoral.[151] Of course, not all deontologists share this view since there are also non-Kantian normative-ethical deontological theories (let us mention the theory of the greater good or the theory of the lesser evil, which should not be

[150] GEALFOW, J. A. Argumentative Fallacies. In MACHALOVÁ, T. et al. *Academic Writing for Lawyers.* Pilsen: Aleš Čeněk, 2018, pp. 194-195.

[151] KANT, I. *Groundwork of the Metaphysics of Morals.* Bratislava: Kalligram, 2004, pp. 26, 46, and 49-50. Kant also wrote an essay entitled *On a Supposed Right to Lie from Philanthropy* (see, for instance, TURČAN, M. Objectivist and Relativist Approach to Moral Values. In *Acta Facultatis Iuridicae Universitatis Comenianae*, 2012 (tomus XXX), p. 114 ff.).

confused with consequentialism, although they often lead to the same conclusions like utilitarianism).[152] However, the utilitarian, as a consequentialist, will be an excellent example of rejecting such a Kantian position. Since the argumentative fallacy can, due to its misleading nature, be evaluated (at least in some cases) as a form of lying, it will be inadmissible in principle in Kantian ethics, or at least a particular set of moves that are commonly referred to as argumentative fallacies will be considered ethically unacceptable.[153] On the contrary, a utilitarian will accept the use of a fallacy if it leads to an overall better consequence than what would have occurred if the fallacy had not been employed in the dispute.

Schopenhauer, who cannot even be described as a utilitarian, argued that deception in polemics can sometimes be justified by an effort to find the truth. Specifically, by confusing the opponent, we may gain time to find the right argument, which will show that we were right in our original argumentation (that our argumentation was only seemingly refuted or fundamentally shaken).[154] If, for Schopenhauer, the occasional use of argumentative fallacy is thus justifiable, how much more must this be true in utilitarianism, where the achievement of good consequences (and possibly even without regard to the question of truth, which, on the contrary, is of fundamental interest to Schopenhauer) is the decisive criterion of the moral good. It should be added, however, that different types of utilitarianism can offer different evaluations of the time horizon in which good consequences are to be sought. Or, the question may rather be which of all that is likely to happen after the use of some argumentative fallacy should be included in the estimation of the overall good consequences. In any case, a certain practical difference with Kantian deontology, which categorically rejects lying, is apparent at the least.

Thus, the theme of legal interpretation and argumentation also has an ethical dimension. In the next chapter, I will focus on the ethical dimension of the issue of legal liability and sanctions and then move on to the implications for legal science and education.

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[152] See, for instance, SCHIRRMACHER, T. *Leadership and Ethical Responsibility: The Three Aspects of Every Decision.* Bonn: Verlag für Kultur und Wissenschaft, 2013, pp. 88 ff.

[153] As I have already indicated elsewhere, misleading the other may represent a violation of the second formula of the categorical imperative, which requires us to approach others as ends in themselves (from which the imperative of respect as a normative expression of human dignity can be derived), while with the conscious application of argumentative fallacies, the other is actually reduced to a means of achieving our goals (TURČAN, M. On the Ethics of Argumentation. In *Cirkevné listy*, 2019 (vol. 143), no. 6, pp. 14-15).

[154] SCHOPENHAUER, A. *Eristic Dialectic: The Art of Being Right in Arguments under All Circumstances.* Brno: „Zvláštní vydání…", 1994, p. 11.

7.
LEGAL LIABILITY, SANCTIONS, AND ETHICS

Legal liability represents a special form of legal relation, the content of which is a legal obligation of a punitive nature, which arises as a result of non-fulfillment of the original legal obligation.[155] It can, therefore, be said that *"there is* [...] *a very close relationship between liability and sanction,"* which has to do with the fact that the institute of legal liability is *"organically linked to those defining features of the law that relate to its general binding force and, in particular, its back-up by state coercion."*[156] The legal facts from which legal liability arises are illegal conduct and illegal states, on the basis of which we distinguish between subjective and objective legal liability. This distinction seems morally significant.

Subjective legal liability is based on the concept of guilt (culpability) as a psychological (cognitive and volitional) relation of the trespasser to his unlawful conduct and its consequences. In theory, we distinguish between *intent* and *negligence* (whereby intent is divided into *direct* and *indirect*, and negligence into *conscious* and *unconscious*).[157] The fact that we do this seems ethically determined. The requirement of the intent of the trespasser for liability for some types of offenses, while the sufficiency of negligence for other types (as well as the fact that the amount of the penalty is influenced by whether a direct or indirect intent was involved or conscious or unconscious negligence) is in the natural intuition of most people (including legislators) given by the link between the subjective legal responsibility and *moral* responsibility. It is presumed that it would be unfair not to distinguish between intentional and negligent acts and their various forms. The category of justice simply requires a certain distinction to be made among them.

So, let us accept that subjective legal liability has its basis in moral responsibility.[158] As is well known, the requirements of criminal liability include

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[155] VEČEŘA, M. et al. *Theory of Law.* 2nd ed. Bratislava: Bratislava College of Law, 2008, p. 233.

[156] PROCHÁZKA, R. – KÁČER, M. *Theory of Law.* Bratislava: C. H. Beck, 2013, p. 273.

[157] OTTOVÁ, E. *Theory of Law.* Šamorín: Heuréka, 2006, pp. 256-257.

[158] Josef Bejček states that legal liability *"is only one of the components of broader social responsibility, which also includes, for example, moral or political responsibility. It is necessary to examine the content of legal liability not only from the formal (positive law) point of view but also from the moral (natural law) point of view* [...]. *Given that law in a good society should be a continuation of morality, liability relations arise where legal and mostly moral obligations have been violated and are therefore necessarily endowed with moral value*

the age and sanity of the perpetrator. In particular, the second (but in a certain way, the first as well) of these requirements is related to the idea of the freedom of the will. This idea seems essential to the very concept of moral responsibility because, in the absence of free will, any moral responsibility appears illusional. Can we call a person morally responsible (and consequently attribute subjective legal liability to them) if they are not free but are a kind of biological machine with a mere illusion of free will? The question of the freedom of the will as a philosophical category is thus opened, and once again, we come to the connection between ethics and metaphysics.

The two traditional answers to this question are called *determinism* and (metaphysical) *libertarianism*.[159] Determinism holds that free will does not exist, that our decisions are born outside of our consciousness, and we become aware of them only after they happen (it is a mere illusion that we have *decided* to do something; in fact, it was done without *us* by the causal laws of the unconscious movement of physical particles that make up our brain and everything around us). If the universe is causal, how could anything in it (including human beings) resist causality? How could there be any free will in a deterministic world where particles collide like one big domino? These are the questions posed by determinism, based on which determinism concludes that there is no free will.[160] Libertarianism, on the other hand, counts on our everyday experience of making a choice (and on the idea of reason and its philosophical reflection).[161] Religious versions of libertarianism may also count on the concept of an immaterial soul that is relatively independent of the causal material universe (but this is not the only possible religious libertarian position). Libertarianism, whether religious or

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content as a response to society." (BEJČEK, J. On Some Open Issues of Legal Responsibility. In *Právny obzor*, 2019 (vol. 102), no. 5, p. 394).

[159] Although for example, Isaiah Berlin, in his reflections on liberalism, also dealt with the question of the existence of free will (see BERLIN, I. *Four Essays on Liberty.* Prague: Prostor, 1999, p. 12 ff.).

[160] Some even point to scientific research. The classic one is Benjamin Libet's experiment, which is supposed to show that the electrical activity of the brain corresponding to the act of human will precedes the subjective consciousness of the decision, which some interpret as the absence of free will (see, for instance, TURČAN, M. Free Will as a Human Attribute? In *Acta Facultatis Iuridicae Universitatis Comenianae*, 2012 (tomus XXXI), no. 1, pp. 195-203).

[161] *"In moral autonomy, then, it turns out that human practice is not simply the natural causal result of previous empirical conditions* [...]*, but is marked by causality from freedom, which is fundamentally different from natural causality."* (ANZENBACHER, A. *Introduction to Ethics*. Prague: Zvon, 1994, p. 72).

non-religious, assumes that there is a conscious self that is the cause of one's own moral decisions (*causa sui*).[162]

The outlined difference seems fundamental. If we refuse to attribute moral responsibility to a mentally disabled person, and if on that basis we do not consider them legally liable, why should we attribute any moral responsibility and subjective legal liability to a mentally fit adult if he or she is not free either? What is the difference between the first (mentally disabled) and the second (who may appear free, but it is just an illusion)? In such a case, attributing moral responsibility and subjective legal liability seems quite counterintuitive.

In the words of Tomáš Sobek: *"If we think about the problem consistently, then we cannot avoid the disturbing question: If no psychopath is morally responsible, then who is morally responsible? If systematic moral failure is, in*

[162] The barrier to the existence of free will is not only the idea of the necessity of the processes of the mind but also the idea of their randomness. If random nerve impulses in the brain are responsible for our choices, then it seems inappropriate to speak of free will. Intuition tells us that the ultimate cause of our choices must be a conscious self that considers reasons, while the choices are not predetermined. Classical libertarianism in the philosophy of mind assumes that if all the particles in the universe were in the same position, the situation could develop in a different way when repeated because a free mind (*causa sui*) interferes. Some libertarians are more cautious today. For example, Robert Kane does not consider a person necessarily free in every situation but speaks of the so-called *self-forming actions*, i.e., some free decisions by which a person determines their further choices (see, for instance, LEMONS, J. Self-Forming Actions and the Grounds of Responsibility. In *Philosophia*, 2015 (vol. 43), no. 1, pp. 135-146). The essence of the idea of free will is that a person has at least two options for how to behave. This assumption is sometimes attacked by compatibilists who argue that free will and determinism are compatible in some sense, and they use a different understanding of free will than the ability to choose otherwise. Tomáš Sobek points to the well-known example of Harry Frankfurt, the essence of which he paraphrases as follows: *"Let's assume that Michal wants Alena to kill Ivana. Let's also consider that Michal can effectively influence Alena's decision-making. And let's also consider that Michal can perfectly predict Alena's decisions. If Michal decides that Alena will decide to kill Ivana, he will remain inactive. But if Michal decides that Alena would not decide to kill Ivana, he intervenes in such a way that she decides to kill her. However, Alena decides to kill Ivana, so Michal doesn't intervene."* (SOBEK, T. *Immoral law.* Prague: Institute of State and Law of the Czech Academy of Sciences, 2010, p. 58). Sobek adds: *"This thought experiment is intended to arouse the intuition that Alena is morally responsible for Ivana's killing, even though she actually had no alternative course of action under the circumstances. The experiment has a revisionist ambition, namely to give up the original intuition that the existence of alternative possibilities of action matters in the moral evaluation of action."* (Ibid.). Honestly, this thought experiment has never seemed convincing to me as an argument for rethinking the concept of free will. If Alena is morally responsible for her act, it is because there was at least a theoretical possibility that she would decide not to kill Ivana. After all, it would be this very theoretical possibility that would cause Michal to intervene and prevent her from freely deciding for her.

principle, always explainable by some objective causes that are accepted as a reason for exempting a person from moral responsibility, will we not end up with no other attribution of responsibility than on the basis of the accidental failures of otherwise reliable people? In such a case, however, the very sense of moral responsibility completely collapses."[163] David Černý, Adam Doležal, and Tomáš Doležal add: *"The whole concept of legal liability (and indeed of law as a whole), both in the field of private law and in the area of public law, is currently based on the assumption (perhaps incorrect) of the existence of free will.* [...] *The current legal discourse and, consequently, the legal systems themselves are based on the paradigm of human freedom; modern law is based on libertarianism. Man is generally understood as free, so he is morally responsible and is, therefore, able to bear the legal consequences of his actions. The law also counts on the restriction of legal capacity if a person is not fully competent, but a normally rational person is considered a free being and, therefore, legally liable. This concept also corresponds to a common human intuition; sociological surveys show that people largely believe that they are free."*[164]

In this context, Slavomíra Henčeková notes that if the hypothesis of the absence of free will were verified, *"it would not be compatible with the current concept of punishment, because it assumes that the offender could have influenced his actions, he could have decided otherwise. But if our actions are determined by our physiological processes and states, our genes and experiences, we cannot influence our actions. But this does not mean that we should let dangerous criminals run free around the world just because they are not to blame for their actions. On the contrary, if they are dangerous to society* [...]*, they need to be isolated in order to protect society and their potential victims. And it also does not mean that it would not be expedient to impose punishments on offenders that will have an educational effect on them. The concept of punishment for 'punishment', i.e., the retributive concept of punishment in which punishment serves as retribution, cannot, however, stand in the absence of a free will."*[165]

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[163] SOBEK, T. *Immoral law.* Prague: Institute of State and Law of the Czech Academy of Sciences, 2010, p. 80.

[164] ČERNÝ, D. – DOLEŽAL, A. – DOLEŽAL, T. Civil Liability and Free Will: Legitimacy Issues Associated with the Current Theory of Liability. In *Právník*, 2014 (vol. 153), no. 10, pp. 831 and 838.

[165] HENČEKOVÁ, S. The Hypothesis of the Non-Existence of Free Will and Its Impact on Law. In LENHART, M. – GIBA, M. (eds.). *Milestones of Law in Central Europe 2016.* Bratislava: Faculty of Law, Charles University, 2016, pp. 456-457.

Thus, the absence of free will does not necessarily lead to the annihilation of the concept of legal liability.[166] John Stuart Mill already doubted the existence of free will, but as a utilitarian, he advocated the need to punish criminals in order to maximize utility. From a utilitarian perspective, if we are not free, this does not mean we are not morally or legally responsible because the moral rightness of an act is based primarily on its consequences. Moral responsibility is a responsibility for the result (although, as I will show, under utilitarianism, this does not apply without qualification). On that basis, we can conceive the idea of legal liability, but, as Henčeková states, it seems that the relevance of retribution is lost,[167] and the purpose of punishment remains solely the effort to prevent bad consequences in the future. This is what utilitarians claim.[168]

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[166] The position of so-called metascepticism in this matter is held, for example, by Tammler Sommers, who argues that none of the existing concepts of moral responsibility (taking into account also the issue of free will) is capable of being universally satisfactory. See SOMMERS, T. *Relative Justice: Cultural Diversity, Free Will, and Moral Responsibility.* Princeton: Princeton University Press, 2012.

[167] Why repay an action (i.e., cause pain for pain) if the offender could not influence his unlawful conduct? If there is no free will, then punishment must be about protecting others from further unlawful actions rather than about repaying them.

[168] In any case, the meta-skeptic Sommers states: *"I do not consider retributive feelings to be primitive or barbaric or an outdated relic of our evolutionary past. On the contrary, I believe retributive feelings have value; they express solidarity, love, loyalty, courage, and moral commitment. It would not surprise me in the least if my 'final' all-things-considered judgment about the conditions of moral responsibility undergoes further revision and modification."* (Ibid., p. 202). Černý and Doležals state: *"The rejection of autonomous decision-making as a starting point for our actions then puts the entire concept of law on questionable foundations. In criminal law, it seems that this contradiction can be resolved by abandoning the retributive theory of the concept of punishment and adopting mainly consequentialist theories, which understand the law in principle as a tool to maximize the principle of happiness in society, in tort civil law, the problem is more complicated. The principle of autonomy of will is always either explicitly or at least implicitly included in the civil law of democratic states. The great civil codes of the early 19th century implicitly included the idea of human freedom and equality from the context in which they emerged. The ABGB, on which the current new Civil Code is a follow-up, referred to freedom in the Kantian sense, i.e., a concept that understood the human being in a double sense, on the one hand in a purely empirical sense, as a natural being included in causal determinism, and on the other hand as a thinking being, endowed on the ethical level with practical reason, from which moral duty and moral responsibility can be derived. This freedom in the area of our thinking and the resulting responsibility for our actions has, of course, had a fundamental impact on the concept of legal liability and the acceptance of some of the principles on which modern tort law is based – especially the preference for the concept of subjective liability. But if agency is an illusion, isn't it worth changing the entire civil law? If so, how? Such considerations of conceptual changes must be based on considerations of the meaning, purpose, and nature of individual areas of civil law."* (ČERNÝ, D. – DOLEŽAL, A. – DOLEŽAL, T. Civil Liability and Free Will: Legitimacy Issues Associated with the

But in such a case, isn't basically any legal liability an objective liability? Those utilitarians who are determinists would answer that the illusion of free will is useful in some sense (if people think they could have done otherwise, they will not feel injustice when punished, and this may help them become better persons, while if they are punished for something they did not commit with *mens rea*, or if they think they could not have done otherwise, they may become bitter and cause more damage in the future).[169]

Thus, even if free will does not exist (whereas I personally still believe it does exist), utilitarianism (or, more broadly, consequentialism) would theoretically remain meaningful, and in its context, the idea of subjective legal liability could also remain meaningful as a "useful fiction" (but only if the majority of the people are not utilitarian determinists and believe in the existence of free will). Deontological ethics should be rejected as erroneous in the absence of the freedom of will. However, if free will does exist, then deontological ethics is meaningful, and from its point of view, the distinction between subjective and objective legal liability (and their various forms) seems crucial. The legitimacy of penalties based on subjective legal liability will, in principle, be unquestionable, and retribution will also be permissible. However, the legitimacy of objective legal liability in certain areas will have to be properly justified.

As far as utilitarianism is concerned, it is also worth noting that Bentham and Mill gave moral weight to the intent of the agent but not to his motives. By intent, they understood the focusing of the human will on an action, the

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Current Theory of Liability. In *Lawyer*, 2014 (vol. 153), no. 10, pp. 838-839). In the end, however, despite the analysis of philosophical objections to the existence of free will and the analysis of possible theoretical-legal solutions to the concept of liability in civil law, they conclude that *"the principle of freedom of will as a basic principle of civil law should be preserved in the concept of the legal order de lege lata for the time being. It may only be fiction, but the legal system is full of such fictions that are highly useful for the functioning of society and the law. If such a fiction corresponds to the prevailing moral intuition in society and scientific research has not fundamentally changed this generally accepted moral assumption, it is more appropriate to keep the current concept of tort civil law with regard to the stability of society and legal certainty and not to make fundamental revolutionary changes."* (Ibid., p. 847).

[169] The above-cited Czech authors similarly state in relation to the issue of civil torts: *"While deontological and iusnaturalistic moral theories accept the principle of intention, consequentialism and other utilitarian theories evaluate the moral rightness of an action only on the basis of consequences. From the outlined points of view, it seems that it would be right, if a consequentialist ethical discourse prevails in society, to conceive legal responsibility de lege lata on the basis of strictly objective responsibility, while subjective responsibility is constituted in a society where natural or deontological ethical discourse predominates."* (Ibid., pp. 846-847).

consequence of which is either the maximization of utility or, conversely, causing rather harm, while by motive, they understood the reason (Mill speaks of a *feeling*)[170] that leads a person to a given action (anger, hatred, compassion, envy, selfishness, benevolence, etc.). Thus, the intent represents what a person *wants to achieve*, while the motive represents the reason *why* the person wants to perform the action.[171] This is how their attitudes differ from Kant, who, as is well known, claimed that if, for example, a salesman is fair to his customers (does not cheat on them) merely because he does not want to lose them (and so, if he could cheat on them without them ever finding out, he would do so), he is acting in a morally wrong way.[172] From the point of view of (classical)[173] utilitarianism, it doesn't matter what the motive of the salesman is; the important thing is that the overall utility is maximized (that everyone is satisfied). The motives are, therefore, irrelevant. But the intent remains essential. For example, if someone tries to make a poison to kill somebody but accidentally makes an elixir of happiness, then when giving it to another, he is not acting in a morally laudable way just because the consequences happen to be "good". What he does is still morally wrong because it includes the intent to cause pain and death. It is, therefore, clear that the theories of Bentham and Mill are not consequentialist to the extreme (the very consequences of human action are not the only criteria for the ethical evaluation of an action), and intent also

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[170] MILL, J. S. *Utilitarianism.* Indianapolis: BOBBS-MERRILL, 1957, p. 24.

[171] In *Utilitarianism,* Mill deals with this difference based on a counter-example set against him by his opponent, Llewellyn Davies, who pointed out the problematic act of rescuing a drowning man by a tyrant who pulls him out of the water only to torture him. Mill acknowledges that such an action (rescue from the water) is, in fact, immoral because it tends to cause pain, but he does not agree that the decisive element is motive. According to him, the rescue of the drowning person does not represent an independent act but rather a part (the beginning) of a composite act – the process of the torture (ibid.). Mill must argue this way if he wants to maintain a moral distinction between motive and intention, not willing to give moral weight to the former. When rescuing a drowning person, one can theoretically ask why the rescue takes place (so it may reasonably appear that the desire to torture is the motive for the act of rescue).

[172] KANT, I. *Groundwork of the Metaphysics of Morals.* Bratislava: Kalligram, 2004, p. 21. Similarly, Michael Novak, who is not a Kantian but a proponent of Catholic virtue ethics, states that the practical conclusion of his reflections on ethical business is not that honesty always pays off. It does not always pay off and often costs something. However, according to Novak, these costs are worth it for moral reasons alone. (NOVAK, M. *Business as a Calling*. Bratislava: Charis, 1998, p. 148).

[173] *Motive utilitarians* argue that the motives are relevant from a consequentialist point of view. Thus, from their perspective, motives have an ethical (and therefore possibly legal) importance.

plays an important role.[174] Incidentally, concerning the relevance of the distinction between intent and negligence, Bentham argued that the penalty for negligence does not have a deterrent effect,[175] so, it does not make much sense to punish such offenses from a utilitarian point of view.

Concerning the theories of punishment, I have already indicated a possible difference between the deontological and utilitarian approaches. As Jozef Prusák states: *"The philosophy of punishment based on criminal law is based on either a retributive or utilitarian approach and their various variations."*[176] The retributive and utilitarian theories of punishment differ in their understanding of the purpose of punishment. While the retributive theory sees the purpose of punishment (primarily) in retribution, the utilitarian approach (being consequentialist) emphasizes the consequences of punishment, which can be either to deter others from following the offender's example, to prevent the offender from committing an unlawful activity, or to re-educate the offender. In retributive theory, punishment is a matter of principle – the offender deserves evil for the evil he has caused (while the punishment should, of course, be proportionate; otherwise, it is unjust). The retributive theory is based on deontological ethics, and some versions of it also admit or even require the death penalty. As is well known, Kant argued that the only way to correct the injustice of a murder is to execute the murderer. According to Kant, if society does not punish the criminal, it bears complicity in the crime.[177] The retributive theory of punishment can also have its place in the context of virtue ethics, where justice is the highest virtue. However, virtue ethicists can give different answers to the question of the acceptability of the death penalty. They may ask whether the death penalty really represents "only" retribution or whether it rather represents vengeance, and for many proponents of virtue ethics, the concept of vengeance is a negative phenomenon that cannot be seen as a reflection of a good character (or a way to build it). From a utilitarian perspective, punishment is not a value in itself; it is a value solely because it serves good consequences. Thus, from this point of view, punishment is imposed either to deter others and thus cause a reduction in crime, to protect

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[174] See, for instance, TURČAN, M. On the Issue of Motive and Intention in Utilitarian Ethics. In KLUKNAVSKÁ, A. – GÁBRIŠ, T. (eds.). *Ad Iustitiam per Ius.* Bratislava: Wolters Kluwer, 2018, pp. 70-85.

[175] See, for instance, RAMRAJ, V. V. *A Theory of Criminal Negligence.* (Dissertation). Toronto: University of Toronto, 1998, pp. 55-56.

[176] PRUSÁK, J. *Theory of Law.* Bratislava: Publishing Department of the Faculty of Law, Comenius University, 2001, pp. 287-288.

[177] See, for instance, POTTER, N. T. Jr. Kant and Capital Punishment Today. In *Journal of Value Inquiry,* 2002 (vol. 36), no. 2, pp. 267-282.

society from further actions of the criminal, or (ideally) to change the criminal for the better.[178]

In addition to the ethical dimension of the issue of punishment, we can also talk about the ethical dimension of other types of sanctions, such as private law sanctions.[179] One can even move to the level of "legal ontology" or "legal metaphysics," as part of the general theory of law or legal philosophy and ask about the essentiality of the idea of a *sanction* for law as such or for the structure of the legal norm (for example: Under what circumstances is it justified to consider an imperfect norm of positive law as a legal norm from the point of view of the connection thesis?). If the solutions to these problems depend (even) on moral evaluation, then the field of ethics certainly comes to the fore.

To sum up: ethical theories have a noticeable influence on the perception of the issue of legal sanctions. They can also have their significance in relation to the very idea of legal liability if we base it on the idea of moral responsibility.

[178] TURČAN, M. On the Ethics of the Death Penalty. In *Cirkevné listy*, 2019 (vol. 143), no. 3, pp. 7-9.

[179] At the level of private law, the issue is connected to the already discussed problem of the limits of private autonomy. For example, it is possible to consider the moral justification of a legal or judicial limit on the amount of a contractual penalty or interest on late payment.

PART TWO
Discussion

8.

IMPLICATIONS FOR LEGAL SCIENCE AND EDUCATION

In the previous chapters, I have outlined the interconnection of various theoretical-legal themes with ethics. I have shown that, in principle, each of these themes has an ethical dimension. The relevance of ethical theories is visible not only in the issue of the concept of law and individual forms of civil dissent, which is a traditional part of theoretical-legal polemics about the relationship between law and morality. Ethics also has its place in the issue of the system of law, where we may ask about the justification of distinguishing between public and private law and their mutual relationship. Ethical questions also arise in connection with the issue of the relationship between international and national law. Similarly, concerning the theme of sources of law and lawmaking, it is possible to ask about the importance of morality and, thus, ethical theories, whether as a material source of law or within the requirements for legal certainty and lawmaking. It is obvious that ethics also has its place in the theme of legal relations, for example, in the issue of human rights as a special type of rights. This is also true of the application of the law, especially in relation to the concept of a fair trial. The methodology of interpretation and argumentation, as well as the issue of legal responsibility and sanctions (punishment), also have an ethical dimension.

These facts are of no surprise. After all, many (or almost all) of the prescriptive questions that the human mind can formulate are ultimately reducible to questions of what is right (just, good), i.e., to questions of ethics.[180] However, I believe that it was appropriate and valuable to explicitly touch on this aspect of legal theory.

One can ask what this factuality implies for the theory of law as a science and what impacts it should have on theoretical-legal education. Here, I would like to point out that the above-given implies that a (good) legal theorist should also be partly an ethicist. Orientation in ethical theories (whether normative-ethical, theories of applied ethics, or even meta-ethical), at least basic, is necessary for a well-founded dealing with various problems of legal theory. A

[180] In some cases, it can be about compassion and humanity rather than justice. In this sense, Slavomíra Henčeková outlines the so-called *humanistic analysis of law.* She states that she is not trying *"to give an unambiguous scientific definition of the term 'humanism'; it is about humanizing the law, i.e., looking at the law in such a way that a human being is not lost in it,"* after all, it is true that *"we are humans, and that the law is mainly about human beings."* (HENČEKOVÁ, S. From Behavioral to Humanistic Analysis of Law. In GÁBRIŠ, T. et al. *Non-Dogmatic Jurisprudence: From Marxism to Behavioral Economics.* Prague: Wolters Kluwer, 2017, pp. 249 and 261). Such an approach can perhaps be described as reflecting the *ethics of compassion*.

legal theorist, therefore, needs to pay attention to this area of human knowledge and consider the overall set of concepts or at least framework approaches within ethics. I am convinced that a proper reflection on the ethical dimension is also in line with the important challenges of the theory of law as a science and teaching subject, which nowadays include (1) interdisciplinary openness, (2) sound "anti-dogmatism," and (3) applicability to practice.

Interdisciplinary openness is important both because no knowledge is isolated and has a broader context that needs to be considered, and because we live in an "interdisciplinary age" (so, if we want to "be up to date," we need to support an interdisciplinary approach). "Anti-dogmatism" means to be open to new ideas and avoid intellectual rigidity. It is a requirement for appropriate flexibility in accepting arguments and for certain creativity in choosing research goals. Applicability to practice gives the theory of law as a science its primary meaning. I agree with Filip Melzer that *"a theory of law or legal philosophy that has no significance, however remote, for legal practice (whether applied or legislative) is only a castle in the air in the heads of scholastics."*[181] However, it is appropriate to simultaneously add that the practicality of a particular theory needs not always be obvious (it can only become clear over time). Therefore, one must be very careful in criticizing certain theories as "impractical".

The orientation towards ethics as a discipline may not seem the most "practical" given the plurality of contradictory views on the ideas of goodness and justice. However, taken to the consequences, ethical problems will always be present in some way when asking normative (prescriptive) questions. Such an orientation also fits into the challenges of interdisciplinary openness and "sound anti-dogmatism" of the theory of law or legal science in general. The theses generated by various prescriptive legal theories will always collide. But how else could it be? The theory of law as a science that is supposed to be useful for practice also includes a prescription. In this respect, the clash of views is a natural part of any humanities or social sciences with a prescriptive focus, where "right" and "wrong" answers are not as obvious as they are in the natural and technical (descriptive) sciences. However, this does not mean that such answers do not exist. The involvement of ethics in the examination of theoretical-legal problems is thus not strange or inappropriate in any sense. On the contrary, if,

[181] MELZER, F. *Methodology of Finding Law: An Introduction to Legal Argumentation.* 2nd ed. Prague: C. H. Beck, 2011, p. 9. However, I do not agree with his view that *"such a theory is useless and not worth the paper on which it is printed."* (Ibid.). The value of a purely abstract and practically useless theory is not big, but it is definitely bigger than what Melzer presents. Such a theory at least sharpens the spirit, which is not irrelevant. In any case, I agree with Melzer's appeal to the practicality of legal theory because practical theory is certainly more valuable.

in the 21st century, we are still to count on the idea of justice as relevant (decisive) in law, then we have no choice but to pay attention to ethical theories. It is in them that the ideas of goodness and justice (provided we truly count on them, say, in the moral-objectivist spirit)[182] are concretized or at least partially outlined. The engagement of ethical perspectives, which can, of course, portray many problems as quite complicated, does not, in principle, oppose the requirement of the practicality of legal theory (at least certainly not at the level of normative and applied ethics; however, metaethics should not be neglected either).[183]

I said that legal theory should also be characterized by a "sound anti-dogmatism". This is true of the theory of law as a science as well as part of the legal education. It is the knowledge of ethical theories, their analysis, and application to individual problems that help such "anti-dogmatism." It shows the complexity of the phenomenon of law and promotes scientific/academic humility (it helps intellectual openness and increases the chance of willingness to change one's mind). If our goal is justice, whatever the term means, then we must not stop seeking it, no matter how difficult the path may be in the attempt to grasp it theoretically (and this is where ethical theories enter).[184] Even if we

[182] The question of the objectivity of moral values is a classic ethical (metaethical) issue. Moral relativism (subjective relativism, moral nihilism) has not yet achieved a dominant representation in society, and in fact, probably not even among philosophers and scientists, although many social scientists (e.g., anthropologists or sociologists) pretend it has. Of the important figures from this sphere, relativism is strongly criticized, for example, by the renowned French sociologist Raymond Boudon. As a rationalist, he insists on the objectivity of moral values and claims that there are fundamental agreements among people on the issue of values, despite fundamental individual and cultural differences, which, according to him, is given by the reality of human rationality – he states that *"a sound mind is what people all over the world have in common,"* and that it results in many significant ethical agreements. (BOUDON, R. *The Poverty of Relativism.* Prague: Sociology Press, 2011, p. 235).

[183] The possible objection pointing to the ambiguity or impossibility of providing correct answers to ethical questions is actually metaethical and concerns the problem of the existence and knowability of moral goodness/justice. Utilitarians and deontologists are obviously convinced that it is possible to arrive at the correct answer to it, even if the moral nihilist or skeptic will not be satisfied with their answers. However, even he can recognize at least the pragmatic (political) potential of normative-ethical theories or various concepts within the framework of applied ethics for law. So, dealing with them should not be completely meaningless, even from the nihilist's or skeptic's perspective.

[184] Although Jacques Derrida, for example, is *"reserved in the possible intersection of justice and law, when he warns: 'Law is not justice. Law is the element of calculation, and it is right, juste, that there is law, but justice is incalculable; it requires us to reckon with the incalculable; aporetic experiences are just as improbable as the necessary experiences of justice, i.e., moments in which the decision between right and wrong is never secured by any rule.'"*

start from intuitionistic assumptions and consider the knowledge of goodness and justice a matter of some moral feeling, their theoretical reflection remains valuable. Perhaps only a few proponents of the intuitive knowledge of moral values will claim there can be no distortions in such cognition. And these distortions can be corrected precisely by theoretical reflection (the question, of course, is what to do if the differences between our moral intuitions and the conclusions of some ethical theory are deep and fundamental; in this case, we must choose whether to prefer one or the other). At the same time, the fact that the "anti-dogmatism" of legal theory is supposed to be "sound" means that concrete legal theories will not be changed too easily or too often.[185] One thing is flexibility, and another is stability, thanks to which different theories can fulfill their critical function. This function is important in relation to politics, which can (at least in some cases) be assessed and modified (for example, by proposals *de lege ferenda*) with the help of specific theories. This is also related to the already mentioned requirement of practicality.

If the theory of law is linked to ethics, then it also means that a culture of interdisciplinarity is important in the academic/scientific environment.[186] This implies, for example, the importance of supporting joint research projects, conferences, publications, etc. (i.e., different ways of mutual communication between both disciplines and their representatives – philosophers-ethicists and legal theorists). From the themes discussed in the previous chapters, it has been seen that, for example, Kantian deontology and utilitarianism sometimes lead

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(ŠOLTYS, D. The Importance of Postmodern Legal Thinking for the Formation of Legal Argumentation – Denial or Redefinition of Legal Principles? In BRÖSTL, A. – BREICHOVÁ LAPČÁKOVÁ, M. (eds.). *New Dimensions of Legal Argumentation Methodology: The Role of Legal Principles in a Multilevel Legal System.* Prague: Leges, 2021, p. 244).

[185] Marek Káčer says something similar about the problem of changing a legal opinion (see KÁČER, M. Change of Legal Opinion. In BÁRÁNY, E. et al. *Change of law*. Bratislava: Institute of State and Law of the Slovak Academy of Sciences, 2013, pp. 317-344). Káčer states that a certain degree of constancy of legal opinions *"is socially desirable"* and that *"a certain degree of constancy in statements is socially desirable not only if we express legal opinions with them."* (Ibid., p. 331).

[186] After all, as Carel Stolker points out, few disciplines are as good examples of interdisciplinarity as law. Stolker notes that law has always been associated with philosophy and theology (whereas, given the phenomenon of multiculturalism, even in today's Western secular context, it makes considerable sense to deal with the theological foundations of some legal systems) and states that *"together with philosophy and theology, ethics are also inherent in legal science, for example in the concept of 'justice'."* (STOLKER, C. *Rethinking the Law School: Education, Research, Outreach and Governance*. Cambridge: Cambridge University Press, 2014, pp. 109-110). In addition, he then points to history, political science, economics, logic, literature, and other disciplines, such as psychology, sociology, or anthropology (ibid., pp. 109-111).

to the same conclusion, but sometimes they differ fundamentally in their ethical evaluation of a certain problem. In this context, not only the effort to confront the given ethical approaches with each other but also to specify individual partial or complex legal theories as prescriptive doctrines based on various ethical theories (i.e., the effort to formulate and deepen deontological or consequentialist theories of law as a whole or various partial prescriptive legal theories) is valuable.[187]

Legal theory, as a practical, "soundly anti-dogmatic," and interdisciplinary open science, is, therefore, able to absorb and use ethical theories and build on them in its own way. Not only is it capable of doing this, it needs to do this. Law is a social phenomenon, and as such, it necessarily has an ethical aspect. After all, *"law and society interact with each other. The law is a certain 'sign of the times'."*[188] This means the law can never be devoid of values, and the science that deals with it also needs to examine its value base and give space to its critical reflections. This applies not only to positive law but also to the level of theoretical concepts that are a part of the general theory of law or legal philosophy. In a sense, they are also a "sign of the times" and develop (at least partially) with time. This is evidenced, after all, by historical developments (with some themes being more obvious than others).[189] If (critical) morality is one of the key factors in judging law and legal theories, then ethical theories help to reflect and evaluate the "zeitgeist" present in legal science as well.

If I should, at least briefly, outline my own prescriptive legal theory (or some of its basic contours), I would like to say that my starting point is a rejection of utilitarian ethics[190] and an inclination towards some form of deontology that

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[187] However, one can also consider, for example, the relationship between law and theological ethics, for instance, in the formulation of Protestant/Evangelical legal theory (or various Protestant legal theories), which is a task that I will hopefully take on in the future as a lawyer and Protestant theologian (in this regard, see, for example, HAMMOND, J. B. Protestant Legal Theory? Apology and Objections. In *Journal of Law and Religion*, 2017 (vol. 32), no. 1, pp. 86-92).

[188] GAJDOŠOVÁ, M. The Right of Citizens to Associate Freely and a Democratic Society. Federal Autonomy and Its Legal Protection. In BÁRÁNY, E. et al. *Law and its environment.* Bratislava: Institute of State and Law of the Slovak Academy of Sciences, 2011, p. 92.

[189] In this regard, see, for instance, the above-mentioned publication by Tomáš Sobek *Legal Thought* (2011).

[190] Based on this, I am not a supporter of the *Law and Economics* school either. The school is inspired by Benthamian utilitarianism, and its understanding of justice seems too economic to me, although this school brings several interesting insights. As is known, the key figure of the movement is Richard Posner, whose book *Economic Analysis of Law*, written back in the 1970s, *"comprehensively, systematically and densely summarized the most important knowledge gained so far and formulated theories, and at the same time*

counts on the idea of universal human dignity. It is clear to me that the concept of human dignity is controversial and that it can be criticized as vague or superfluous.[191] However, I am convinced that this concept has its practical value, and not only that – I assume that it also has something to it in an in-depth perspective (i.e., that it is not just an accidental and empty construct), and without it, our idea of human rights, which are, after all, a key category (or even paradigmatic) from a liberal-democratic perspective, would be impoverished.[192] In relation to the idea of human rights as legal and moral rights, which I consider essential, no better term has yet emerged that would serve as their basis (justification).[193] The objection may theoretically be that the concept of human

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defined the theses that became a fertile ground for further progress and development of this academic movement. In addition to the economic analysis of various branches of law (contract law, family law, labor law but also criminal law), Richard Posner put forward the idea that the Anglo-American legal system based on judicial lawmaking is more efficient and thus more just, than legal systems that are primarily built on the foundations of written-codified law. [...] *According to Posner, the judge is able to intuitively evaluate the economic aspects of the case under consideration and decide effectively, as a result of which the legal system itself is gradually being formed as an effective system (imitating market principles and rules). The legislator, on the other hand, does not have such a possibility, and in most cases, he is subject to various political pressures, as a result of which the legal system is deformed, and laws are often adopted in which (economic) rationality is absent."* (MÉSZÁROS, T. Law and Economics. In *Current Questions of Legal Theory.* Bratislava: Wolters Kluwer, 2018, p. 120). I do not reject a certain justification for Posner's comparison of the Anglo-American and continental systems of law, but I do not agree with his reduction of the idea of justice to an economic category. However, as Josef Šíma points out, Posner does not insist on the full application of his theory in all situations (ŠÍMA, J. The Dispute about the Nature of the Relationship Between Economics and Law. In GÁBRIŠ, T. et al. *Non-Dogmatic Jurisprudence: From Marxism to Behavioral Economics.* Prague: Wolters Kluwer, 2017, p. 117).

[191] See, for instance, HAPLA, M. *Human Rights Without Metaphysics: Legitimacy in the (Post)Modern Era.* Brno: Masaryk University, 2016, pp. 114 ff.

[192] Of course, the acceptance and concrete interpretation or, on the contrary, rejection of the idea of liberal democracy is also a matter of values.

[193] And here, of course, I'm talking about the concept of *intrinsic* human dignity, not *aspirational* – i.e., about the basis of inalienable human rights, not a specific human right to dignified treatment. Whoever renounces the concept of human dignity threatens or at least weakens the concept of human rights. A similar danger may arise from the claim that human dignity is merely a social or political construct (see, for example, TURČAN, M. Critique of the Concept of Human Dignity in the Conception of Suzy Killmister. In *Filozofia*, 2022 (vol. 77), no. 1, pp. 36-47), although human rights do not necessarily collapse as a result, because human dignity as a construct can possibly be reasonably ethically justified. An interesting discursive-ethical justification of human rights is offered, for instance, by Rainer Forst (see FORST, R. Justification of Fundamental Rights: A Discursive-Theoretical Approach. In *Reflexe*, 2020, no. 59, pp. 135-163). Let us add that the essence of the

dignity is religiously tinted. I admit that my personal worldview is Christian (but at the same time, I am a supporter of moderate secularism, i.e., the idea of the religious neutrality of the state, separation of state and church, law and religion).[194] So, for my part, I have no problem accepting a term that has theistic foundations or connotations,[195] but in a secular context, I support the effort to find religiously neutral (non-religious) explanations of human dignity, if possible (after all, the term is now commonly used also in a purely secular sense).[196] As I have already indicated in this monograph, the concept of human dignity can theoretically be counted on even when accepting consequentialist ethical

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discursive ethics of the Habermasian type lies in the fact that *"the intersubjective (communicative) process of argumentation, in which all those who may be affected by its outcome participate as equal partners, forces its participants to stop limiting their understanding of the matter to their own particular point of view and to see the problem from the point of view of others.* [...] *This kind of objectivity is based on qualified intersubjectivity; it is not based on some phenomenon that is external to practice, but on the procedural quality of practice as such."* (SOBEK, T. *Arguments of the Theory of Law.* Prague: Institute of State and Law of the Czech Academy of Sciences, 2008, p. 101). In any case, Tatiana Machalová states that *"despite the efforts of the creators of discursive ethics to overcome the traditional formalism and universalism of deontologically oriented ethics, its greatest weakness remains the insufficient thematization of the agatological dimension of 'practical reason'. This means nothing else that neither Habermas nor Apel succeeds in formulating the original 'source' of morality, the original source of good relations. Good relationships, moral qualities, and moral phenomena, in general, are only manifestations of the right way of cognition and understanding. That is why discursive ethics is rightly referred to by critics as ethics without morality* [...]*. Without questioning the legitimacy of the critique of the weaknesses of discursive ethics, it is nevertheless necessary to emphasize that this theory of morality does not succumb to the fashionable wave of the postmodernist approach to ethics and seeks a new way of interpreting traditional humanistic ideas."* (MACHALOVÁ, T. Discursive Ethics. In GLUCHMAN, V. et al. *Ethical Theories of the Present (Ethics II).* Prešov: Grafotisk Prešov, 2010, p. 142).

[194] See, for example, BATKA, Ľ. – MRVA, M. – TURČAN, M. *On Law and Religion in the European and Domestic Context: Freedom of Religion in History and Today; State, Church, and Canon Law*. Bratislava: Faculty of Law, Comenius University, 2021.

[195] See TURČAN, M. *Human Rights in the Context of Christian Theology Today.* Prague: Advent-Orion, 2021, p. 50 ff.

[196] Martin Hapla, referring to Doris Schroeder, states that the failure of the Kantian concept of human dignity implies that only the traditional Christian idea of the given concept remains relevant (Hapla speaks specifically of the traditional *Catholic* concept; however, it is not necessarily a *Catholic* concept), *"which, in turn, is perceived as difficult to accept in a secular society."* (HAPLA, M. *Human Rights Without Metaphysics: Legitimacy in the (Post)Modern Era.* Brno: Masaryk University, 2016, p. 117). I recognize that it is questionable whether any satisfactory secular concept of human dignity can actually be formulated.

presuppositions, but in this case, it is rather a useful fiction, and the idea of human dignity always fits better with some form of deontology, for which it is not just a fictitious concept. Therefore, if I want to outline the basic features of the prescriptive theory of law from this perspective, I can briefly state the following:

The idea of justice, which is implemented precisely in protecting human dignity, is crucial in law. Any law that fundamentally departs from this goal must be denied obedience, whereas such a refusal must also be implemented in a way that respects the value of human dignity. At the same time, human dignity can be perceived as a fundamental justification for the institution of the state as such and thus of public law (I assume that the basic moral reason for the existence of the state is self-defense or a preliminary defense of others, weaker ones – in order to protect oneself or others from the "mafia regime," which would probably prevail in an anarchist society and would collide with the idea of human dignity, a democratic state is needed), and possibly also as a justification for the international humanitarian law. At the same time, however, the idea of human dignity requires noticeable limitations of public law (i.e. of state paternalism) and respect for individual autonomy. At the level of lawmaking, ethical obligations based on the idea of human dignity are the basis of the democratic legislative process and the elementary requirements of legal certainty protecting the legitimate expectations of the addressees of the law as respectable subjects. In legal relations, this idea is the basis of some absolute human rights, and at the same time, it is a justification for a certain "sound anthropocentrism" (i.e. the refusal to elevate animals or other entities to the level of humans and allowing their moderate instrumentalization in favor of humans). In the field of application of the law, it is a justification for the idea of a fair trial, and it has its place in legal interpretation and argumentation as well (it is, therefore, also necessary to interpret and argue with a deep respect of the idea of human dignity). It is also reflected in the theory of legal liability and punishment, where it is the basis for distinguishing between subjective and objective legal liability, while the latter of the mentioned forms of liability is legitimate only exceptionally. At the same time, human dignity points rather to restoration, which is supposed to mitigate (or even replace) the retributive aspects of the punishment.

In a sense, I agree with the thought of Tomáš Gábriš (on which he bases his prescriptive legal theory) that law is a practical (phronetic) science.[197]

[197] However, it depends on what we understand by practical wisdom (on which such science is based) and what importance we attach to it. Aristotle uses the term *phronesis* to designate reasonableness (practical wisdom), which is distinct from theoretical wisdom (*sofia*). He states: *„Although young people may become well acquainted with geometry and*

Although I do not proceed from the Aristotelian virtue ethics, which he seems to be inspired by, I consider his "cautious casuistry" that he proposes[198] reasonable and practically valuable. Exploring the possible connections of such a casuistry with various ethical theories may be one of the suggestions for this approach to legal science.

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mathematics and become wise in such fields, it does not seem that this will make the young person reasonable. The reason for this is that reasonableness also applies to individual things that we know only by experience, and a young person does not have it because experience takes a long time. [...] *It is clear that reasonableness is not guidance (scientific knowledge), for it is concerned, as we have said, with that which is last in the order of our knowledge, that is, with the object of action. This is the opposite of (intuitive) understanding, for (intuitive) understanding refers to the highest concepts, which no longer admit of further explanation; on the other hand, rationality refers to the latter, which is not the object of knowledge but of sense perception, not that which perceives the objects proper to it, but that by which we perceive that in mathematics, for example, the last one is the triangle. He stops at it. But no, the latter is an act of perception rather than rationality, and that is a peculiar kind of it."* (ARISTOTLE. *Nicomachean Ethics.* Bratislava: Kalligram, 2011, pp. 171-172). Personally, I do not claim that no moral knowledge can be acquired by purely rational reasoning (i.e., apart from empirical experience). It seems, for example, that Kant's categorical imperative is constructed in this rationalistic way. In fact, Kant argues that the person, as a rational being, cannot rationally want anything other than the universal ethics and non-objectivity of the person (the first and second formulations of the categorical imperative). According to him, reason requires us to want to remain a subject (otherwise, we would deny ourselves) and apply the same standard to all subjects. Interestingly, John Locke as an empiricist arrives at a similar view, albeit from a different angle, when he quotes Hooker saying that *"the like natural inducement hath brought men to know that it is no less their duty, to love others no less than themselves; for seeing those things which are equal, must needs all have one measure."* (LOCKE, J. *Second Treatise of Government.* Indianapolis: Hackett Publishing Company, 1980, p. 8). I do not claim that Kant's method is necessarily the correct one, but it is surely worth consideration. Kant's categorical imperative is purely formal, and if it is true, then it represents a certain moral knowledge. However, regardless of how we view Kant, I agree that from the point of view of the art of achieving ethical goals by being cautious (having a refined moral acumen), the practical experience emphasized by the proponents of virtue ethics is significant. Virtue jurisprudence is right in that a similar applies to law.

[198] Gábriš formulates his instruction for the application of law as follows: *"Act as the law and legal doctrine require, as your institution acts, your colleagues act, learned from the experience of the past. Proceed with restraint in the application (not only of written law or legal regulation) – especially if you operate at lower instances within the system. A departure from standards established or given by regulation, practice, institution or experience must be justified by the particular circumstances of the case, in the light of which the traditional practice of applying the law would lead to a manifestly unjust conclusion."* (GÁBRIŠ, T. *Prescriptive Theory of Law: A Methodology for the Application of Law for the Current Times.* Bratislava: Veda, 2020, p. 204).

In legal science, an ethical analysis of law can be described as a set of various prescriptive legal theories based on specific ethical approaches (whereas we can also speak of a descriptive ethical analysis of law). Just as the school of economic analysis of law examines law through the tools of economic sciences, at the level of ethical analysis, the law is examined through the lens of ethical theories.[199] The methodology of such an examination is related to the criteria of good/right/just, in the light of which a certain legal phenomenon is evaluated. It is a comparison of the requirements resulting, for example, from a legal institute under consideration and the requirements of a chosen ethical theory, with the aim of determining their compliance or contradiction. It can, therefore, be said that the basic method of ethical analysis of law is "comparison". Along with this, it is also an abstraction since the objective of the research is to carry out an evaluation with respect to ethical criteria that are general (or ideal).[200] Other methods depend on a specific ethical theory (in some cases, for instance, mathematical methods can be applied – here, it can be noted that in terms of the future, the use of the calculation capabilities of artificial intelligence might be a theme for consequentialist theories – or system methods, in others mainly logical methods, etc.). Within the ethical analysis of law, it is possible to examine, for example, how existing or proposed legal institutes fit into the requirements of a particular ethical theory,[201] as well as the ethical consistency of the relevant (sub-)branch of law or the legal order as a whole, and with the possible help of legal sociology, also the logical compliance of selected legal institutes with the axiological setting of (a specific part) of the population (even at the level of *de lege ferenda* considerations). Ethical analysis of law can also be applied in relation to case law, where it is possible (at least in some instances) to examine the application of specific ethical theories in decision-making practice

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[199] The ethical analysis of law is explicitly contrasted with economic analysis, for example, by John P. Anderson (ANDERSON, J. P. The Final Step to Insider Trading Reform: Answering the "It's Just Not Right!" Objection. In *Journal of Law, Economics & Policy*, 2016 (vol. 12), no. 3, p. 280).

[200] *"Abstraction is a necessary form of scientific and any rational thinking in general.* [...] *As a logical method of cognition, it consists in the mental separation of unessential signs, properties, etc., of observed objects and the arrangement of signs or properties, etc., of essential ones."* (KNAPP, V. *Scientific Propaedeutics*. Bratislava: Publishing Department, Faculty of Law, Comenius University, 1993, p. 69).

[201] In the course of my search, I found that, for example, in the area of environmental law, the ethical analysis of law is explicitly mentioned by Ilona Cheyne in a paper on fishing law (CHEYNE, I. Ethical perspectives in law and public debate. In MARAZNO, M. — CARSS, D. N. (eds.). *Essential Social, Cultural and Legal Perspectives on Cormorant-fisheries Conflicts*. NERC Centre for Ecology & Hydrology, 2012, pp. 136-148). However, this is a relatively rare mention of the term *ethical analysis of law*.

or to look for implicit ethical preconceptions of judges in the interpretation and application of the positive law or in the evaluation of certain theoretical-legal concepts.[202] Finally, ethical analysis can also have its place in the examination of the scholarly literature, where the influences of concrete ethical theories can be sought (whether we understand this literature as a material source of law or as a reflection of the legal awareness of experts in relevant fields of law).[203]

What attention has been paid to ethics so far in our (i.e., Slovak) legal science? A certain answer to this question can be provided by a look at papers published in domestic scholarly journals.[204] For example, in the database of

[202] In case law, it is possible to note the ethical level mainly when dealing with *hard cases* or in situations of "overriding" positive laws by the courts. These need not be only typical "value" decisions, such as, for example, the well-known decision of the Constitutional Court of the Slovak Republic on abortion from 2007 (where it can be stated, at least with a negative ethical-analytical view, on which theoretical bases the Constitutional Court of the Slovak Republic does not base its decision – certainly it is not based, for example, on the Thomistic natural law theory, even in its "non-religious" version, such as that of J. Finnis; natural law concept, on which the court bases its reasoning, must be different in some way in order to allow for the constitutionality of abortions). We may also note some seemingly "value-neutral" issues. An example is the 2012 decision of the Court of Justice of the European Union on the trade of used software licenses. The CJEU has ruled that it is legal to trade the used licenses for software downloadable from the internet in the European Economic Area, despite the fact that such a conclusion runs counter to the provisions of the 1996 WIPO Copyright Treaty, which allows for the secondary trade only if the software is fixed on a tangible medium (see, for example, MEZEI, P. The Doctrine of Exhaustion in Limbo - Critical Remarks on the CJEU's Tom Kabinet Ruling. In *SSRN Electronic Journal*, 2020, available online: https://www.researchgate.net/publication/340753093_The_Doctrine_of_Exhaustion_in_Limbo_-_Critical_Remarks_on_the_CJEU's_Tom_Kabinet_Ruling [07-08-2022]). It seems as if the court preferred a consequentialist approach to a deontological one and, in fact, assumed that the overall consequences that would result from allowing the secondary trade of online software would be better than those that would result from respecting the obligation of the EU/EC, as a party to the WIPO Copyright Treaty, to allow only the secondary trade of software on CDs/DVDs/USBs. Software manufacturers understandably did not like the decision of the CJEU in question, which caused controversy, as it allowed online software licenses to be purchased from secondary resellers at a fraction of the price demanded by its creators and primary resellers.

[203] For example, Bibiana D. Koh and Frederic G. Reamer seem to make such a (descriptive) analysis in a paper devoted to exploring the explicit or implicit presence of ethical theories in the scientific literature on child adoption (KOH, B. D. – REAMER, F. G. Why Moral Theories Matter: A Review of Ethics and Adoption Literature. In *Adoption Quarterly*, 2021 (vol. 24), no. 1, pp. 5-24).

[204] In the introduction to this monograph, I have already referred to several book publications, but these are of a small number, so a look at the relevant sample of papers published in legal journals could give us a somewhat better picture.

scholarly papers on the *judikaty.info* website, in August 2022, when I searched for the keyword "ethics," I found 150 documents, and when searching for the keyword "ethical," I found 217 documents. After finding an overlap in 63 cases (since some documents contained both keywords, while others contained only one of them), the total number was established at 304 (i.e., papers in which at least one of the words "ethics" or "ethical" appears).[205] Upon a cursory look at the 304 papers, I found that most of them contain the term only accidentally (i.e., marginally and basically insignificantly).[206] In reality, only 17 papers were truly related to ethics, and other six or seven papers were loosely related to ethics. Of this set of 17 (or 24) papers, most dealt with the professional ethics of a lawyer. The number of all papers in this database was 4,437 at that time.[207] This means about half a percent of all the papers dealt with ethics. A similar result was achieved by looking at the journal *Justičná revue* with the help of the information system of the library of the Faculty of Law, Comenius University in Bratislava, where the scholarly papers are registered. Searching for the keyword "ethics,"[208] I found 17 papers from this journal at that time. Almost all of them were devoted to the issues of professional ethics, and it can be noted that more than half of them came from the 1990s.

Are these numbers big or small? It seems they rather do not indicate a great interest in ethics in our legal science. However, on the other hand, it must be said that regarding the huge number of problems that legal science (including legal dogmatics) covers, half a percent may not be a small number. In any case, when I look at the matter as a legal theorist, I have to say that although professional ethics is certainly an important part of the applied ethics of law, the ambition of legal theorists is to go a little deeper and also broader and to deal with ethics in other contexts as well, not just in the context of legal professions. Of course, the direct needs of practice must always be paramount in legal science. In principle, there is no dispute about that now. However, this does not mean that legal theory and legal philosophy are irrelevant. The question remains, therefore, how legal theorists deal with ethics in our country.

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[205] Of these, 87 results were with the term "ethics" without the term "ethical," 154 results with the term "ethical" without the term "ethics," and 63 results with both terms – i.e., "ethics" and "ethical".

[206] However, it is certainly not negligible that a reference to ethics at least appears in these texts. At the very least, it indicates a certain relevance of ethics (morality) in our thinking.

[207] On the webpage *judikaty.info* in the section of scholarly papers there are contributions from various legal journals and conference proceedings.

[208] Unlike the previous case, it is not about the occurrence of the term in the full-texts of individual papers but about the keyword assigned to the respective paper when registered in the library system.

It can be said that the *judikaty.info* website, as well as the journal *Justičná revue*, are basically practically (dogmatically) oriented media[209] (although they also contain some theoretical-legal papers). Therefore, it seems that the outlined picture of the interest of local legal science, and especially legal theory/legal philosophy, in ethics is perhaps somewhat distorted when looking into these sources and could be sharper via a careful manual analysis of those legal journals that are profiled as (at least slightly) more theoretical.[210]

Therefore, at the same time, I carried out an analysis of the current content of three relevant journals from the Czecho-Slovak environment, which, according to the general understanding, also deal with legal theory/legal philosophy to a considerable extent. These are the journals *Právny obzor*, *Právník* and *Časopis pro právní vědu a praxi*. I have researched their editions from 1993 to the present day (summer 2022). When looking for papers that would relate to ethics, I have based my search on their titles listed in the table of contents of each of the issues, and I have often helped myself with an abstract with keywords or even direct look into the text of the papers.[211]

It was quite a painstaking job. I divided the papers I found into three categories. In the first category, I have included papers that are more or less directly related to ethics. In the second category, I have included papers that are partly related to ethics (they are more of a political-philosophical character, and, say, to some extent, they intersect with the area of social ethics). Finally, in the third category, I have included papers that deal with the relationship between the concepts of law and morality or with the natural law (or at least touch on them in some relevant way so we could talk, at the minimum, about a certain overlap with ethics).[212] Papers in these three sorted categories do not overlap (each category contains different papers). I focused only on papers that have a scientific or scholarly character (i.e., those that try to contribute something substantively). I did not take into account published reviews of publications,

[209] Several of the papers dedicated to professional ethics that were found in the database of articles on the *judikaty.info* come from the *Bulletin of the Slovak Advocacy*, which is also a practically oriented journal.

[210] Although, of course, most of the papers are of a legal-dogmatic nature, which is understandable since the problems of practical law are and should always be paramount. In addition, there is a minimal amount of purely theoretical journals in our country (I will notice them later).

[211] I had full-texts available for *Časopis pro právní vědu a praxi* and for some issues of *Právník* and *Právny obzor*. I had abstracts available for *Právník* and for some issues of *Právny obzor*.

[212] However, I usually did not include legal-historical papers about the school of natural law, etc., in this category. I focused more on philosophical papers on iusnaturalism.

reports from scientific life, or biographies of prominent lawyers/legal scientists (unless they seemed to be oriented more towards their ideas than their lives).[213]

I have counted all the papers and I came to the conclusion that a total of 1,233 papers were published in the journal *Právny obzor* (after filtering out papers that do not have the character of a problem-oriented scientific or scholarly text) from January 1993 to August 2022, of which 14 are about ethics, 13 are related to it in some sense, and 12 relate to the relationship between the concepts of law and morality or natural law. A total of 1,878 papers have been published in the journal *Právník* during this time, of which 24 are about ethics, 28 are related to it in some sense, and 15 relate to the issue of the relationship between law and morality or natural law. A total of 1,415 papers have been published in *Časopis pro právní vědu a praxi*, of which 21 are about ethics, 18 are related to it, and 8 are related to the relationship between law and morality/natural law. Sorting was not always easy. Several papers were somewhere between the categories, or sometimes it was questionable whether to include them in any of them (I was perhaps slightly generous in my approach, so the total number could theoretically be smaller).

The above data show that just over one percent of papers are dedicated to ethics (or after including the second category, it is between two and three percent, and after counting all three categories, it is more than three and a half percent). However, this still does not imply much. Therefore, in order not to compare the incomparable, in each volume and issue of each of the journals, I have individually counted the papers that can be considered theoretical-legal or philosophical-legal (in this category, I have included papers in the field of the theory of state and law, legal and political philosophy, or even sociological-legal or psychological-legal papers).[214] Again, I relied on the titles of the papers or their abstracts, and if needed, I looked into the text of the paper. I have found that a total of 162 such theoretical-legal or philosophical-legal papers have been published in *Právny obzor* in the last 30 years. If we compare the ratio between the papers dealing with ethics and this set (since dealing with ethics can first be

[213] For example, I took into account several articles from the journal *Právny obzor*, which were published in the "Information" section because, in fact, they often had the character of a scholarly article. I also took into account doctoral papers (but not master's student papers, with some exceptions) in *Časopis pro právní vědu a praxi* (if it was not stated whether the paper was doctoral or student, I considered it to be a doctoral paper). So, I paid attention to all the sections (whether they were sections such as "Discussion," "Glosses," etc.). However, the condition was that the paper was not shorter than three pages.

[214] I assume that an author who writes a theoretical-legal or philosophical-legal paper (although he or she is often not a legal theorist/legal philosopher) is able to touch on ethics in a relevant way.

expected from legal theorists or from other authors who are able to write a theoretical-legal/philosophical-legal paper),[215] we arrive at about 8.5% (taking into account the second category, it is slightly above 16.5%, and taking into account all three categories, it is 24%). A total of 284 theoretical-legal or philosophical-legal papers were published in *Právník* in the given period, and the ratio of ethically oriented papers is also at the level of about 8.5% (together with the second category it is 18.5% and taking into account all three categories it is almost 24%). The results in *Právny obzor* and *Právník* are, therefore, very similar. Concerning *Časopis pro právní vědu a praxi*, the total number of theoretical-legal or philosophical-legal papers during the given period was 137. The ratio of ethically oriented papers is at the level of about 15% (together with the second category, it is about 28% and together with the second and third categories up to 34%).[216]

Taking all three categories into account, this is, of course, a very decent number (ratio). The same applies when considering the first two categories. However, if we take into account only the first category, which is the most relevant (or I am inclined to conclude that it is rather the only relevant category that indicates the current situation, while the second and third categories indicate rather the potential) which consists of a total of 59 published papers in these three journals, the total number and the ratio are not as high. On the positive side, however, only about a sixth of these papers relate to professional ethics, which means that a large number of them notice ethical problems other than those of the legal professions. The overall average of the ratio of ethically oriented papers to papers in the field of legal theory and related disciplines (59 ethical papers to 581 theoretical-legal papers) indicates that in the last thirty years, perhaps about a tenth of the overall legal-theoretical attention has been paid to ethics, which is not bad. But not overly good either (especially when we consider certain aspects like quality). A more favorable view is offered when evaluating the period since 2010, where we are at an average level of around

[215] However, I would like to point out that a significant part of the papers of a legal-theoretical character, as well as papers in the field of ethics, which were published in all three journals, come from the representatives of legal-dogmatic disciplines. Thus, not all of them were written by legal theorists. However, since legal theorists can be expected to deal with ethics most often, I present below the ratios between theoretical-legal papers and papers related to ethics.

[216] For example, if we look only at the period from 2010 onwards, the percentages in this proportion are slightly higher – in the case of *Právny obzor*: 13.5%, 39%, and almost 45%, in the case of *Právník*: 14.5%, slightly over 26% and 30%, and in the case of *Časopis pro právní vědu a praxi*: 19%, 30% and 30%. However, in absolute numbers, these are not large numbers, so when creating the overall picture, these ratios should be taken with the necessary reserve.

fifteen percent (i.e., it would be around one-seventh). However, it can be pointed out, for example, that a significant number of recent papers from the *Časopis pro právní vědu a praxi* that I have classified as ethically oriented, come from a relatively narrow group of authors, mainly Czech (these are usually high-quality papers). So it is a positive trend in a narrower, mainly Czech, environment. The general Czech dominance can also be seen in the number of ethically oriented papers published during this period in *Právník* (the vast majority of such papers in both of the Czech journals were written by Czech authors, although Slovak authors also publish relatively commonly there). It is also possible to argue about the quality of some domestic papers (but rather in the entire time period of 30 years), which I included in the first category in the total amount.

Therefore, while it certainly cannot be said that the attention paid to ethics in the journals in question, or in our (Czecho-Slovak) legal science, of which these journals are to be a relevant sample, is minimal, it cannot be said that the given attention (considering the breadth of ethics, quantity, and, dare I say to a certain extent, the quality of some papers) is a reason for a premature satisfaction either. There is definitely space to work on concerning the interconnection of ethics and law/legal theory in the Slovak legal-theoretical environment.[217]

This is partly (although I admit that only to a limited extent) shown to us by a view of purely theoretical-legal journals (or one such journal). When we look at journals focused on legal theory/legal philosophy, two can be pointed out in our environment. One is Slovak – *Historia et theoria iuris*, which is being published since 2009, and one is Czech – *Ratio publica*, being published since 2021. The journal *Ratio publica* had, at the time of my research in the summer of 2022, published only three issues (but it was definitely possible to see that it was a journal of high-level quality and a good perspective). As for the journal *Historia et theoria iuris*, in August 2022, I had its issues for the years 2009 to 2021 (in total 30 issues). As the name of the journal implies, it focuses not only on legal theory/legal philosophy but also (and in fact predominantly) on legal history. In addition, it also gives partial space to contributions from other legal disciplines. When examining the content of individual issues, I found that out of a total of 248 papers published (applying the same criteria to a scientific or scholarly paper

[217] As for the Faculty of Law of Comenius University in Bratislava in particular, while examining the local journal *Acta Facultatis Iuridicae Universitatis Comenianae*, I found that 447 papers have been published between 2006 and 2022 (using the same criteria for selection of the papers as before), of which 35 can be considered theoretical-legal or philosophical-legal, seven about ethics and several others (maybe 10 papers) related to ethics, whereas I think that I was again quite generous in counting the papers in.

as in the previous three journals), only 23 have a legal-theoretical or legal-philosophical character and barely a single one has an ethical character (a few of them can be described as somehow related to ethics).

Even taking this fact into account, it cannot be said that the attention paid to ethics is very massive in our legal-theoretical community, and there is undoubtedly a relevant room for growth. This is true not only in terms of quantity but also quality (as I have already mentioned, good trends are currently emerging in the Czech environment, which will be appropriate to follow, at least in some way, in the Slovak).

Here is the tabular overview of the data obtained:

Právny obzor	Number of all papers	Theoretical / philosophical-legal papers	Papers on ethics	Ethics-related papers	Papers on the relationship between the concepts of law and morality or natural law
2022	10	0	0	0	0
2021	32	3	1	1	0
2020	37	5	3	5	1
2019	37	2	0	2	0
2018	38	3	0	1	0
2017	43	6	1	1	0
2016	32	4	0	0	0
2015	35	3	0	0	0
2014	39	1	0	0	0
2013	37	5	0	0	0
2012	38	4	0	0	1
2011	35	0	0	0	0
2010	40	2	0	0	0
2009	33	4	1	0	0
2008	36	4	0	0	0
2007	36	1	1	0	0
2006	35	3	0	1	0
2005	50	4	0	0	2
2004	38	2	0	0	0

2003	48	13	1	0	4
2002	44	1	0	1	0
2001	48	10	1	0	2
2000	38	3	0	0	0
1999	40	3	2	0	1
1998	47	4	0	0	0
1997	77	28	0	1	0
1996	41	7	0	0	0
1995	53	14	1	0	0
1994	65	18	0	0	1
1993	51	5	2	0	0
together	1,233	162	14	13	12

Právník	Number of all papers	Theoretical / philosophical-legal papers	Papers on ethics	Ethics-related papers	Papers on the relationship between the concepts of law and morality or natural law
2022	39	7	2	0	0
2021	54	7	2	3	0
2020	49	9	0	1	0
2019	51	9	1	1	2
2018	53	7	3	0	0
2017	56	8	0	4	0
2016	52	7	0	0	1
2015	45	7	1	0	0
2014	53	11	3	2	0
2013	66	15	3	2	0
2012	72	10	0	0	0
2011	68	7	1	0	1
2010	57	6	0	0	0
2009	60	13	0	0	1
2008	67	6	0	0	0
2007	70	8	1	0	1

2006	69	11	0	2	0
2005	69	11	1	0	1
2004	59	5	0	1	0
2003	67	8	0	1	0
2002	59	12	0	1	1
2001	60	8	0	0	0
2000	65	11	0	0	0
1999	65	5	0	0	1
1998	64	4	0	1	0
1997	66	9	1	0	1
1996	70	7	2	0	0
1995	78	21	3	3	2
1994	82	14	0	1	0
1993	93	21	0	5	3
together	1,878	284	24	28	15

Časopis pro právní vědu a praxi	Number of all papers	Theoretical / philosophical-legal papers	Papers on ethics	Ethics-related papers	Papers on the relationship between the concepts of law and morality or natural law
2022	21	5	0	0	0
2021	38	7	4	0	0
2020	31	7	2	0	0
2019	36	4	1	0	0
2018	31	1	1	0	0
2017	41	4	0	1	0
2016	39	2	1	1	0
2015	46	3	0	0	0
2014	40	6	1	0	0
2013	64	11	1	3	0
2012	49	3	1	0	0
2011	48	6	0	2	0
2010	47	4	0	0	0

2009	42	13	3	0	0
2008	55	8	0	2	1
2007	46	3	1	1	0
2006	52	2	1	0	0
2005	55	1	0	0	0
2004	41	1	0	0	0
2003	35	1	0	1	0
2002	44	1	0	1	0
2001	52	4	0	1	0
2000	55	5	0	1	1
1999	50	2	1	0	1
1998	57	5	1	1	0
1997	48	7	1	2	1
1996	45	4	0	0	3
1995	70	6	1	0	0
1994	108	11	0	1	1
1993	29	1	0	0	0
together	1,415	137	21	18	8

Historia et theoria iuris	Number of all papers	Theoretical / philosophical-legal papers	Papers on ethics	Ethics-related papers	Papers on the relationship between the concepts of law and morality or natural law
2021	25	2	0	1	0
2020	36	3	0	0	0
2019	30	2	0	1	0
2018	11	1	0	0	0
2017	19	4	0	2	0
2016	17	1	0	1	0
2015	17	1	0	0	0
2014	12	1	0	0	0
2013	14	1	0	1	0
2012	14	2	1	1	0

2011	19	4	0	0	0
2010	18	1	0	0	0
2009	16	0	0	0	0
together	248	23	1	7	0

Above, I have focused exclusively on journals. Conference proceedings are other relevant sources of research into the orientation of our legal science. In this context, we can point out in particular the proceedings of the Czecho-Slovak legal-theoretical conference *Weyr's Days of Legal Theory*, which has been held every year since 2015 (with the exception of 2021). The conference has two standard sections – one thematic and the other general (entitled "Current Problems of Legal Theory"). As a rule, there are no papers of an ethical character in the outputs from the general section. A few of them can be found in the thematic sections (specifically for the years 2015, 2016, 2020, and 2022). The 2022 proceedings were not finished yet at the time of my research in 2022 but considering the papers that were included in the conference program for that year, it was possible to conclude that a total of 126 papers were (were to be) published from 2015 to 2022. Perhaps five of them (i.e., about four percent) can be described as papers of an ethical character, and a few others as loosely related to ethics. That is not a big number.

As for the two largest legal-scientific conferences in the Czech and Slovak environment, namely the *Days of Law* in Brno and the *Bratislava Legal Forum* (these are international conferences with foreign participation, but the vast majority of participants are, of course, Czech and Slovak academics), in the proceedings of the first of these conferences for the years 2008 to 2019 I found about fifteen ethically oriented papers (I was mainly looking at the titles of the sections and papers, and partially I used a full-text search) and in the proceedings of the second conference, I found about a dozen papers of this sort for the years 2013 to 2021. That is, on average, one to one and a half papers at each of these conferences every year. However, I was relatively generous in including the papers in this category, and with a stricter eye, the number would probably be smaller.[218] Again, it can be said that these are not huge numbers.

[218] In connection with probably the largest doctoral conference in Slovakia, which is the Milestones of Law in Central Europe, I can say, after looking at the proceedings from the conference, that in the last decade, there have been several papers that touch on ethics (on average about two every year, which is definitely a positive fact), but perhaps only two or three papers from this entire period (up until 2022) are directly (focused) on ethics. In the proceedings of the Brno doctoral conference, I found a few more papers of this sort during the given period.

Although it is difficult to set a desired percentage or otherwise quantitatively defined goal, the data suggest that we certainly (especially in the area of Slovak legal theory/legal philosophy) have some room to deepen our interest in ethics. It is also appropriate to state that even though ethics has often been touched upon by representatives of dogmatic legal disciplines within the total set of all the above-examined papers from Czecho-Slovak legal journals and conference proceedings,[219] it is probably not possible to expect legal dogmatists to deal with legal ethics in depth. The responsibility for focusing on this sphere remains in principle with legal theorists. The practical proposal for legal science that follows from this is that it would be good to promote a kind of "interdisciplinarity" *within* legal science (i.e., "intradisciplinarity"). This could consist, for example, of an effort to organize sporadic legal colloquia on ethics, in which legal theorists as more abstractly oriented thinkers can discuss with legal dogmatists as experts in practical problems of law.[220] The fact that certain, albeit limited, attention is paid to ethics by legal dogmatists is a plus – a positive signal of the functionality of such cooperation. This means circumstances are relatively favorable. The question is how and whether they will be utilized.[221]

So, it can be concluded that the ethical dimension in law is important, and in legal science (especially legal theory/legal philosophy), it has been given some (not negligible) attention in the Slovak environment so far. However, we still have noticeable room for improvements. It follows that our interest in ethics in this respect could and should be better.

As far as the issue of legal education is concerned, I believe that it is appropriate, even desirable, to emphasize the ethical dimension of legal theoretical themes and to draw students' attention to the non-obviousness of various commonly repeated theses. Ethics also plays the role of a tool for the development of critical thinking, and at the same time, pointing to ethical perspectives in some cases allows for better clarity in the analysis of the issues

[219] Several of them have also written papers that I have included in the category of theoretical-legal or philosophical-legal papers.

[220] Perhaps it would be worth considering the creation of a Slovak electronic journal for questions of ethics and law, where philosophers-ethicists could eventually publish along legal scholars, which would potentially connect all three groups of academics.

[221] If I return to theoretical-legal interdisciplinary openness as such (i.e., interdisciplinarity in a broader sense), it is worth mentioning that natural and technical sciences (such as neuroscience, computer science, etc.) also make interesting contributions to ethics. They influence the understanding of the concept of a person, and they also enter into discussions about the existence of free will and, thus, moral responsibility. Interdisciplinary open legal science will, therefore, also give an ear to the arguments that are heard from these areas of human research.

taught. It is a positive fact that within the last accreditation, a compulsory teaching subject devoted to legal ethics was included in the master's degree of legal studies, which focuses mainly on the ethics of legal professions. It is an important area of applied ethics. However, at least within the framework of teaching the theory of law as such (or even political and legal philosophy for lawyers), it remains a certain challenge to connect legal knowledge with normative ethics (or even with metaethics and, of course, with various areas of applied ethics).

I am not saying that this call is not reflected somehow today, for example, at the Faculty of Law of Comenius University in Bratislava. A survey among first-year students, that I conducted on a sample of 145 respondents at the beginning of March 2022 (it was the period of the summer semester when freshmen have already completed the entire basic theory of law and the basics of political and legal philosophy, which are taught here in the winter semester, whereas these were not students whom I would personally teach in the winter semester) showed that that the majority of respondents (71.5%) think that they devoted sufficient space to the ethical dimension of the discussed problems in their lessons as part of the teaching of legal theory and/or legal and political philosophy. However, there is also a group of those who could not answer the question (13.9%) and those who believe that this space was not sufficient (14.6%). But almost all of them (93.8%) agreed that there is a close connection between the theory of law and ethics, and a significant majority of respondents (82.1%) also inclined to the idea that in the study of law, it is necessary to pay considerable attention to ethical theories and their understanding. More than a third of all respondents (39.3%) were of the opinion that a law student should come into contact with ethical themes at the beginning of their studies, and more than half (55.2%) think that it would be best at the beginning and also at the end of their studies.[222]

In a way, these fragmentary data support the emphases I am making. The fact that the vast majority of students perceive the interconnectedness of both disciplines and the more than twenty percent difference between this group and the group convinced of the sufficiency of dealing with a given dimension in law theory classes (I note that the question also asked about

[222] Students always chose only one of the options (it was an electronic questionnaire in which respondents clicked on one of the submitted answers). Only about four percent of them said it would be appropriate to address ethical issues merely at the end of their studies (so they preferred this option to the possibility of dealing with ethical problems at the beginning of their studies and the possibility of dealing with them at the beginning, and also at the end of their studies). Only one student said that he or she does not consider dealing with ethical issues important.

political and legal philosophy, which potentially increases the difference in relation to the *Theory of Law* as a teaching subject), or the almost thirty percent reserve of those who believe there was not enough attention, together with those who were unable to answer the question, points to the still existing possibilities for improvement. I would like to point out that I am only talking about the Faculty of Law in Bratislava, and there is no guarantee that the results at other Slovak law faculties would be equally favorable.

The relevance of the ethical dimension of theoretical-legal (and philosophical-legal) problems leads to the need to support such a form of teaching legal theory (or other subjects) in education, which encourages critical reflection on various ethical attitudes within individual themes. It is therefore important to address, for example, issues such as those I have outlined in the previous seven chapters of this monograph. If this is already happening in some form, then it is advisable to continue and develop the set course of education. If this is not done sufficiently, then it is desirable to pursue this objective.

And I have one more input on the topic of teaching. A few years ago, in a conference paper related to legal education, I asked a question about the value of practical teaching subjects in the teaching of law.[223] I dealt specifically with the issue of the fulfillment of basic didactic precepts within practical education, which was then taking place at the Faculty of Law of Comenius University in Bratislava. I can now ask the same question about incorporating an ethical perspective into the teaching of legal theory (or other theoretical subjects). The scholarly literature dealing with higher education didactics defines several precepts that must be respected in the implementation of higher education.[224] I will briefly mention them and relate them to the question posed.

The first of the didactic precepts is the relatively trivial precept of creating optimal conditions for the teaching process, which concerns requirements such as teaching space, sufficient teaching materials, etc. Its fulfillment does not principally change when involving an ethical perspective in the teaching of legal theory (however, it is appropriate to point out the need for a sufficient amount of scholarly literature reflecting this dimension, to which, hopefully, this monograph contributes at least partially). The second precept is the precept of motivation, awareness, and activity, which says that *"the acquired knowledge and skills of students should be the result of their own thinking, their activity*

[223] TURČAN, M. Theoretically on the Practical Education of Lawyers. In BÓDIOVÁ, Ž. – MIČÁTEK, V. (eds.). *Innovations for Modern Legal Education – Foreign Language Study Program and Legal Clinics.* Bratislava: Faculty of Law, Comenius University, 2015, pp. 80-89.

[224] BAJTOŠ, J. *Didactics of the University.* Bratislava: Iura edition, 2013, p. 60 ff.

directed by the teacher."[225] I believe that this precept (together with the third precept, which is the precept of clarity) can be relatively well implemented. As I have already mentioned, pointing to the ethical dimensions of theoretical-legal problems supports critical thinking and the search for one's own answers. It also has the ability to be somewhat illustrative. This can help fulfill even the fourth precept, which is the precept of durability and operability of the results of the teaching process. It is an obvious truth that if a person thinks critically about something, it is easier for them to remember it. The level of fulfillment of the fifth and sixth precepts, which are the precept of continuity and graduality and the precept of systematics, does not change when incorporating an ethical perspective into the teaching of legal theory. In connection with systematization, it is only required that the students were introduced to the basic picture of the division of ethics as a discipline, which can help them in the search of their own ethical answers. This is related to the seventh precept, which is the precept of a scientific approach. The teacher should have appropriate competence in ethics, and this precept also applies to the requirement of his pedagogical skills. In connection with the eighth precept, which is the precept of proportionality and individual approach, it is appropriate to point out the need to consider the individual abilities of students in the evaluation of ethical problems, as well as the need to respect individually expressed ethical positions. The fulfillment of this requirement should be commonplace in academia. And finally, the last, ninth precept, which is the precept of connecting school with life, theory with practice, can be fulfilled in ethically oriented teaching by applying real problems and situations as models with which the student works (by pointing out existing ethical discussions or specific ethically relevant events).

The fulfillment of all the above precepts should, therefore, be relatively unproblematic when incorporating the ethical dimension into the teaching of legal theory. In any case, this primarily requires expertise from the teacher, which is related to the already discussed issue of the relationship between ethics and the theory of law as a science.

[225] Ibid., p. 61.

9.
A CONCRETE CONTRIBUTION TO ETHICAL-LEGAL DISCUSSIONS

In the last chapter, I want to introduce my own partial contribution to ethical thinking in legal science and formulate an argument in a nowadays relevant and discussed topic of the philosophical justification of human rights. My ambition in this chapter is to join the polemics that are currently taking place in the Czecho-Slovak legal-theoretical or legal-philosophical environment.

I will start by referring to an article by Martin Hapla, which was published a couple of years ago in *Časopis pro právní vědu a praxi*. The article concerns utilitarianism and human rights, and Hapla outlines the thesis that utilitarianism is no worse than other competing theories when it comes to justifying human rights. Thus, he suggests that utilitarianism is at least as reasonable a basis for the idea of human rights as other known concepts (but rather a better one).[226] The possible exceptions are absolute human rights, about which the author of the article admits they cannot be justified in a utilitarian way. However, he believes that the idea of absolute human rights is not even necessary because insisting on an absolute rule is simply absurd under certain circumstances. Or rather, he actually assumes that *if* there is an absolute right (no matter how broadly or narrowly we define it), it must be justifiable in a utilitarian way. He agrees with J. J. C. Smart, about whom he states that, in his opinion, *"if we really consistently carry out a utilitarian calculation and take into account all relevant factors within it, it will be right to break any rule if the result of such a calculation requires it. Of course, we must not forget to include in our calculation all the less obvious effects that a violation of the rule will have (such as a decrease in people's trust in the moral order). At the same time, it is highly likely that there will be very few such exceptions in the real world, and it will be precisely the insistence on blind adherence to the rule that will seem absurd and counterintuitive in such isolated cases."*[227]

Hapla thus claims that on the level of social ethics, utilitarianism does not require or allow what it can theoretically require or allow on the level of individual ethics[228] – to actively purposefully harm an innocent person in the

[226] On theories justifying human rights, see, for instance, HAPLA, M. Ethics of Human Rights. In SOBEK, T. et al. *Legal Ethics.* Prague: Leges, 2019, p. 144 ff.

[227] HAPLA, M. Utilitarianism and Human Rights. In *Časopis pro právní vědu a praxi*, 2020 (vol. 28), no. 3, p. 335.

[228] Hapla is not interested in the level of individual ethics in his paper, as he focuses on legal issues that are justified by concepts of social ethics.

interest of the greater overall benefit of other people. A well-known thought experiment for the individual-ethical level is the dilemma of a doctor who can secretly kill one healthy person and, thanks to an organ transplant from her body, save five patients who are waiting for organ donation.[229] Even if utilitarianism demanded or allowed the doctor to do this on the individual-ethical level (let's say the doctor is able to commit a "perfect crime" in the name of the greater good), on the level of social ethics resulting legislation, utilitarianism definitely cannot demand or allow anything like that, because, in terms of overall consequences, the benefit would not be maximized but decreased. If the impunity of such an act of health workers were enacted, people would lose trust in the health system and would be afraid to see a doctor, as they could never be sure that some forced sacrifice awaits them in the name of the greater good. That would do more harm than good. The utilitarian socio-ethical and, consequently, legal (i.e., *de lege ferenda*) position in relation to this example is thus obvious, despite its relatively wide-rooted misunderstanding (which is fair to state; in this sense, therefore, one must agree with Hapla). It can be said that through a refusal to legalize such an act, utilitarianism keeps the existing social (legal) order intact in this respect, and it can justify it just like deontology or virtue ethics.

But from the point of view of utilitarianism, why insist, for example, on the absolute prohibition of torture (which represent the best-known absolute human right)? Many utilitarians reject this prohibition under certain circumstances. From their perspective, for example, insisting on the inadmissibility of torture in the so-called "ticking bomb scenario" is not correct. This applies not only at the individual-ethical level (i.e., in the perspective of the question: *What should I do in such a situation?* – for example, in the position of an interrogating police officer) but also at the socio-ethical level (i.e., from the point of view of the question: *How should we as a society evaluate the situation and what rules should we adopt and enforce through state authorities?*). After all, every reasonable person must admit that in the case of a terrorist threat to a vast number of people, it would be morally absurd and counterintuitive to say that one of the detained members of the terrorist organization who has information about the location of a hidden time bomb and the possibility of its deactivation, has an absolute moral right (and therefore should have an absolute legal right) not to be forced by torture to reveal the location of the explosive and the method of its deactivation. Right?[230]

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[229] THOMSON, J. J. Killing, Letting Die, and the Trolley Problem. In *The Monist*, 1976 (vol. 59), no. 2, p. 206.

[230] On the legal discussion on this topic, see, for instance, GREER, S. Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International

In fact, I don't want to focus on the example of the "ticking bomb scenario" here.[231] I understand that because of the guilt of the detained terrorist and the terrible consequences that are threatening for a vast number of innocents, the moral emotions of many of us may remain cold when considering his suffering. After all, it is he who primarily causes the risk of harm to others...[232]

Human Rights Law? In *Human Rights Law Review*, 2015, available on the internet: https://www.corteidh.or.cr/tablas/r33346%20(2).pdf [16-08-2022].

[231] See, for example, LUBAN, D. Liberalism, Torture, and the Ticking Bomb. In *Virginia Law Review*, 2005 (vol. 91), no. 5, pp. 1425-1461.

[232] It is also possible to argue deontologically, namely, to appeal to the right to self-defense. However, as David Rodin points out, *"the self-defense variant of the argument could potentially justify torture when far less is at stake than an overwhelming catastrophe, because the defensive harm inflicted need only be 'proportionate' to the harm averted."* (RODIN, D. Torture and terrorism. In SKORUPSKI, J. (ed.). *The Routledge Companion to Ethics.* London: Taylor & Francis Group, 2010, p. 824). In addition, the so-called *threshold deontology* holds that when there is a threat of too-bad consequences (whereas the threshold is difficult to determine clearly), the otherwise absolute obligation (e.g., not to torture) will be outweighed by the obligation to achieve the desired result (to save many people). A representative of this view is Michael Moore, who formulated his concept of threshold deontology in his article "Torture and the Balance of Evils" (1989). Moore's conception is essentially deontological while accepting the existence of a certain threshold (e.g., thousands or millions) in light of which the weight of the imminent consequence (consequentialist aspect) outweighs a certain "absolute" obligation to which a specific subjective right is linked (e.g., not to be tortured). Larry Alexander criticizes such a hybrid of deontology and consequentialism as illogical, arguing that *"the best conception of deontology would deem its core principle to be that one may never use another as a resource without his consent. In other words, a person's body, labor, and talents do not exist for others' benefit except to the extent that he freely chooses to benefit others. Outside the realm of appropriating others' bodies, labor, and talents, deontology is inapplicable.* [...] *The consequentialist, on the other hand, does view each of us as resources for others. If my labor or my body can be used to maximize total welfare (for maximizing versions of consequentialism), or to equalize total welfare (for equalizing versions), then I am obligated to sacrifice, and others are permitted to take, my labor or my body. That we are resources for others is as fundamental to the consequentialist as that we are not resources for others is to the deontologist."* (ALEXANDER, L. Deontology at the Threshold. In *San Diego Law Review*, 2000 (vol. 37), no. 4, pp. 911-912). However, Alexander is actually also arguing that there are no positive obligations in deontology (only negative ones), which I consider an exaggeration. Even the most famous deontologist, Kant, accepts positive duties. He speaks, for example, of the duty to help the needy (KANT, I. *Groundwork of the Metaphysics of Morals.* Bratislava: Kalligram, 2004, pp. 50-51). In the given context, Kant is concerned with the individual-ethical level, but I doubt that he would approve of any strict libertarianism on the socio-ethical level. However, I am aware that this can be disputed, as well as the question of which deontological theory is the best one. In any case, it must be said that several deontological theories of social ethics also count on positive duties. Alexander perhaps only aims at some narrow set of deontological theories.

Regardless of how we approach that situation,[233] let us look at another situation in which it can be shown that the recognition of a certain absolute rule is intuitively essential. And it is not some marginal intuition but a relatively central one corresponding to a principal moral value (although the example I give is quite particular). The categories of intuitiveness and counter-intuitiveness also seem relevant to M. Hapla, so focusing on them makes sense at least for a reaction to this type of utilitarianism.

I want to focus namely on the situation that I have already indicated in the first chapter of this monograph – the situation of war. Let's use an example from David Černý's book *The Principle of Double Effect.* In his illustrations, Černý mentions two possible tactical approaches of soldiers throwing bombs in a war: *"A strategic bomber wants to weaken his enemy. He decides to bomb the ammunition depot. He knows very well that there is a school in the vicinity of the ammunition depot where there are children. The strategic bomber's plan is not to kill children, nor is it a means to his end. He chooses the means (type of ammunition) carefully, chooses the right moment for an air raid, and bombs the ammunition depot. The unintended, yet expected, consequence of his actions is the death of several children.* [...] *The terrifying bomber has a similar goal to the strategic bomber: to weaken the enemy. But he chose a different strategy: he wanted to instill terror in the enemy. So, he decides to bomb the school where the children are located. He chooses the appropriate ammunition, waits for the right moment, and drops bombs on the target. The intended result of his actions is the death of children."*[234]

Let us consider the "terrifying bomber". At the end of the fourth chapter, I stated that the right *not to be actively sacrificed as an innocent person* can be considered an absolute human right in the current human rights understanding.[235] Of course, even from a utilitarian point of view, it is not desirable to limit it in situations such as the "doctor-savior-of-five" because the already mentioned breach of trust in the system would occur.[236] However, it seems that, from a utilitarian point of view, the right can theoretically be limited

[233] And what if we don't know if the person in question is a terrorist? A rule utilitarian would probably agree with the inadmissibility of torture in such a case.

[234] ČERNÝ, D. *The Principle of Double Effect: Killing Within the Limits of Morality.* Prague: Academia, 2016, p. 172.

[235] The definition of the right in question is my abstraction. It does not matter now how broadly or narrowly we define a(n) (absolute) right, but whether or not it can be justified by some basic intuition and at the same time by a utilitarian calculation.

[236] So, if we want to consider the patient's right as an absolute right (such a narrowly defined particular right), even a utilitarian can agree with it because he has a utilitarian justification for it.

in the context of war, which is not as common as a visit to the doctor. If we admit that targeting innocents can, under certain circumstances, lead to the victory of the legitimate side of the conflict and bring about the overall greater good, why not make special use of it?[237] So, I argue that there are probably absolutely exceptional situations in a war in which it is good, from a utilitarian point of view, to sacrifice innocent civilians of the other (guilty) side through "terrifying bombers" and that a utilitarian should actually agree to a legal (i.e., systemic) possibility of such an exception. When we consider that war is a relatively rare phenomenon that most people do not normally take into account (they do not imagine they will become direct participants in it, or at least do not want to admit it, and they do not normally include it in the overall calculation of their own well-being – in *the system* of their life),[238] then it is not appropriate to compare it to a hospital or clinic where one would feel insecure because of a doctor who could sacrifice them for others. It is obvious why, from a utilitarian point of view, the act of the "doctor-savior-of-five" cannot be legalized. But it is not equally obvious why there could not be such legal rules of a just war that would allow an innocent side of a military conflict to target the enemy's civilians by "terrifying bombers" if this would guarantee a faster and more successful end to the war (in a quite exceptional situation and under extraordinary conditions like a special procedure and decision of an international body, etc.).[239]

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[237] In utilitarianism, however, it is true that various claims *"can be brought to the common measure of the Greatest Happiness Principle, and there can be no coherent idea of a right or wrong thing to do, other than what is, or is not the best thing to do on the whole: and if two courses come out equal, then it really cannot matter which he does. As against this, many people can recognize the thought that a certain course of action is, indeed, the best thing to do on the whole in the circumstances, but that doing it involves doing something wrong. This is a thought which for utilitarianism must, I think, ultimately be incoherent. This is one reason for saying (what is certainly true) that for utilitarianism tragedy is impossible* [...]." (WILLIAMS, B. *Morality: An Introduction to Ethics.* Cambridge: Cambridge University Press, 1993, pp. 85-86).

[238] From a utilitarian perspective, it can be said that even though the suffering experienced by people in regions of war cannot be neglected, globally speaking, it can be assumed that most of the planet's population consists of people who do not calculate with the war in their lives.

[239] Most people expect to visit a doctor regularly, so if an active involuntary sacrifice of a patient for the benefit of others was allowed, people would have a constant distrust of the health system. On the contrary, most do not systematically count on war. Certainly, we expect that the distinction between combatants and non-combatants will be maintained so that the war does not turn into genocide. However, we also need to take into account the fact that war is unpredictable, and in the context of a utilitarian approach, I am talking about quite a radical exception to the ban on attacks on the civilian population. So let's say that it would be no more likely (or rather much less likely) that someone will fall victim to

However, such a conclusion has one problem: It is counterintuitive. It says that we can deliberately harm an innocent harmless person if we stop a guilty person who is harming us.[240] It contradicts our intuition about the basic principle that requires us not to attack the defenseless, who do not threaten us in any way (*neminem laedere*). As I have already outlined, we are not at the level of individual ethics now, where perhaps some utilitarians (trumping intuition with calculation) would have no problem sacrificing the innocent in various exceptional situations. We are at the level of social ethics, which, together with basic moral intuitions, is important, for example, to the mentioned M. Hapla, as legal regulation is supposed to stem from it, and Hapla seems to want to show that this will not lead against our basic intuitions. Concerning the calculation of utility, the utilitarian should not have a problem with such legal regulation of a just war, in which the sacrifice of innocent people by "terrifying bombers" would be allowed under exceptional circumstances.[241] However, he would also sacrifice his intuition.

It may remind us of Bernard Williams' famous illustration of Jim and the Indians,[242] in which a botanist named Jim finds himself on an expedition in a South American town, where Captain Pedro and his soldiers are going to shoot twenty innocent Indians. The captain makes Jim an offer: either Jim, as an honored guest, personally kills one Indian, and Pedro lets the other nineteen live (exceptionally, he will "show them mercy" in honor of the guest), or Pedro kills all the Indians.[243] According to Williams, utilitarianism dictates that Jim sacrifice one Indian because this will save more lives, while deontology or virtue ethics dictates not to participate in this evil (in the murder of a single Indian), even if the overall consequences will be terrible. Of course, it can also be a dilemma from a certain deontological point of view when an Indian begs Jim to shoot him

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the application of such a legally enshrined exception than that they will be struck by some misfortune or some illegal war activity.

[240] Although we do so with the noble aim of preventing the total amount of greater suffering of innocents.

[241] A utilitarian might argue that the political enforcement of such a rule would be very difficult in the current world, so it is not worth striving for. However, I believe that the mere hypothetical admissibility of such a step in an imaginary world (past or future) indicates something essential about the relationship between utilitarianism and the idea of human rights.

[242] Williams used this example in the book *Utilitarianism: For and Against* (1973), which he co-wrote with J. J. C. Smart. See also JENKINS, M. P. *Bernard Williams.* New York: Routledge, 2014, p. 32.

[243] From the reactions to this, see, for instance, HOLLINS, M. Jim and the Indians. In *Analysis*, 1983 (vol. 43), no. 1, pp. 36-39.

because he wants to sacrifice for others.[244] However, let us leave this situation aside now. We don't even have to worry about considering the fact that the Indian in question would die anyway, as Pedro would kill him with other Indians. Let's imagine that Pedro's offer to Jim reads like this: "Either you kill this one person, or I kill these nineteen." The essential question is whether it is morally right to deliberately harm one defenseless innocent against their will (based on direct or indirect pressure from an evil aggressor) in order to save other innocent people. As I have stated, I believe that the affirmative answer (no matter how we try to justify it with a good consequence) collides with our deep moral intuition, but utilitarianism requires such an answer (or at least allows for it) under certain circumstances. So can we say that it is right if, during a war, by deliberately harming a small group of innocent foreign civilians, we prevent, for example, harming a larger group of our compatriots (whether civilians or soldiers) whom the aggressor threatens with war (or a larger number of any persons), or if this is allowed by the applicable law of war in quite exceptional situations? As I said, it seems to me that a utilitarian should answer this question in the affirmative. A historical example can be the dropping of atomic bombs on Japan during World War II. If we accept that the purpose of nuclear attacks on Japanese cities was not merely to destroy some strategic targets of the enemy but to hit a significant number of civilians in order to scare the enemy and force him to surrender, we actually have a historical example of a "terrifying bomber".[245] This attack is traditionally advocated by shortening the war and

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[244] Unless I am mistaken, in Williams' original example, all twenty Indians are begging Jim to choose one (whichever) of them. After all, it significantly increases everyone's chance of survival.

[245] Another possible example is the bombing of Hamburg in 1943, which was one of the most terrible manifestations of the then-new (and understandably controversial) Allied tactics called "area bombing". *"The concept was simple: Instead of bombing specific targets, Allied bombers would focus on targets and surrounding civilian areas. With this new strategy, the Allies had decided that their enemy was not just Adolf Hitler or the German military, but German morale."* (BLAKEMORE, E. The Bombing of Hamburg foreshadowed the horrors of Hiroshima. In *National Geographic*, 22.06.2021, available online: https://www.nationalgeographic.com/history/article/the-bombing-of-hamburg-foreshadowed-the-horrors-of-hiroshima [24-08-2022]). The justification of (part of) this strategy by Michael Walzer, who distances himself from utilitarianism but formulates the so-called *supreme emergency exemption* in his theory of the just war, has been criticized by Alex Bellamy as utilitarian in nature (BELLAMY, A. J. Supreme Emergencies and the Protection of Non-Combatants in War. In *International Affairs*, 2004 (vol. 80), no. 5, pp. 829-850). Sean Fleming, on the other hand, argues that Walzer's exemption is consequentialist but not utilitarian. He reminds us that Walzer is a communitarian, and in his conception, it is true that *"an action counts as 'useful' in a supreme emergency if it helps to ensure the survival of the political community, not if it promotes the greatest good for the greatest number. Walzer would therefore allow a small community to invoke the supreme*

sparing a large number of lives that would be lost if the war had continued. This is a typically utilitarian justification (what reason could a utilitarian have at that time to demand from the law of war a ban on such an exceptional act?).[246] However, it clashes with our deep intuition about the inadmissibility of active, targeted sacrificing of defenseless innocents.

The argument I have put forward is thus as follows: I argue that for the type of utilitarianism that rejects the idea of absolute human rights, or rather demands that any absolute human right be justified by a utilitarian calculation

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emergency exemption against a larger one even if this resulted in a greater net loss of life. Supreme emergency marks a domain in which individual rights and considerations of the overall good are suspended; the only action-guiding principle is 'preserve the political community at all costs.'" (FLEMING, S. The Communitarianism of Extremity: Walzer's Supreme Emergency Argument Revisited. In *St Antony's International Review*, 2016 (vol. 12), no. 1, p. 101). However, this is not decisive in principle. In relation to the question of the moral counter-intuitiveness of the actions of the "terrifying bomber," which I have addressed, utilitarianism and Walzer's communitarian exemption are similar. I would like to add that from an ethical point of view, I do not think it is fundamentally important whether our demoralizing intention to hit civilians who do not threaten us in any way is *direct* (*dolus directus*) or *indirect* (*dolus eventualis*). Both are morally problematic in principle, and the difference between them is of little importance. So, in principle, it does not matter whether our effort is to kill civilians directly or whether we want to destroy, for example, only residential buildings (so that the enemy is shaken by great damage to civilian objects and a devastated landscape) in which these civilians are "coincidentally" staying (while we understand that civilians will die in such an attack).

[246] In the words of historian George Cotkin: *"Thus, the atomic bombing of Hiroshima and Nagasaki, human tragedies though they be, can also be understood in terms of a moral utilitarianism. Here the stress is on how choices were understood within the context of total warfare that made the dropping of these bombs appear to be moral, albeit in a tragic sense."* (COTKIN, G. A Conversation about Morals and History. In *Journal of History of Ideas*, 2008 (Vol. 69), no. 3, p. 497). From the position of the ethics of social consequences (a consequentialist theory), Lukáš Švaňa evaluates the dropping of nuclear bombs on Japan as immoral and unjustifiable and says: *"Based on the aforementioned analyses, I am even of the opinion that they can be called terrorism because they deliberately attacked non-combatants."* (ŠVAŇA, L. *The "Ethics" of War and Terrorism.* Bratislava: Veda, 2016, p. 164). He claims that the criteria of Walzer's supreme emergency exemption were not met in this case, whereas he accepts Walzer's exemption as such and states that *"to disagree would be to deny the concept of not-humane justice, but the reality is that there must be very extreme situations that would require such action."* (Ibid., pp. 163-164). I, on the other hand, believe that some acts are so terrible (such as the bombing of houses with small children that really bear absolutely no share of responsibility in the ongoing war) that it is always morally better not to do them, no matter how tragic the overall consequences may be. In the words of Christopher Toner, *"there are things so bad that it is better to die than to do them."* (TONER, C. Just War and the Supreme Emergency Exemption. In *The Philosophical Quarterly*, 2005 (vol. 55), no. 221, p. 561).

but at the same time tries to take into account our deep (basic) moral intuitions and wants to show that at the level of social ethics and the resulting legislation, it does not actually go against them, the ambition to justify human rights has its weak place. At least one of the absolute rights seems to be strongly intuitive, while it breaks with utilitarian calculation (my example was the right not to be actively purposefully sacrificed in war as an innocent person).

Somebody might perhaps argue that I may not have been right in the chosen example:[247] What if, in fact, utilitarianism must agree with the absolute

[247] The situation of the "terrifying bomber" is not analogous to the already mentioned situation of shooting down a civilian plane that is hijacked by terrorists who want to fall with it into a residential area. Even if we admit that shooting down the plane is legitimate from the point of view of some deontological (or some non-reductionist) ethical theory and should be legally permissible (and I do not comment on the legitimacy of such a step here), the difference with bombing will remain in at least two facts: (1) the passengers are (albeit against their will, but still) part of the weapon into which the civilian plane turned (the self-defense argument), and (2) the passengers would die anyway, which is not true of the civilian population, who are deliberately killed by the "terrifying bomber"; if they hadn't been bombed, they would have stayed alive (this argument may be relevant, for example, from the point of view of proportionalism or some pluralistic ethical theory). I admit that if we accept the first of these arguments, then we are also allowing the active sacrifice of the civilian population used as a human shield by the aggressor. For example, we can imagine a situation in which the aggressor drives civilians into a military facility where a device that fires missiles is located, and he does so to prevent the facility from being bombed. In such a case, it can also theoretically be argued that civilians who are part of a given military facility against their will are "part of the weapon." This is actually a situation analogous to the case of the "strategic bomber," which I have not dealt with in this chapter (I only wanted to show that at least the situation of the "terrifying bombing," which seems to be legally allowed from a utilitarian perspective in exceptional situations, is intuitively absolutely morally unacceptable). In any case, it is worth mentioning that, for example, in German criminal law and constitutional doctrine, the idea of an individual exception in the event of the so-called "excusing state of emergency" appears. In the words of Milan Hodás: *"As part of an excusing state of emergency, it is possible to interfere with the right to life of another person, even a person who did not cause a threat to our life. It is, therefore, an opportunity to save one's life or the life of a loved one by killing another person who did not cause the threat, provided that this is the only way to save these lives. This is an illegal act that the state authorities do not approve but accept. In other words, in tragic situations such as Karneade's example of two drowning shipwrecked people, the state does not claim the right to judge but capitulates... In Germany, there is even a doctrine of a supra-legal excusing state of emergency ('übergesetzlicher entschuldigender Notstand', 'supra legal duress'), which is supposed to cover situations where it is not possible to apply the institute of an excusing state of emergency because by interfering with the innocent life of another, we do not avert the danger threatening us, or people close to us. Thus, for example, an individual not acting on behalf of public authority could legitimately shoot down a plane with 50 innocent passengers on board in order to save a city district with 5,000 inhabitants, residents of the floodplain of a hydroelectric power plant, or residents within the radiative effects of a*

nature of the prohibition of active targeted sacrificing of civilians in war because the consequences of such sacrificing will be always worse from the overall long-term aspect?[248] I don't think so. It seems to me more likely that exceptional situations in which utilitarian calculation commands (or at least allows) a "terrifying bomber" to sacrifice innocents in the name of the greater good are real in this imperfect world, even with a thorough calculation (in terms of the horizon that humans are able to see). Just in case it happens to be otherwise, I will limit myself to stating that the mere assertion that it is our moral duty not to harm the innocent, not because it would be morally perverse but just because it will always cause less happiness in the total amount, is quite counterintuitive. It means that if *there was/will ever be* even one legally regulable situation (not to mention the individual-ethical level) in which the active targeted sacrificing of an innocent person who does not directly or indirectly threaten others in any way will cause a greater overall benefit, taking into account all the circumstances, its legalization *would be/will be* legitimate from a utilitarian point of view.[249] Such a statement must inevitably clash with our moral intuitions.[250] What I mean by this is that the agreement of some (many) utilitarian conclusions with deontology does not mean that utilitarianism, as we know it, is an

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nuclear power plant. The Federal Constitutional Court in Karlsruhe and the Constitutional Tribunal in Warsaw agree that state power loses its legitimacy if it wants to sacrifice a minority or an individual for the benefit of the majority. Such actions of state power are prohibited in a state governed by the rule of law. However, Christof Gramm argues, referring to paragraph 130 of the judgment in BverfG, 1 BvR 357/05, which dealt with the constitutional compatibility of legislation permitting the shooting down of a plane with innocent passengers on board, that the Federal Constitutional Court in Karlsruhe does not preclude a rescue shoot ('Rettungsschuss') carried out by an individual in the sense of the logic, 'What is forbidden to the state, can (or must?), in certain circumstances, be done by an individual.'" (HODÁS, M. The Law in Border Situations – the Plank of Karneades or about the Humbleness of the Lawmaking. In *Právník*, 2014 (vol. 153), no. 3, pp. 241-242).

[248] The need for such a ban from a utilitarian perspective seems to be defended, for example, by William H. Shaw in his book *Utilitarianism and the Ethics of War* (2016).

[249] Theoretically, the proposal of the utilitarian Peter Singer for the legalization of infanticide may also be pointed out (SINGER, P. *Writings on an Ethical Life.* Bratislava: Publishing House of the Association of Slovak Writers, 2008, p. 227). In any case, it is fair to add that Singer is proposing a strictly regulated form of infanticide. The condition is not only the will of the parents to give the newborn child for euthanasia but also the child's disability and its age in days or weeks (which, of course, does not mean that I agree with his justification of infanticide).

[250] In such collisions, we have to choose: either our intuitions are wrong and need to be rejected/corrected, or the utilitarian theory is flawed.

appropriate ethical theory for justifying human rights.[251] In connection with the attempt to justify human rights in a utilitarian way, I also recall Bernard Williams'

[251] In the cited paper, Martin Hapla himself states that the theory of utilitarianism is "*criticized for presenting us with solutions that are counterintuitive in some situations. Will we torture a child, commit murder, or sacrifice ourselves when that is what will maximize utility? Will we punish an innocent person under such circumstances? In other words, critics of utilitarianism argue that it leads to immoral inequalities and injustices because, in some cases, consideration of the overall utility leads us to favor some people at the expense of others. Utilitarians usually consider such counterexamples to their theory to be artificial and unrelated to real life. Their critics respond to such an answer by saying that even if we admit that this is indeed the case, the very fact that this school of study reaches such conclusions (even if only hypothetically) is a sufficient basis for rejecting it. However, such a perspective can also be seen as a misunderstanding of the very nature of utilitarianism as a theory. Especially when it comes to classical utilitarianism, Frederick Rosen draws our attention to its character as a generalizing and not a concretizing theory. Neither Bentham nor John Stuart Mill imagined that we would calculate the utility produced for each particular action. On the contrary, they counted on the fact that we would follow various generalizing rules in everyday life, which, however, should pass the test of the principle of utility. Our practice should, therefore, have been evaluated by these rules and not directly by this principle itself. In their eyes, utilitarianism was intended to provide guidance for making social and political decisions rather than directly shaping the personal morality of individuals. Such a view excludes the punishment of the innocent, as well as the torture of children, the murder of other people, etc. Even according to classical utilitarianism, a person should only be punished if he or she commits a crime, children should not be tortured, people should not be intentionally killed, and self-sacrifice should not be required of them. It is the generalizing rules that prohibit such a practice that increase the overall utility the most in the long run. The important thing is that when utilitarians do their calculations, they are not interested in short-term or local utility maximization but instead in seeking to increase it as much as possible in the long run and globally. They take into account all the consequences of action, no matter how long and where they occur. If it is not possible to ascertain all such consequences (either by the nature of the matter, various epistemic constraints, or perhaps just because of the disproportionately high costs associated with their ascertainment), they calculate probabilities. In the examples given above, we could maximize the benefits in the short term, but in the long run, they could prove fatal. They would not only represent bad incentives but would also destroy mutual trust in society, which is a necessary prerequisite for its successful functioning.*" (HAPLA, M. Utilitarianism and Human Rights. In *Časopis pro právní vědu a praxi*, 2020 (vol. 28), no. 3, pp. 325-326). In this chapter, however, I have shown that from a utilitarian point of view, harming an innocent person is probably actually permissible in a situation of war (for example). I am talking about an imaginary systemic matter – a theoretical formulation of the legal rules of a just war, which would contain an exception similar to Walzer's *supreme emergency exemption*. So I start from the idea of utilitarianism of rules, just like Hapla, and show that this kind of utilitarianism probably really makes it possible. And even if it happens that such a situation, in which an innocent person could be actively sacrificed on the basis of legal rules, is not real from a utilitarian point of view, I do not agree with Hapla's claim that the deontological critique of its even hypothetical enabling by utilitarianism is a misunderstanding of the essence of the problem. I think that if utilitarianism has at least the potential to legitimize such actions, it

observation that while J. Bentham and J. S. Mill tried to prove the fallacy of the positive morality of their time through their arguments, *"modern utilitarian theorists tend to spend more effort in reconciling utilitarianism with existing moral beliefs than in rejecting those beliefs on the strength of utilitarianism. One recent writer, for instance, has taken great and honest pains to show that public executions could not, as might seem, be justified on utilitarian grounds. He is left with some frank doubts; but these are doubts about the application and formulation of utilitarianism, and not, as they surely should be, doubt whether public executions might not be reintroduced.* […] *But more generally all the many human qualities which are valued and yet resist utilitarian treatment, such as an uncompromising passion for justice; certain sorts of courage; spontaneity; a disposition to resist such things as* […] *the use of napalm on some people to secure (as it is supposed) the happiness of more people, often elicit from utilitarian theorists attempts to accommodate rather than condemnation of such values as irrational legacies of pre-utilitarian era. This is no doubt a tribute to the decency and imagination of those utilitarians, but not to their consistency or their utilitarianism."*[252]

Let me conclude by stating that the moral intuition that prevents us from adopting a utilitarian perspective is undoubtedly related to an important category, the importance of which to legal theory/legal philosophy I have already indicated in the previous chapter – the category of human dignity,[253] no matter how vague it may seem to us.

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means that the ethical theory in question is fundamentally different from the idea of human rights as we know it. After all, it is the fundamental (deeply counterintuitive) evils that human rights are supposed to prevent. This is an essential feature of human rights (a characteristic related to the core of the concept of human rights), no matter how controversial some of the currently accepted human rights may be.

[252] WILLIAMS, B. *Morality: An Introduction to Ethics.* Cambridge: Cambridge University Press, 1993, pp. 94-95.

[253] …the respect of which is its *"morally imperative quality."* (SEILER, V. – SEILEROVÁ, B. *Human Dignity – an Axiom of Human Rights.* Bratislava: Vladimír Seiler and Božena Seilerová, 2010, p. 87). It is worth mentioning that the cited authors do not count on the idea of innate dignity but rather dignity acquired in the course of socialization (ibid., p. 80). Alexander Bröstl, referring to Rosemarie Will, notes that *"human dignity, inalienable rights, the free development of the personality… are the basis of political order and social peace."* (BRÖSTL, A. Human Dignity Categorically Commands Respect as the Framework of All Interpersonal Relationships. Are We Children Raised by the Childless Immanuel Kant? and BRÖSTL, A. – BREICHOVÁ LAPČÁKOVÁ, M. (eds.). *New Dimensions of Legal Argumentation Methodology: The Role of Legal Principles in a Multilevel Legal System.* Prague: Leges, 2021, p. 148).

CONCLUSION

The ethical aspect is inextricably present in the vast number of prescriptive questions one may ask. Questions about what is right/good/fair, on the basis of what criteria to define it, and what actually follows from these criteria arise in a large number of situations,[254] which often need to be reflected by the law.[255] Those of these questions that are legally relevant fall within the framework of partial legal disciplines in terms of specificity and, more generally, within the field of legal theory or the philosophy of law. This monograph dealt mainly with the theoretical level. I noticed the issue of the ethical dimensions of individual "classical" theoretical-legal themes. I tried to point out the ethical dimensions in a relatively coherent way, describe them, and ask questions about the significance of this fact for the theory of law as a science and part of legal education. My ambition was, therefore, to show the relevance of ethics to legal science, especially the theory of law/legal philosophy (as well as for the teaching

[254] Dietrich Bonhoeffer once wrote: *"Hardly has a generation had such a small interest in theoretical and programmatic ethics as ours. The academic question of the ethical system seems to be the most useless. The reason for this is not some ethical indifference of our time, but quite the opposite: we are gripped by a multitude of concrete questions in a way that has never been the case in the history of the West."* (BONHOEFFER, D. *Ethics.* Prague: Kalich, 2007, p. 65). Is this statement still valid? It is true that we are overwhelmed by all sorts of ethical questions and that their number is growing. But it is also true that ethics as an academic discipline has undergone quite intensive development in recent decades, and a considerable number of ethical problems have been reflected on a global scale in a pile of books and articles, the quantity of which is increasing every year. There is, therefore, an interest in theoretical ethics, and there is a lot to work with and build on in this discipline. However, it can be said that the question of designing a coherent ethical *system* remains one of the challenges in the midst of our extremely complicated world.

[255] It is worth mentioning that the relevance of ethics in law can also be observed in Slovak legislation and judicial practice. When I searched for the keyword "ethics" (without using the adjective "ethical") in August 2022 in the database of court decisions available on *judikaty.info* website, I found more than 1,070 decisions and opinions of Slovak courts in which the term appears. When searching for the keyword "ethical" (without the term "ethics"), it was almost 3,400 documents, and when searching for documents that contain both terms (i.e., "ethics" and "ethical"), I found around 230 results. In total, there were approximately 4,700 court documents. In search of normative legal acts on *zakony.judikaty.info* website, there were more than 340 results for the word "ethics" (without the word "ethical"), more than 650 results for the word "ethical" (without the word "ethics") and almost 420 results for both the term "ethics" and "ethical". In total, I found more than 1,400 results for normative legal acts. Of course, the aforementioned cca. 6,100 documents of a judicial and legislative nature contain different uses of the words "ethics" or "ethical" by various entities (whether legislators, judges, or parties to the proceedings). However, this suggests that everyone counts on ethics as a relevant area of human life/knowledge, including the area of law.

of law), and also to show the need to deal with it a little more in the Slovak scholarly environment. At the same time, I wanted to contribute something in this respect. I have implemented these goals in the nine chapters, the content of which can be briefly summarized as follows:

In the first chapter, I focused on the issue of the concept of law and civil dissent. These are standard themes related to the question of the relationship between law and morality. I have pointed out the importance of ethical theories for the question of the validity of an unjust law as well as for the question of refusal to obey it (whether at the level of personal disagreement in the form of conscientious objection or at the level of public protest in the form of civil disobedience or the right of resistance).

In the second chapter, I focused on the issue of the system of law and paid attention to the division of law into private and public, as well as national and international. I have pointed out that the definition of a certain area of human life as an object of public or private interest, or its regulation by mandatory versus optional norms, is also a moral issue. In the context of international and national law, I have focused on the tensions between international human rights norms and the value of state sovereignty, which can sometimes be opposed, and this issue also has an ethical dimension.

In the third chapter, I discussed the ethical dimension of the issue of sources of law and lawmaking. I noticed the value of morality as a material source of law and also the question of legal certainty as part of a broader concept of justice (which comes to the fore in the issue of formal and gnoseological sources of law). As part of the issue of lawmaking, I pointed out the ethical aspects of the democratic legislative process.

The subject of the fourth chapter was the ethical dimension of legal relations, namely the definition of the subject and object of the legal relation and also the content of the legal relation (in connection with which I focused on the concept of human rights as a particularly important type of rights). Within the theme of the subject and object of legal relation, I noticed the problem of granting legal personality to non-human entities, such as animals, parts of nature, or artificial intelligence. This is a theme with an obvious ethical context. The same applies to the issue of rights, especially the so-called absolute human rights, the definition of which (or any distinction between absolute and relative human rights) depends on the acceptance of a certain ethical theory.

In the fifth chapter, I paid attention to the application of law, specifically the issue of a fair trial, which is one of the important legal themes with ethical content. I pointed out the ethical aspects of the application of the principle of disposition versus the principle of officiality, then the ethical aspects of

obstacles to proceedings resulting from the principle *of ne bis in idem*, as well as the ethical aspects of other procedural principles. In connection with the issue of a fair trial, I also noticed the prohibition of incriminating oneself and the issue of miscarriage of justice.

In the sixth chapter, I focused on the ethical aspect of interpretation and argumentation in law. I pointed out the ethical context of the choice of interpretative methodology and also the ethics of argumentation.

The seventh chapter dealt with the issue of legal liability and sanctions (punishment). I reflected on the relationship between legal and moral responsibility and noticed a retributive and utilitarian theory of punishment that can be linked to different ethical theories.

In the eighth chapter, I asked about the implications of the ethical dimension(s) of the theory of law for legal science and legal education. In this context, I pointed out the value of ethics as a discipline and the ways in which its consideration responds to the challenges of legal theory in the 21st century. As part of this, I noticed the situation in Czecho-Slovak legal science and critically examined it. I pointed out that there is some room for improvement in dealing with ethics as an area of human knowledge.

Finally, in the ninth chapter, I offered my own partial contribution to legal science. I focused specifically on the relatively lively topic of the justification of human rights and formulated my argument against one particular approach to it (the utilitarian approach of the respected Czech legal theorist Martin Hapla).

To sum up in a nutshell: With this monograph, I pointed out the relevance of ethics to legal theory, noticed the state of dealing with ethics in the Czecho-Slovak legal science (from which I drew a conclusion about the non-negligible attention that has been paid to ethics so far, but at the same time about certain reserves that we have, especially in Slovakia, and the need to pay a little more attention to ethics here), and offered my own contribution to this relatively broad area.

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ABOUT THE AUTHOR

Martin Turčan (1983) is an associate professor at the Department of Theory of Law and Philosophy of Law, Faculty of Law, Comenius University in Bratislava (Slovakia). He holds PhD degrees in law and protestant theology. He teaches legal theory, ethics, argumentation, and some law–religion and philosophical stuff. His main research interests cover areas of legal interpretation and the relationship between law, religion, and morality. He has authored or co-authored several textbooks, monographs, and various scholarly papers.

Ethical Dimensions of the Theory of Law

Department of Theory of Law and Philosophy of Law
Faculty of Law, Comenius University in Bratislava

First edition.
Based on the Slovak original *Etické dimenzie teórie práva*, 2nd ed. (2022).

Published by the Faculty of Law, Comenius University in Bratislava in 2025.

ISBN (print): 978-80-7160-743-4

ISBN (e-book): 978-80-7160-744-1

FACULTY OF LAW
Comenius University
Bratislava

ISBN (e-version): 978-80-7160-744-1