On the Missing Discourse Concerning Legal Professions

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On the Missing Discourse Concerning Legal Professions. This paper elaborates on the reasons behind the recently uncovered legal crisis in Slovakia. I submit that the perceived crisis stems from a low level of discipline within the legal professions, which itself results from the limited discourse on the role of these professions in society. The concept of discipline is explained through Michel Foucault's analysis of changes in power structures. The second part of the paper analyses types of professional regulation and specifically explores whether codes of ethics and codes of conduct are appropriate instruments for addressing the lack of discipline within these professions and the low levels of public trust in legal practitioners. The third part focuses on whether legal education should include the institutional approach, which seems preferable to adding further regulations. An intensive simulation course on professional ethics and the associated legal skills is presented as a chance for experiential learning in the Slovak context.

Keywords: discipline, legal profession, institution, legal education, code of ethics

Introduction

Until recently, the legal professions managed to stay under the radar, with public discourse on the role of the profession in society being minimal to non-existent. However, the topic of a lawyer's role within society is now slowly becoming part of the academic curriculum.[1] The dominant view has been that a lawyer is above all bound by the stated will and interests of the client.[2] This view depicts lawyers as entrepreneurs offering legal services, rather than public servants. We could contrast this with the roles of doctors and teachers, whose professions are perceived as contributing to the public good. In the Slovak discourse, this function of lawyers was not considered until recently. However, as the misdeeds of lawyers and judges have recently been exposed as scandals, public discourse on their role in society is slowly taking shape. While the formal rules of the legal professions have been established by laws or codes of conduct for some time, only recently has discourse focused on the institutions of legal professions.

Until the social role of legal professions is analysed and discussed, the crisis will not be resolved. Lawyers must be taught at university what is expected of them; otherwise,

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[1] Courses of Legal Ethics and Professional Responsibility at Slovak law faculties: https://www.prf.umb.sk/katedry/katedra-ustavneho-prava-a-teorie-prava/predmety-katedry/etika-v-prave.html, http://iuridica.truni.sk/vyucovane-predmety-katedry-tpaup, https://www.upjs.sk/pravnicka-fakulta/ustavy/utp/vyucba/bms/pp/pe/, https://www.flaw.uniba.sk/pracoviska/katedry/katedra-teorie-prava-a-socialnych-vied/dokumenty/.

[2] Sec. 2, Parliamentary Act no. 586/2003 Coll. on the Legal Profession and on Amending Act No. 455/1991 Coll. on the Business and Self-Employment Services (Business Licensing Act) (later only Act on Legal Profession).

they may favour more appealing business over guardianship of the law. In the United States, the legal profession fell under public scrutiny after the Watergate scandal, prompting the subsequent accreditation response from the American Bar Association. As a result, the necessity for disciplined lawyers appeared and the professional responsibility course began its ascent into respectability. Such courses even began to be expected of lawyers.[3] This event kickstarted the discourse on which duties form the basis of a lawyer's role. Perhaps then it is time to ask, is the current crisis in the Slovak legal professions the Slovak Watergate?

We can imagine advocates shut off in the world of their clients' interests, which are tantamount to their own interests of being paid. Judges may be convinced that they are underpaid and feel that their sacrifice for public service is worth more than the several thousand euros on their pay checks. It seems that those who perceive their duty as a means for personal gain rather than as a public service are more likely to slip into opportunism. It may be that a few errant bad apples have destroyed the honourable professions of judge and advocate. If so, they should be prosecuted by the authorities. If the majority of actors within these professions still know what ideals they represent, then the Slovak Bar Association proceedings and disciplinary senates at the courts could resolve the crisis quickly. Unfortunately, the solution will not be so simple. It is the thesis of this paper that any actions taken by the authorities to repress the crisis would only be a short-term and ineffective solution. The problem that led to the crisis is much more profound and is rooted in a lack of discipline within legal professions in general. The necessity of introducing the concept of discipline to the discourse is presented here through the work of Michel Foucault. I will start Part I with an explanation of why lawyers are supposed to be guardians of the rule of law and continue in Part II with an explanation of the term 'discipline'. In Part III, I will focus on the recent use of informal regulations through codes of ethics and codes of conduct, while in Part IV, I will propose a solution. The paper will elaborate on discipline—where it originates, why we expect it in a community, and how it is disappearing in the new age.

The concepts of the lawyer, legal profession, legal ethics, professional responsibility, and judge will be used within the text. 'Legal profession' includes the profession of a lawyer, while the label 'lawyer' is reserved for members of the Bar Association. This is usual in the vocabulary of common law countries, despite vast differences in bar structure across various jurisdictions. 'Legal ethics' denotes the institutional discourse on the duties of the legal professions. 'Professional responsibility' refers to the positive norms of the legal professions and the duties of legal professionals, which can be enforced by sanctions. Finally, 'judge' denotes a member of the judicial branch whose salary is provided by the state and who has a legal capacity to deliver decisions backed by law.

[3] MOLITERNO, J.E. Experience and Legal Ethics Teaching. In *Legal Education Review*. 2001, no. 12, vol. 1, p. 8.

1. What is the crisis? Lawyers are supposed to be guardians of the rule of law, but the public does not see them that way.

Democracy is the result of an institutionalised wager: '*Everyone who supports and wishes to belong to a democratic political community assumes the risk that 'the wrong' people and policies are chosen as the result of fair elections'*.[4] In the same way, the rule of law rests on an institutionalised wager that features independent lawyers and judges as the main protagonists. The justice system plays a primary role in the narrative of the rule of law. For this reason, in any system based on the rule of law, it is crucial that the public have confidence in the justice system.[5]

The rule of law is the historical tradition of Western civilisation, in which even the ruler is bound by the law. There is no higher authority than the sovereign except the authority of law, to which sovereigns and their representatives are accountable.[6] The members of legal professions are called as experts to protect the principles of law *'as a restriction on arbitrary power by the state, that no man, including officials, are above the law, and that the constitution is a result of judge-made law protecting individual rights'*.[7] In contrast, in a state of exception, the political community can dispose of people's lives, *'unlike the normal situation, when the autonomous moment of the decision recedes to minimum, the norm is destroyed in the exception'*.[8] In the exception, *'the authority proves that to produce law it need not be based on law'*.[9] Regardless, in states that are based on the rule of law or the rule of a good conception of law,[10] the legal

[4] O'DONNELL, G.A. Democracy, Law, and Comparative Politics. In: *Studies in comparative international development* [online]. 2001, vol. 36, no. 1. p. 17.

[5] '*Desiring to promote the freedom of exercise of the profession of lawyer in order to strengthen the Rule of Law, in which lawyers take part, in particular in the role of defending individual freedoms*'. In Recommendation No. R (2000) 21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer (adopted by the Committee of Ministers on 25 October 2000).

[6] *'The rule of law is a separate component of political order that puts limitations on a state's power'*. FUKUYAMA, F. *The Origins of Political Order: From Prehuman Times to the French Revolution*. New York: Farrar, Straus and Giroux, 2011.

[7] DICEY, A.V.: *Introduction to the Study of The Law of the constitution*, 8th edition 1915. Published by Liberty Fund Indianapolis, 1982, pp. 110-122.

[8] SCHMITT, C.: *Political Theology*. Cambridge: MIT Press, 1985. p. 12. To illuminate Schmitt's opinion, the order in State of Exception in the juristic sense still prevails. He considers the liberal concept of the Rule of Law weak, and presumes an ever-present sovereign behind the liberal constitutional order. He strongly detaches democracy from the Rule of Law. Democracy is the self-rule of the people. In a democratic polity, the decisions taken by the rulers express the will of the people. Schmitt's opinion is that, in a liberal state, the political nation will slowly wither and die as a result of spreading depoliticisation.

[9] *Ibidem*, p. 13.

[10] RAZ, J.: *The Authority of Law*. Second Edition, Oxford: Oxford University Press, 2009, p. 211. According to Raz, the rule of law requires that people be ruled by law and obey it, and that the law should be such that people can be guided by it. The former is a requirement that ascertains '*standards designed to enable it to effectively guide action, and to ensure effective legal institutions to supervise conformity to the rule of law*' (*Ibidem*, p. 218). The latter includes the rule of law in a substantive sense, including legal freedoms or the presumption of legal dignity, which are essential parts of the current legal-political order (WALDRON, J.: *The Rule of Law and the Measure of Property*. Cambridge: Cambridge University Press, 2012, p. 47.). These principles must be preserved as essential components to the legal-political order itself.

professions are responsible for aiding the government, businesses, or citizenry while ensuring that these principles are not broken.

The role of lawyers as guardians of the rule of law is visible in cultural texts. Since the profession as an institution derives its power from both formal and informal sources, the lawyer's role can even be seen in popular literature. One example is William Shakespeare's *Henry VI*, where in one scene Jack Cade says, '*I thank you, good people: there shall be no money; all shall eat and drink on my score; and I will apparel them all in one livery, that they may agree like brothers and worship me their lord'.* Following this, Dick the Butcher declares, '*The first thing we do, let's kill all the lawyers'.* This is not a call for justice, neither is it driven by revenge. Instead, to accomplish its goals, the coup must destroy the current system's pillars: the guardians of the law.[11] In the novel *To Kill a Mockingbird*,[12] the lawyer Atticus Finch is presented as a guardian of the law when he sits in front of the prison to stop a mob from lynching his client, who is in his cell. Atticus here stands against 'the exception' demanded by the mob, as his client deserves a fair trial. He does not act with self-interest by staying home in safety, but does just the opposite.

Lawyers play an essential role in society by protecting the rule of law, which has become the most effective normative system in society. This immediately puts much power into lawyers' hands, and as we know, with power comes responsibility.[13] The lawyer's role has become critical in the fight against the threats to equality posed by modern technology, authoritarianism, and even the general decline of the rule of law. Lawyers must understand from the outset of their studies that their role is not to become rich in a world where comprehensive legislation makes legal services a necessary but expensive commodity that is not economically accessible to all citizens. Instead, the role of the legal professions is to maintain the trust of the citizenry in institutions. Failure in this regard symbolises that the legal system—the rule of law—is an insufficient authority, which can be replaced by 'the exception'. Both the history and contemporary events of Europe show that such a failure can easily lead to authoritarianism.

Lawyers must be committed to the rule of law. In a constitutional democracy, members of the legal professions are not servants of the government, as in an authoritarian constitution. Nor are they servants of their clients. They are servants of the law. How did following lapses happen in a country which claims adherence to the rule of law? In the spring of 2020, thirteen judges were arrested by the police under accusations of corruption. In the summer and fall, six more joined them. The subsequent investigation

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[11] However, that function was well understood by Jack Cade and his followers, who are often forgotten and whose most famous line is often misunderstood. Dick's statement ('The first thing we do, let's kill all the lawyers') was spoken by a rebel, not a friend of liberty. See W. Shakespeare, King Henry VI, pt. II, Act IV, scene 2, line 72. As a careful reading of that text will reveal, Shakespeare insightfully realised that disposing of lawyers is a step in the direction of a totalitarian form of government'. 'Walters v. Radiation Survivors, 473 U.S. 305 (1985)' dissenting opinion on Justice Stevens. I would like to thank to Alexander Bröstl for reference to this case.

[12] LEE, H.: To Kill a Mockingbird, 1960.

[13] Uncle Ben, Spiderman, Marvel comics.

uncovered that these judges had inappropriate relations with business leaders, politicians, and advocates, sometimes delivering decisions on request. These investigations have caused a voluntary exodus of judges from the Slovak judiciary, which has not been seen since 1989.[14] In sum, nineteen judges were accused of corruption, and several advocates are facing charges of corruption and obstruction of justice.[15]

The discipline of legal professionals in Slovakia had been criticised even before a conversation between Monika Jankovská and Marian Kočner on the Threema application revealed inappropriate relationships within the Slovak justice system.[16] In one infamous case, a lawyer charged extremely high contingency fees for representing the organisation administering the state's property.[17] In another, accusations of inappropriate behaviour and corruption were made against another lawyer.[18] The scandals accelerated with the findings of the police operations 'Tempest' (Búrka), 'Gale' (Víchrica),[19] and 'Weeds' ('Plevel'),[20] which dealt with the involvement of lawyers in criminal activity. The failure of discipline among legal professionals,[21] judges and prosecutors was not initially communicated as a problem affecting the Slovak Bar

[14] Dissimilar Similarities, 2020. *Verfassungsblog* [online]. Available at https://verfassungsblog.de/dissimilar-similarities/ [accessed 7 December 2020].

[15] https://spectator.sme.sk/c/22355425/kocners-judges-charged-and-detained.html?ref=av-left;

https://spectator.sme.sk/c/22252665/kocner-judges-threema-resignations-overview-judiciary.html?ref=av-right;

https://spectator.sme.sk/c/22241871/judge-stands-down-for-exchanging-messages-with-kocner.html?ref=av-right; https://spectator.sme.sk/c/22227698/jankovska-had-judges-on-call-for-kocner.html?ref=av-right;

https://spectator.sme.sk/c/20790365/two-witnesses-talk-about-the-corruption-of-judge-and-state-secretary. html?ref=tab; https://spectator.sme.sk/c/22208042/police-seized-mobile-phones-of-judges-and-ex-state-secretary-due-to-corruption-suspicions.html?ref=tab; https://spectator.sme.sk/c/22355558/why-did-the-police-moved-against-judges-one-of-them-collaborated.html?ref=tab; https://spectator.sme.sk/c/22356338/charges-against-judges-show-nobody-is-inviolable.html?ref=tab.

[16] In August 2019, the phones of several judges, heads of courts and a high ranking Justice Ministry official were seized by the police to investigate communication with an entrepreneur charged with several counts of fraud, as well as with ordering the murder of investigative journalist Ján Kuciak and his fiancée Martina Kušnírová. Some of the judges apparently exchanged thousands of messages with the businessman via the secured application Threema. Transcripts of the alleged conversations appeared in the press and suggested massive manipulation of court cases in favour of the businessman. Fresh pieces of communication were published later, with details of inappropriate communication between the judges and the suspect. The information from the press was first indirectly supported and confirmed by the actions and decisions of these judges in specific cases involving the businessman.

[17] For an English version see https://spectator.sme.sk/c/20675751/justice-ministry-to-prepare-rules-for-states-use-of-legal-services.html and https://spectator.sme.sk/c/20792644/state-takes-legal-action-in-case-of-bzans-extremely-high-reward-for-legal-services.html. For a Slovak version: https://www.aktuality.sk/tema/kauza-bzan/

https://www.aktuality.sk/clanok/533151/opozicia-ziada-odvolanie-sudcu-sadovskeho-pre-vztah-s-bzanom/.

[18] https://dennikn.sk/1901646/burka-nevycistila-vsetko-z-korupcie-je-obvineny-znamy-advokat-problem-maju-dalsi-sudcovia/.

[19] https://spectator.sme.sk/c/22524776/court-takes-most-suspects-from-operation-gale-into-custody.html.

[20] https://spectator.sme.sk/c/22488160/police-targeted-judges-in-zilina-due-to-corruption.html.

[21] https://spectator.sme.sk/c/22524776/court-takes-most-suspects-from-operation-gale-into-custody.html.

Association directly, although a roundtable discussion on the rule of law and the judiciary was suggested.[22] Later, after the misconduct of lawyers was uncovered, a roundtable on legal ethics was proposed.[23] However, in December 2019, the Bar Association admitted the application of the so-called 'Threema judge' David Lindtner, who was suspended as a judge but became a lawyer in the meantime.[24] In June 2020, the Slovak Bar Association announced that nine members of the Bar were facing disciplinary proceedings.[25] In January 2021, Slovak police reported inappropriate behaviour from lawyers during an investigation of an accused businessman.[26]

The justice system, particularly the judiciary, has faced continual low levels of trust from the public, as reflected in surveys. According to the results of a 2020 Eurobarometer survey, 64% of the general public ranked the justice system's independence as bad, while 26% ranked it as good.[27] For comparison, in 2017, 59% rated Slovakia's judicial system as bad, while 25% of people in Slovakia tended to trust it.[28] In a survey on corruption, 52% of the sample thought that bribery and abuse of power for personal gain happened in the courts, while 35% thought that such behaviour took place in the prosecution office.[29] These statistical data show what society expects from lawyers.

What is the reason for such failures among members of the justice system? The present paper proposes that these failures are due to a societal decrease in disciplinary power, which is so subtle that it can go unnoticed.

2. What is discipline?

Discipline is a mechanism of power structures that regulates the actions of members within a community. It tries to influence the behaviour of individuals following a particular system of governance. As French post-structuralist Michel Foucault sees it, disciplinary power accomplishes this goal through control, through the organisation

[22] https://www.sak.sk/web/sk/cms/news/form/list/form/row/689/_event.

[23] https://www.sak.sk/web/sk/cms/news/form/list/form/row/692/_event.

[24] https://dennikn.sk/1693528/advokatska-komora-uz-ma-prvy-podnet-na-zapis-sudcu-davida-lindtnera-za-advokata/ reference from BERDISOVÁ, L.: Slovenské právnické profesie v kríze: Vyjde po Búrke slnko? [Slovak Legal Professions in Crisis: Will the sun shine again after the Storm?] In JERMANOVÁ, H. (ed.): *Metamorfózy práva ve střední Evropě 2020: Právo a krize.* [*Metamorphoses of Law in Central Europe 2020: Law and Crisis*] forthcoming.

[25] https://www.sak.sk/web/sk/cms/news/form/list/form/row/201490/_event.

[26] https://dennikn.sk/2221349/vysetrovatelka-gorily-pri-prehliadke-penty-nas-verbalne-napadali-hascakova-manzelka-mi-vyvolavala-na-sukromny-mobil/?ref=tit1.

[27] PublicOpinion - European Commission. At https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/search/justice/surveyKy/2258 [accessed 6 December 2020].

[28] 'PublicOpinion - European Commission. At https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/yearFrom/1974/yearTo/2017/surveyKy/2148 [accessed 6 December 2020].

The long term pattern of low trust in institutions is also visible in Eurobarometer 2013, while across the EU, 53% of the population tend to trust to the national justice system and 43% tend not to. In Slovakia the trust was 25% and the distrust 66%; 9% did not know whether they trusted or not.

[29] PublicOpinion - European Commission. At https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/yearFrom/1974/yearTo/2017/surveyKy/2176 [accessed 6 December 2020].

of space and time using infrastructure and timetables, and through training of individuals.[30]

Departing from Foucault's concept of discipline, in which power is exerted on the subject from the outside, in the present paper, the term discipline refers to as a personal conviction which the subject obeys because of allegiance to an some identity. Although discipline and the disciplinary process in the practice of legal professions refers to 'the device for the policing of conduct'[31], I use the term 'discipline' in the present article to denote not the process of sanctioning professional misconduct, but rather a subject's acceptance of a professional identity, as well as their fulfilment of professional rules and institutional roles within the legal system[32]. While the disciplinary process is often used to address professional misconduct, disciplinary power in this article refers to a power that creates a subject by reinforcing an identity rather than by punishing. Disciplinary measures are taken when the discipline is broken by a subject's actions against this disciplinary power—when they act differently than is expected within an organised space and time.

Discipline is a result of long-term exposure to training, which is usually imperceptible, even to the individual experiencing it. Such training is called by less obtrusive names, such as ethics, morality, civility or duty. Discipline is a consequence of repetitive processes within organised surroundings in the contexts of communication, upbringing, education and professional training. It is also a result of a process whereby cultural constructs of a political system over time become a natural part of everyday life within that system.[33] Long-term exposure to a system's processes shapes the values, attitudes, and identities of its members. This process of discipline is part of everybody's life. No one is free from it. There is nothing wrong with it, and the intention here is not to criticise or fight this process, but rather to point out its characteristics and encourage awareness of its role in the educational process. Foucault wrote that the disciplinary process creates 'docile bodies'.[34] It has played a crucial role in the functioning of large, modern societies through its norm-creating capacity and its categorisation between normal and abnormal.

Discipline within political systems plays a central role in the structure of every community. It helps the community to organise itself and accomplish goals that are crucial for its survival and development. The disciplinary process shapes our perception of institutions in social life. Communication is more effective and quicker in disciplined

[30] FOUCAULT, M. *Discipline and punish: the birth of the prison*. New York: Vintage Books, 1995, p. 144.

[31] MOLITERNO, J., KEYSER, J.: Why do Lawyers Do What They Do (When Behaving Ethically). In *St. Mary's J. Legal Malpractice & Ethics*, 2014, no. 2. p. 8., See also sec. 56 of the Slovak Act on Legal Profession no. 586/2003 Coll. where the professional misconduct referring to 'disciplinárne previnenie': '*Professional misconduct of a lawyer, European lawyer, foreign registered lawyer and international legal practitioner or a trainee lawyer shall mean a violation of his duty or obligation arising hereunder or under the Bar´s internal rule*'.

[32] WILKINS, D. B.: Who Should Regulate Lawyers? In *Harvard law review* [online]. 1992, vol. 105, no. 4, p. 807.

[33] Natural in that the social reality becomes united and all institutions seem to be pieces of a puzzle which fit into our perception of reality.

[34] FOUCAULT, M. *Discipline and punish: the birth of the prison*. New York: Vintage Books, 1995, p. 135.

communities, as members can spend less time clarifying their attitudes and the reasons behind them.[35] The goal of discipline in any profession is to create predictability in action. The legal profession exists to meet the expectations of clients and the courts. For this reason, when discipline is lacking, the whole structure of the justice system falls apart.

Discipline is rooted in acceptance of an identity and a position within the society.[36] It is essential that legal professionals understand why they have accepted this identity, what duties the profession requires of them, and the reasons for these duties. The professional must be aware they are being disciplined—ascribed an identity—and yet still decide to accept this identity positively. If they perceive this professionalism as a negative, they should leave the profession due to untenable conflicts of consciousness. However, discipline does not function like a graduation certificate, which can be acquired once and is valid for the rest of time. The process of discipline is rooted in repeated activities which continuously confirm the subject's commitment to the profession. Most of the time, individuals are unaware they are acting in response to some external influence because the discipline has become a part of their own self-perception and they consider the desires of the collective disciplinary power as their own.[37] The individual accepts the identity of the subject—in our case, the legal professional. Following the rules of the profession, performing the activities that characterise the members of the profession, even wearing proper clothes, displays an acceptance of this identity. This positive acceptance is discipline.

2.1 The Origins of Disciplinary Power

In pre-modern society, power came from the top down. When order was disrupted by crime and sovereign power was challenged, an execution symbolically re-established order. The audience was an essential part of the execution, as the exercise of symbolic power needed to be seen.[38] However, beginning in the 18th century, society began to disapprove of such atrocious punishments, so the sovereign needed to be detached from the condemned. Crime has also changed. With structural changes in the economic system, criminal activity now often focuses on seizing goods, rather than attacking bodies. As such, Foucault claimed that the shifts in punishment practice do not indicate greater humanity, but rather a desire to punish more effectively.[39]

[35] This may be the main threat in the current situation of closed schools. Children cannot take part in this process and may as a result have a reduced ability to function in society.

[36] In Foucault's view, the concept of autonomy may reveal that we are not autonomous at all. As all that comes under scrutiny is determined by society and its impact on the individual.

[37] 'Ideological State Apparatuses are distinct, relatively autonomous, more or less malleable, and under more or less direct state control (even when they are state institutions, like the schools or radio, they are not all equally malleable, at least not in certain periods; they even 'grate' on certain occasions, terribly'. ALTHUSSER, L.: *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses*. London: Verso, 2014, p. 137.

[38] FOUCAULT, M. *Discipline and punish: the birth of the prison*. New York: Vintage Books, 1995, p. 10.

[39] *Ibidem*, p. 80.

The legitimacy of power also changed during this time. Patrimonial theory was replaced by social contract theory.[40] Citizens implicitly enter a contract with the sovereign, claiming obedience as long as the sovereign intended to be subordinate to a collective normative system of rules. The criminal then becomes a paradox—a person who consents to being punished when not acting with discipline or according to norms. The narrative of punishment shifted from the vengeance of the sovereign to the protection of society from the abnormal. The punishment's goal was no longer to perform a ritual of power but to reduce the risk that a criminal would repeat their crime.

Foucault noticed the emergence of a new type of power concurrent with the emergence of the new penitentiary system in the 18th century. He saw in this new type of power a resemblance to an everyday practice that previously occurred mostly in monasteries and armies: '*Corrective penalty acts on the soul instead of representations, forms of coercion operate here. Exercise, timetables and plans all try to restore the obedient subject, who obeys habit, rules and orders*'.[41] He charted how the power structure changed prior to the 18th and into the 19th century. He recognised the shift from sovereign power—a power over death, defined by corporal punishment and the spectacle of execution—to disciplinary power, which does not reduce but rather produces efficacy. Sovereign power in the hands of the sovereign king is an instrument for maintaining order in the community via public spectacles of enforcement. The punishment needs to be on display to symbolise the establishment and legitimacy of power in the hands of the central body.

As Foucault wrote in *Discipline and Punish*, the sovereign power—with control over death—did not recognise the accused as a subject. Instead, the subject did not yet exist.[42] The ritual of public execution was not about punishing the bad character. Rather, it was a pure power performance that demonstrated '*who is the sovereign here and who punishes when something happens to threaten that order'*. The power did not work within an elaborate system of criminality surveillance. However, when someone doubted who controlled the order, a performance was enacted to remove the doubt.

Foucault noted the drastic differences between the executions of 1757 and the punishments of 1837. To illustrate the former, he referenced the execution of Damien, who was *'condemned 'to make the amende honorable before the main door of the Church of Paris', where he was to be taken and conveyed in a cart, wearing nothing but a shirt, holding a torch of burning wax weighing two pounds'; then, ''in the said cart, to the Place de Gréve, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin,*

[40] ČUROŠ, P.: Povinnosť dodržiavať právo – od zvyku poslušnosti k politickej povinnosti [A Duty to Obey the Law – From Habit of Obedience to Political Duty]. *In Olomoucké debaty mladých právniku*. Praha: Leges, 2016, pp. 269-277.

[41] *Ibidem*, p. 128.

[42] *Ibidem*, p. 29.

wax and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds''.

In the archival documents of 1837, the structure of the punishment had changed completely:

'*The correct duration of the penalty must be calculated, therefore, not only according to the particular crime and its circumstances, but also according to the penalty itself as it takes place in actual fact. This amounts to saying that, although the penalty must be individualized, it is so not on the basis of the individual-offender, the juridical subject of his act, the responsible author of the offence, but on the basis of the individual punished, the object of a supervised transformation, the individual in detention inserted in the prison apparatus, modified by it or reacting to it. 'It is a question only of reforming the evil-doer. Once this reform has come about, the criminal must return to society' (C. Lucas, quoted in the Gazette des tribunaux 6 April 1837)'.*[43]

The change from scaffolding a body to disciplining a soul was part of what Foucault called the '*power economy*'.[44] The old practices of punishment did not fit with the new ways of Enlightenment thinking. Ceremonial punishment based on confessions that had been extracted by torture had been seen as a way to cleanse perpetrators of sin.[45] Moreover, the punishment was sometimes not equal to the crime committed. Sometimes the punishment was unsuccessful in meeting its end. Indeed, when the authority was unpopular, the audience may easily favour the side of the criminal. In such cases, the punishment did not fulfil its primary goal of demonstrating sovereign power.

Foucault noticed the emergence of a new type of power, disciplinary power, with the institution of the prison. The core goal of the prison is not to inflict pain on the guilty individual but to coerce them into a prescribed normalcy. As such, the focus of punishment moved from the body to the soul.[46] The certainty of punishment now played a leading role in conditioning society to avoid crime. Instead of displaying the suffering of the executed to highlight the power centralised in the king or supreme administrative body, a sentence in the disciplinary age was intended to correct behaviour.

'*New figures took over from the executioner, the immediate anatomist of pain: warders, doctors, chaplains, psychiatrists, psychologists, educationalists; by their very presence near the prisoner, they sing the praises that the law needs: they reassure it that the body and pain are not the ultimate objects of its punitive action*'.[47]

The behaviour of the individual, even individuals themselves, came under the microscope of the scientific method. The method that inspired the sentencing system can be observed in other ideological state apparatuses, like schools and hospitals. The normalisation[48] of the individual soul became essential. Thanks to this shift, society grew

[43] *Ibidem*, pp. 245-246.
[44] *Ibidem*, p. 303.
[45] *Ibidem*, p. 39.
[46] *Ibidem*, p. 16.
[47] *Ibidem*, p. 11.
[48] *Ibidem*, pp. 20-21.

more unified by categorising normal and abnormal. By focusing on the repentant soul instead of the condemned body, the concept of an individual possessing agency became popular. An individual was seen as having the capacity to make decisions based on their interests and as responsible for their actions.

Disciplinary power is more effective than sovereign power, because discipline directs forces towards the functioning of a useful machine. As Foucault pointed out, disciplinary power is more diffuse within society. It comes from various sources and lacks a centre**.** The individual body becomes part of a bigger whole and must be normalised through controlled time and space to adjust to the time and space of others. It is crucial that individuals recognise the effectiveness of this process. Disciplinary power, by repeatedly analysing the individual, gives the individual identity which constitutes a self within society. One can say: '*I am a son, I am a husband, I am a father, I am a judge and I am a golfer'*. When claiming all of these identities, one also says, '*I have duties, and I obey rules as a son, as a husband, a father, a judge and a golfer'*. Foucault claims that this shift towards identity classification, through the analysis of delinquents and establishment of limits between normalcy and abnormality, followed the creation of the subject.[49]

'This form of power applies itself to immediate everyday life by categorizing the individual, marking him by his own individuality, attaching him to his own identity, and imposing a law of truth on him that he must recognize and that others have to recognize in him. It is a form of power which makes individuals subjects. There are two meanings of the word 'subject': subject to someone else by control and dependence, or attachment to his own identity by a conscience or self-knowledge. Both meanings suggest a form of power which subjugates and makes oneself a subject'.[50]

Disciplinary power does not apply to the hierarchical ruler–subject relationship, but rather governs at all levels of society. There is no enthroned monarch behind such power. Instead, a rational process, the logic of a particular historical period, and the efficacy of the outcome reign supreme. The goal of disciplinary power is to use collective knowledge to establish and further a norm and limit abnormality. It remains unclear how this phenomenon works, but it is widely accepted that its use of knowledge and classification is effective for control.

Social reality becomes divided into disciplines, each of which becomes a field of expertise with its own rules and methodologies for relations, which are the core of what we refer to as discipline in both senses: as a subject defined by a method of action and as

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[49] According to Deleuze, power both individualises and collectivises in the process of creating a subject; that is, it incorporates members of the system into a body and moulds the individuality of each member. DELEUZE, G.: Postscript on the Societies of Control. In *October*. 1992, vol. 59. p. 4. It is interesting to compare the notion of the subject among Descartes, Foucault and Deleuze. When we label a person—a subject of law—we imagine an active standpoint—a consciousness that has agency and freedom. However, in the Foucauldian sense, a person is a body reduced to the identity of the subject and subjected to the set of rules under threat of sanction**.**

[50] FOUCAULT, M. The Subject and Power. In *Critical inquiry* [online]. 1982, vol. 8, no. 4. p. 781.

obedience to the rules within the zone. Disciplinary power is crucial for building stable social normative structures called institutions, which are based on a series of repetitive actions. Schools, hospitals, prisons and professions each have their own sets of rules and practices within them that gradually become institutionalised by such repetitive actions. Discipline becomes essential in reaching the desired effective and organised behaviour through the control of time and space and by controlling which activity occurs at a particular time. Examples include Sunday services taking place in church at 11 a.m., working time constituting eight hours per day, five days a week, and lawyers wearing suits with leather shoes while in the office.

'*The chief function of the disciplinary power is to "train", rather than to select and to levy; or, no doubt, to train in order to levy and select all the more... Instead of bending all its subjects into a single uniform mass, it separates, analyses, differentiates, carries its procedures of decomposition to the point of necessary and sufficient single units. It "trains" the moving, confused, useless multitudes of bodies and forces into a multiplicity of individual elements -- small, separate cells, organic autonomies, genetic identities and continuities, combinatory segments. Discipline 'makes' individuals; it is the specific technique of a power that regards individuals both as objects and as instruments of its exercise… it is a modest, suspicious power, which functions as a calculated, but permanent economy… The success of disciplinary power derives no doubt from the use of simple instruments, hierarchical observation, normalizing judgement and their combination in a procedure that is specific to it, the examination*'.[51]

As power in the disciplinary age always tends towards efficacy, surveillance naturally shifts from 'being watched' to 'accepting identity'. Both kinds of disciplinary influence share the categorisation between normal and abnormal.

To create and maintain power in a disciplinary society, it is essential to convince as many people as possible that the distinction between normal and abnormal is legitimate. The power structure of a disciplinary society allows a reshaping of the distinction if the outcome would be a more effective society. The discourse on this matter, as well as the interpellation, must be continual.

Discipline takes its power from the promotion of good thoughts. The goodwill of an action is essential in the disciplinary power structure, and a positive attitude towards rules makes the action more predictable, ultimately benefiting more members of both the society and the power structure. From the perspective of disciplinary power, it does not hurt the individual to be personally convinced that the rules they follow are legitimate. Accepting the identity positively is crucial. Discipline only works when individuals have no desire to break the rules.[52]

[51] FOUCAULT, M. *Discipline and punish: the birth of the prison*. New York: Vintage Books, 1995, p. 305.

[52] To think good thoughts requires effort and therefore discipline and training. CLAVELL, J. *Shōgun.* Delacorte Press, 1975.

2.2 What comes after the disciplinary age?

Foucault, in his lectures entitled *Security, Territory, Population*, introduced the concept of biopower, which is a set of mechanisms through which the basic biological features of the human species became the object of a general strategy of power. It deals with the population as both a scientific and political problem.[53] While discipline is about organising in detail the space and time schedule of subjects, biopower is concerned with details that are not intrinsically good or bad, but necessary—the so-called natural processes. Specifically, these are the contingently correlated circuits of production: economic and sexual, micro- and macro-biological, material and immaterial.[54]

An interesting view on what comes after the disciplinary age was offered by Gilles Deleuze, who claimed in his essay *Postscript on Societies of Control* that society was already moving from disciplinary power to control. A society of control is based on continuous responses to the subject's action. These responses then form the options that are available to the subject. For example, the search history on an internet browser may determine the options and commercials that the subject will be offered. The options for education might be based on previous results, exams, social activities and finances. In Deleuze's essay, the power in societies of control does not need to organise the space and schedule for the subjects. Instead, it presents before the subject options that were chosen based on the subject's own responses.

However, professional conduct has not become part of the society of control. It is still based on the traditional concept of discipline.[55] According to Deleuze:

'The administrations in charge never cease announcing supposedly necessary reforms: to reform schools, to reform industries, hospitals, the armed forces, prisons. But everyone knows that these institutions are finished, whatever the length of their expiration periods. It's only a matter of administering their last rites and of keeping people employed until the installation of the new forces knocking at the door… The apparent acquittal of the disciplinary societies (between two incarcerations); and the limitless postponements of the societies of control (in continuous variation) are two very different modes of juridical life, *and if our law is hesitant, itself in crisis, it's because we are leaving one in order to enter the other'.*[56]

However, it is unlikely that the legal profession would move into this continuous variation because it has not lost its monopoly on legal services. For this reason, the legal profession has not yet transitioned to a gig economy[57] and maintains its way of functioning

[53] FOUCAULT, M.: *Society Must Be Defended*. London: Penguin Books, 2003. p. 245.

[54] DILLON, M., LOBO-GUERRERO, L.: Biopolitics of security in the 21st century: an introduction. In *Review of international studies* [online]. 2008, vol. 34, no. 2. pp. 281-282.

[55] As the Preamble proudly stipulates: '*The Rules of Professional Conduct for Lawyers are rooted in Act No. 586/2003 Coll. on the Legal Profession and on amending Act No. 455/1991 Coll. ... and in traditions of the Slovak legal profession based on the moral and professional values inherited from the past generations of lawyers and their creative work.*

[56] DELEUZE, G.: Postscript on the Societies of Control. p. 3-4.

[57] Economy based on short-term contracts and freelance work.

within its organised space and schedule. However, this time and space is becoming less organised. Only members of the Bar can provide legal services, and it is to a large extent the Bar Association that decides whether someone can follow the rules of the organised space and schedule after committing misconduct.

Deleuze is right that disciplinary societies have moved towards control based on responses to the input of the subject. However, the legal professions stay within their organised space and schedules. '*The disciplinary societies have two poles: the signature that designates the individual, and the number or administrative numeration that indicates his or her position within a mass*'. While the disciplinary man '*was a discontinuous producer of energy*,' the one in a society of control is '*undulatory, in orbit, in a continuous network*'.[58] Individuals become 'dividuals' and Deleuze labels them machines '*not that machines are determining, but because they express those social forms capable of generating them and using them'*. In this sense, it may seem that lawyers used as hired guns in the hands of a client represent this shift towards losing discipline. In a society of control, a lawyer can become a machine responding to inputs from other machines.

The attempts to regulate the legal profession using written codes of conduct and codes of ethics signal an attempt to preserve the disciplinary power structure, with disciplined lawyers adhering to their professional duty, without interference from an authority, because they follow the duties and rules through positive acceptance of the identity of the legal professional.

The next part will argue that it is not sufficient to have a written code of conduct which was created to meet the requirements of international organisations rather than out of any real need. If legal professionals wish to preserve the traditional way in which lawyers hold the public trust, they must put more weight on creating positive acceptance of the identity of legal professional, mainly through legal education.

3. Can codes of ethics bring us to a better tomorrow?

Foucault's thesis is that particular knowledge can only arise within particular spheres of discourse. For example, the discourse on sexuality allowed for knowledge of sexual orientation and gender roles. The concept needs to enter the discourse and undergo constant analysis, with various views meeting and colliding, for a norm to be established. It is discourse that determines what in a particular field is true or false, normal or abnormal. One can also determine the discipline's limits and content. A lack of discourse is one reason why past attempts towards transparency in the legal professions were unsuccessful and only lone fighters opened the topic to no significant reaction for such a long time. Despite this, a positive change can be seen. We are finally starting to discuss conflicts of interest, inappropriate relations among lawyers, a lawyer's role while representing a client, the contingency fee when representing the state, and the independence and accountability of the legal profession. This knowledge was not possible before, as widespread discourse was absent.

[58] DELEUZE, G.: Postscript on The Societies of Control. p. 4.

Slovakia is similar to other Central and Eastern European countries in having strong faith in the omnipotence of regulation. Regulation and laws are considered an effective instrument for controlling behaviour. The strong normativist heritage from the interwar Czechoslovakia,[59] moulded by the mechanical formalist jurisprudence of state socialism,[60] has left its mark. '*During the socialist era, illusions controlled the way of thinking in socialist countries, resulting in a false reliance upon legislation or law. The illusion of the French revolution was that the formulation of some general declaratory rules would be sufficient. In a similar way, after World War II, it was supposed that the central power could solve almost any problem in a short time*'.[61]

This criticism, that formal rules lack efficiency, can be found in schools that criticize the normativist omission of the norm's institutional being.[62] Only when we consider the institutions of legal professions, with their formal rules and informal relations, practices, and consciousness, can we then speak of an effective, valid norm. While lawmakers have considered in detail the normative aspects[63] of most issues related to legal professions, the discourse on the role of the lawyer did not begin until recently. In other words, formal legislation and professional codes do not guarantee that a norm is obeyed in practice. One good sign that a formal norm is also functional is the existence of robust discourse on what is required by that norm. Such discourses on professional ethics and the role of the lawyer have been lacking in Slovakia for a long time.[64]

In place of discourse, less formal documents have been presented as a solution to the unsatisfactory conditions of the profession.[65] These documents have been labelled codes of ethics or codes of conduct. The initial concern is whether or not we can call these rules ethics at all. Ethics are concerned with knowledge, experience, and prudence, so a code of ethics as a normative list of duties does not fall under the definition of ethics; living well is a virtue found through long-term training.[66] The modern concept of ethics, as

[59] See the normativistic theories of František Weyr in Brno or Hans Kelsen in Vienna.

[60] KÜHN, Z.: *The judiciary in Central and Eastern Europe: mechanical jurisprudence in transformation?*. Leiden; Boston: Martinus Nijhoff Publishers, 2011, p. 116 et seq.

[61] HARMATHY, A.: Codification in a period of transition. In *U.C. Davis law review*. 1998, vol. 31, no. 3, p. 785.

[62] See WEINBERGER, O.: Inštitucionalizmus [Institutionalism]. Bratislava: Kalligram, 2010.

[63] Code of ethics for judges – https://www.sudnarada.gov.sk/data/files/697.pdf, code of ethics for prosecutors –https://www.genpro.gov.sk/eticka-komisia-prokuratury/eticky-kodex-prokuratora-3970.html, both adopted in 2015 and 2016.

[64] As it is difficult to prove a wrong which goes unreported, I will use several examples which are, to my knowledge, overlooked. The interpretation of the Rule 29a of the Law on Legal Profession Act No. 586/2003 Coll. on the forwarding fee, limits of the institute of substitution, an issue of duty of candour to the court, inappropriate contacts of lawyers with judges and prosecutors or role of contingency fee, have not been seriously discussed yet.

[65] Corporate social responsibility became a strong concept of self-regulation promoting anti-corruption and social responsibility, see BRIEN, A.: Professional Ethics and the Culture of Trust. In *Journal of Business Ethics*, 1998 no. 17, p. 4-19; CASSELL, C., JOHNSON, P., SMITH, K.: The Black Box: Corporate Codes of Ethics in their Organizational Context. In *Journal of Business Ethics*, 1997, no. 16, p. 10–24; SOSSIN, L., SMITH, C. L.: Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government. In *Alta.L.Rev,* 2002-2003, vol. 40, no. 4, pp. 867-892.

[66] ARISTOTLE: *Nicomachean Ethics*. Kitchener: Batoche Books, 1999, p. 24-25.

elaborated by Ronald Dworkin, is built on the concept of human dignity and living well.[67] Thus, it does not fit with a pattern of codes. Neither does the ethical concept of Geoffrey Hazard, who departed from the Aristotelian tradition in which ethics are part of an individual's autonomous sphere and rather envisioned ethics as social norms that are the outcome of the collective will.[68] He labelled ethics as standards recognised in a particular community that does not have legal norms. These standards do not function based on the misdeed–sanction structure, but on the reciprocal duty of community members. The legitimacy of the ethical norm is then rooted in clarity and rationality.[69] However, even Hazard admitted that the concept of ethics is difficult to grasp when he claims, '*I am not sure I know what ethics 'is'. Defining 'ethics' proved elusive to Aristotle and there has not been great improvement in the analysis since then'*.[70]

The code of ethics offers guidelines for behaviour in particular situations, not for solving dilemmas posed by potentially contradictory duties. In its essence, it is similar to the legal provision of a statute in that it takes the form of a command. Even though it is labelled as an ethical code, the individual's agency for resolving problems is minimal. The deontological form does not offer a choice that needs to be decided upon, and the deontological norm laid down to be read is ineffective without continuous practice and training. In other words, ethical behaviour cannot be expected without repetitive training during complex cases.

A successful political system must convince its members that what they do in favour of the system—their obedience to expected behaviour—is done knowingly and, even more profoundly, done voluntarily. Alasdair MacIntyre offers an illustrative example of a child who is taught to enjoy playing chess.

'Consider the example of a highly intelligent seven-year-old child whom I wish to teach to play chess, although the child has no existing desire to learn the game. The child does, however, have a very strong desire for candy and little chance of obtaining it. I can tell the child that if the child will play chess with me once a week, I will give the child 50 cents' worth of candy. Moreover, I tell the child that I will always play in such a way that it will be difficult, but not impossible, for the child to win and that, if the child wins, the child will receive an extra 50 cents' worth of candy. Thus motivated, the child plays, and plays to win. Notice, however, that so long as it is the candy alone which provides the child with a good reason for playing chess, the child has no reason not to cheat and every reason to cheat, provided he or she can do so successfully. We may hope that there will

[67] DWORKIN, R.: *Justice for Hedgehogs*. Cambridge, MA: Harvard University Press, 2011, p. 195. It consists of two principles which match the concept of professional ethics. The first principle of self-respect implies that every person needs to take their life seriously. In other words, life is supposed to be a successful performance, rather than a missed opportunity. The second principle of authenticity concerns each person's requirement to decide autonomously the values that are important in their life.

[68] HAZARD, G. C.: Law, Ethics and Mystery. In *University of Detroit Mercy Law Review*, vol. 82, 2004-2005, p. 510.

[69] HAZARD, G.C.: Law, Morals and Ethics. In *Southern Illinois University Law Journal*, vol. 19, 1994-1995, p. 454.

[70] HAZARD, G. C.: The Legal and Ethical Position of the Code of Professional Ethics. In *Soc. Resp. Journalism L. Med*., vol. 5, 1979, p. 10.

come a time when the child will find in the specific goods of chess – the highly particular kind of analytical skill, strategic imagination, and competitive intensity – a new set of reasons, reasons now not just for winning on a particular occasion but for trying to excel in whatever way the game of chess demands. Now, if the child cheats, he or she will be defeating not me, but him or herself'.[71]

Therefore, successful power structures function because their members have a positive awareness of their obedience towards the community's wellbeing. Members are motivated to follow the rule for reasons other than the desire to avoid personal disapproval, to act based on economic analysis, or to adhere the idea of how a virtuous person would act. In the most successful power systems, members act preferably and understand why it is preferable to act that way.

Finally, the contribution of codes of ethics in Slovak practice has not yet been researched. It would be helpful for us to have a Slovak version of the study conducted by Moliterno and Keyser on the Florida and Virginia Bars in 2014. They focused on what motivated lawyers to obey the duties of their profession, which are essential to their identity as lawyers.[72] The conclusions were that lawyers obeyed professional duty in predictable areas, like the maintenance of trust accounts, but that they cared less about discipline in areas of historical non-enforcement, like fees. They seemed to evaluate the likelihood and gravity of disciplinary measures based on a general knowledge of how such measures have been applied in the past. The market for clients is a more powerful motivator than any law or related motivator, but 'doing the right thing' must be the greatest single motivator for ethical conduct.[73]

The strength of formal regulations relies on their enforcement in practice. On the other hand, re-establishing the discourse on the role of the lawyer may provide an opportunity to establish professionalism as a priority in the legal profession. Any system that depends on the fear of force to maintain order will fail if the authority is not powerful enough to maintain order by force. If subjects do not positively accept the rules, then they will only comply when it is in their personal interest or when the authority is watching. Discipline can ensure that rules are accepted by imposing a professional identity. When the identity of the legal profession is primary, the duty is obeyed not because of the threat of sanction but because it is intrinsic to the professional.

This discipline cannot be forced upon a student, as this would necessarily create a contradiction of forced positive acceptance. Rather, it should be developed in the student, firstly through descriptive explanations of the importance of the norm within the

[71] MACINTYRE, A.: *After Virtue: A Study in Moral Theory*. Third edition, Notre Dame, IN: University of Notre Dame, 2007, p. 188.

[72] Do lawyers train staff in confidentiality preservation because they fear bar discipline? Because they fear malpractice liability? Because they must comply with malpractice liability carrier demands? Because they honour client confidences for their own value and wish to protect them? Because the market forces them to do so? Because it is the right thing to do?

[73] MOLITERNO, J., KEYSER, J.: Why do Lawyers Do What They Do (When Behaving Ethically). In *St. Mary's J. Legal Malpractice & Ethics*, 2014, no. 2. p. 22.

institutional framework of democratic liberal constitutionalism, and secondly by normative practice. In our case, this is accomplished through a simulated course that incorporates legal ethics. Both will be presented in the following section.

The proposal to effect changes through legal education aims to align disciplinary power with the identity of the legal professional. It is not a proposal to foster a revolution within legal professions to enact a society of control. In my opinion, the legal profession is a more valuable part of modern society when it is governed by rules, principles, and values, rather than by networks of choices. However, the section above criticises the notion that more regulation in the forms of ethics or conduct codes can 'save the day'. The final argument presented is that legal education might be the best way to promote discipline in students through an awareness of the process that creates their professional identity.

4. Necessity of teaching legal ethics through an institutional approach

An institutional approach is a useful tool for legal education because it accounts for the historical, organisational and structural features of social phenomena. Societies create institutions, or social, stable facts,[74] to relate social reality to the individual. An individual is born and raised within the structure if a social institution, leading many people to understand these institutions as natural and eternal, rather than artificial, social and temporary.[75] Institutions are made up of norms and knowledge, which can be either formally expressed or informal and tacit.[76] In other words, '*institutions are the rules of the game in a society, or, more formally, are the humanly devised constraints that shape human interaction'*.[77] Institutions are the more enduring features of social life. In this sense, the institutional approach to law is how general legal principles are superimposed upon rules, making them into a coherent unity and justifying the limitations of their effect in some areas, as well as extensions or innovations in others.[78]

[74] See SEARLE, J.: *Making the Social World: The Structure of Human Civilization*. Oxford: Oxford University Press, 2010.

[75] Other definitions include 'humanly devised constraints that structure political, economic and social interaction' (NORTH, D. C.: Institutions. In *Journal Of Economic Perspectives*. 1991, vol. 5, p. 97). Institutions form part of the structure that shapes human action. They consist of 'formal rules, informal rules and their enforcement characteristics' (NORTH, D. C.: *Understanding the Process of Economic Change.* Princeton – Oxford: Princeton University Press, 2005, p. 48). 'The prescriptions that humans use to organise all forms of repetitive and structured interactions including those within families, neighbourhoods, markets, firms, sports leagues, churches, private associations, and governments at all scales' (OSTROM, E.: *Understanding Institutional Diversity*. Princeton – Oxford: Princeton University Press, 2005, p. 3).

[76] GRAVER, H. P.: Judicial Independence Under Authoritarian Rule: An Institutional Approach to the Legal Tradition of the West. In *Hague Journal on the Rule of Law*, 2018, vol. 10, p. 323.

[77] NORTH, D. C.: *Institutions, Institutional Change and Economic Performance.* Cambridge: Cambridge University Press, 1990, p. 3.

[78] MACCORMICK, N., WEINBERGER, O.: *An institutional theory of law: new approaches to legal positivism*. Dordrecht: Reidel, 1986, p. 74.

The institutional approach is essential for legal training because lawyers are required to have '*a full understanding of the mode of operation of the social institutions which are charged with the tasks of making, sustaining, interpreting, applying, and enforcing the law'*.[79] When we talk about the law, we also include the normative structure. In addition to its rules, a legal system contains informal practices, attitudes, beliefs, and values that guide the application, enforcement, and development of formal rules. An institution is always bound *'to the context of and for the purposes of norms and rules which (in complex sets) variously give sense to, justify, regulate or even authorize human conduct in social settings'*.[80] Institutions consist of social norms and facts that help form our understanding of social reality. For example, our understanding of the legal profession would be different if we only read the Act on the Legal Profession and did not know of the beliefs, ethics, people or public opinions that shape the profession. Furthermore, to understand the judicial institution, it is not enough to read the statute on judges or the administration of courts. We need to understand how the judiciary functions and how it relates to the legal profession in a system. When we trace all the concepts to their meaning—both diachronically and synchronically—we can find out more about the role of the legal professions.

Using the institutional approach in education gives students a picture of the social reality in which they act. It shows students that what they consider natural in the place, time and environment they live in is mostly a social construct that they take part in, largely unconsciously. Using an institutional approach and practical education under supervision gives the student a repetitive pattern that develops into discipline. The institution is not Kelsen's pure 'ought' element of law[81] in the normative approach that guides how we act. Instead, it is a normative 'ought' set in the realm of other social facts.[82]

We can use the example of the lay question, 'Would you be able to defend a murderer?' Imagine someone who is not a lawyer examining the rules in the Act on Legal Profession and the Rules on Professional Conduct. The person is likely to see the formal rules which a lawyer must obey when representing a client. These rules dictate that the lawyer is independent, acting on the client's instructions, but bound by legal rules.[83] Let us imagine that the client instructs the lawyer to lead the defence in such a way that they are found not guilty. However, the twist is that they tell the lawyer that they did commit the crime described in the indictment. What can the lawyer do? Can the lawyer disqualify a relevant

[79] GRAVER, H. P.: Judicial Independence Under Authoritarian Rule. p. 321.

[80] MACCORMICK, N., WEINBERGER, O.: *An institutional theory of law: new approaches to legal positivism*. p. 14.

[81] KELSEN, H.: *Pure Theory of law*. Berkeley: University of California Press, 1967, p. 11.

[82] *'Norm is valid only when there is institutional being…institutionalisation is a complex phenomenon, that constitutes social reality of social norms. Elements of the institutionalisation are: normative consciousness, acceptance of the normative system in society…, existence and functioning of the entities, that account to norms, existence of institutionalised objects… that are supposed to fulfil a role in institutions presupposed by the normative system'*. HOLLÄNDER, P. In WEINBERGER, O.: Institutionalism. p.15., also in WEINBERGER, O.: *Rechtslogik*. Second edition, Berlin: Duncker & Humblot, 1989, p. 260.

[83] Act on Legal Profession, sec. 2.: '*When providing his legal services, each lawyer shall act independently, shall be bound by the generally binding legal rules, and within the limits of the same also by the client's instructions*'.

witness during the hearing?[84] Can the lawyer misinform the court by saying that the client did not commit the deed? In the Act and in the Rules, there is no mention of such a duty. It is possible to find it in the CCBE Code of Conduct for European Lawyers,[85] which contains a much clearer norm on not misinforming the court than '*respect towards court and other competent authorities. His behaviour including his appearance add to the honour and credit of any act he is involved in, as well as to the status and dignity of the entire legal profession*'.[86] In the formal national law and professional rules on the legal profession, there is no barrier to a lawyer fulfilling such an instruction from the client.

However, neither the rules of a lawyer's duties nor the institution of the judiciary expects the lawyer to represent a defendant in a way that misleads the court. Criminal justice expects a lawyer to provide the client with legal advice and representation to protect their rights when the state might threaten them. No duty requires a lawyer to misinform the court or disqualify a witness to help their client. The rules of the game set in the Code of Criminal Procedure are meant to assure that *'criminal offences are properly investigated and their perpetrators justly punished under the law with due respect to fundamental rights and freedoms of natural persons and legal entities'*.[87] Giving judges the uncertainty that a lawyer may be misinforming the court with every word is not compatible with an effective justice system.[88]

On the other hand, from the viewpoint of the lawyer, the client is the one who pays. If they refuse a case, another lawyer may easily agree to the client's strategy. It is a common question from students: 'Who will know and who will prove that the lawyer offered misleading information to the court?' And what is the standard on misleading information? What level of certainty is required for information? Is intent relevant?

The answer should be that the lawyer ought to know. They ought to know that the rule in the code of conduct does not stand alone, but is a piece of the institution of the justice system. However, where in the statute is the border of how zealous the lawyer can be in defence of their client? Can they have knowledge of the defendant committing a crime and still support the defendant's declaration of innocence? Can the lawyer use a strategy during a witness' testimony to disqualify a trustworthy witness? The appropriate relationship among lawyers and their clients, the court, and opposing parties is hard to deduce solely from the Act on the Legal Profession or the Rules on Professional Conduct. Memorising the code with vague provisions on the lawyer's

[84] In reaction to the opinion of FREEDMAN, M. H.: *Lawyers' Ethics in an Adversary System*. Indianapolis, IN: Bobbs-Merrill, 1975.

[85] 'A lawyer shall never knowingly give false or misleading information to the court'. CCBE code of conduct, rule 4.4.<https://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf> [accessed 20 December 2020].

[86] Slovak Rules on the Professional Conduct adopted by the Conference of Lawyers on 19 June 2004 , sec. 29.

[87] Code of criminal procedure No. 301/2005 Coll, sec. 1.

[88] It is interesting that, among the published decisions of the disciplinary senates, there are no decisions on presenting misleading information to the court. See https://www.sak.sk/web/sk/cms/document/D_rozhodnutia

duty to the court without understanding the lawyer's role is not helpful for students or lawyers.

4.1 The legal profession as an institution

One way to prepare lawyers for this task is to provide them with an education that combines legal sociology, legal philosophy and legal history.[89] Nevertheless, this approach must be accompanied by practical education. James Moliterno proposed a way to amend legal education towards lawyers' awareness of their role. In his article, he offered the image of five hypothetical lawyers educated at different times, from 1875 to 2010. From Alan Anderson studying in 1875, through students in 1910, 1948 and 1980, we can observe how a student of legal education developed. The last on the list of those five, Emily Ethridge, enjoyed the latest innovations and legal education approaches. Gradually, more experiential elements replaced memorising codes and case law, and learning moved towards education. The next step was moving legal education towards experiential education and co-operation between practice and faculty.[90]

Sadly, it would not be fair to compare the level of experiential education in the US with that in Slovakia.[91] While the Czech Republic made a significant leap in clinical legal education,[92] Slovak legal education was not successful in the dispute over who is eligible to provide legal services. According to the law, only a lawyer registered in the Slovak Bar Association may do so.[93] Finally, in 2019, a memorandum was prepared on co-operation in legal education between the Law Faculty of Šafárik University and the Slovak Bar

[89] This concept of legal education has been neglected for long time, mostly because of the influence of the normative theory. See KELSEN, H.: *Pure Theory of Law*. where Kelsen criticises scientific syncretism and invokes the purity of legal science. The adverse attitude towards institutional theory followed later in 1950s due to influence of legal nihilism and revolutionary conceptof law and since 1960s by using law as an instrument to oppress in the communist regime (See KÜHN, Z.: *The Judiciary in Central and Eastern Europe : Mechanical Jurisprudence in Transformation?* Martinus Nijhoff Publishers, vol. 61, 2011, p. 31 et seq).

[90] MOLITERNO, J. E.: Legal Education, Experiential Education, and Professional Responsibility. (Symposium: W.M. Keck Foundation Forum on the Teaching of Legal Ethics) In *William and Mary Law Review*, no. 38, 1996, p. 76.

[91] The three largest Law Faculties in Slovakia (Bratislava, Trnava and Košice) give only brief and vague descriptions of their clinical programs. Basically, that they are interactive and reflective methods of education, both in simulated and live clinics. In fact, law faculties may mainly provide education on 'theoretical and practical knowledge, practical skills and competencies, moral values in accordance with professional ethics' in simulated clinics. In this regard, the Slovak Bar Association reasons rather unpersuasively that the law does not permit legal services to be provided by faculties, and the Bar Association prefers to educate their members on their own after they have finished their law degree. See https://pravnekliniky.sk/o-klinickom-pravnom-vzdelavani-jeho-prinose, https://www.flaw.uniba.sk/en/departments/institutes/institute-of-clinical-legal-education/clinical-legal-education, http://pravne-kliniky.truni.sk/pravne-kliniky

[92] TOMOSZEK, M.: The Growth of Legal Clinics in Europe – Faith and Hope, or Evidence and Hard Work? In *International Journal of Clinical Legal Education*, no. 21, 2014, p. 93; TOMOSZKOVÁ, V., TOMOSZEK, M.: A New Dawn in the Czech Clinical Movement: The Clinical Programme at the Law School of Palacký University in Olomouc'. In ALEMANNO, A., KHADAR, L. (eds.): *Reinventing Legal Education*. Cambridge: Cambridge University Press, 2018. pp. 76-92.

[93] Slovak Act on the Legal Profession no. 586/2003 Coll. sec. 1.1. and 1.3.

Association,[94] and there is now a dialogue between the Slovak Bar Association and law faculties in general.[95]

Legal ethics shows students that they are no longer applying rules in another person's interests.[96] In the case of positive law in Central and Eastern Europe, the typical course is supposed to give future lawyers all the necessary tools for handling another person's agenda, to decide over another party's case or to defend another person's rights. In contrast, in a legal ethics course, students learn how to handle their cases and how a lawyer is supposed to act. In other words, students in this course do not enjoy the kind of detachment that allows lawyers to maintain their distance and gain objectivity in understanding the case of another person. Legal ethics courses do not ask, 'How would you solve this issue for your client?' or, 'How would you decide such a dispute?' Just the opposite, they ask students, 'How would you act in such a situation?' Instead of holding the observer's aspect, students take upon themselves the role of participants.

'*Unlike in other areas, in the law governing lawyers, the lawyer is the client. When a lawyer interacts with the law generally, she does so as a once-removed expert. The client who comes to the lawyer has direct contact with the law; the client has the tort problem or the contract problem. The lawyer's experience with the law is vicarious, through its application to the client. Not so the law governing lawyers'*.[97]

We expect lawyers to be independent in their actions, understanding the duties of representing a client, practicing candour towards the court, and maintaining society's wellbeing. It might be an unreachable goal to obtain these outcomes through a paternalistic education system based on an approach that says, '*Listen, you will be told how the practice ought to be done'*. Letting students enter the practice without a proper understanding of their role in society may lead them to understand lawyering as another lucrative business that allows a person, after legal training, to enter the higher levels of society and gain large amounts of wealth.[98] However, one of the most important outcomes of a student's legal education should be that personal financial gain is not at the core of the lawyer's attention.

To achieve this goal, students must be provided enough training under supervision, which will allow them to face the challenges of their social role as parts of the justice system. It would instil more discipline in the Foucault sense—repetitive action leading to a desired goal.

[94] I apologise to readers, as there is no evidence of this step in a source written in English. https://www.najpravo.sk/clanky/ms-sr-advokati-otvorili-diskusiu-o-kvalite-pravnickeho-vzdelavania-na-slovensku.html.

[95] https://www.najpravo.sk/clanky/ms-sr-advokati-otvorili-diskusiu-o-kvalite-pravnickeho-vzdelavania-na-slovensku.html, https://www.sak.sk/web/sk/cms/link/news/645.

[96] MOLITERNO, J. E.: An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere. In *University of Cincinnati Law Review*, no. 60, 1991, pp. 98-99.

[97] MOLITERNO, J. E.: Experience and Legal Ethics Teaching. In *Legal Education Review*, no.12, 2001, p. 6.

[98] The institutional approach has been applied to the institution of education. See SAHA, L. J. (ed.): *International Encyclopedia of the Sociology of Education*. Pergamon. 1997. pp. 340-345.

The call for experiential learning about legal ethics alongside legal practice is important, because students cannot understand the limits of interpretation of the formal provisions simply by memorising the code. The education system needs to keep this in mind for the sake of future jobs and individual development. The law graduate should be a model figure who is confident of their integrity and expertise in their field.[99] However, even the structure of internships and live client clinics may not prepare students for the legal ethics issues they will face in practice.

4.2 An intensive simulation course on legal skills filled with issues of professional ethics

Jim Moliterno has been leading the course on Skill Immersion at the Washington & Lee University Law School. This course inspired a proposal for a similar method at the Slovak Law faculties. '*This intensive simulation course treats professional responsibility and skills teaching in the context of long-term, comprehensive, simulated client service*'.[100] The method entails close supervision of students' work by a group of teachers and law practitioners. The program is divided into two stages—a classroom presentation and a simulated client presentation. The latter is organised around a simulated student law office. Teachers play the role of the supervising senior lawyers in a law firm. Students in the role of junior lawyers are assigned a case, and a selected person plays the role of the client. The client knows the scenario of her case, including the twists and turns that will require the student lawyer to respond quickly. This approach tests the student's knowledge and skills. The client presents their case to the student, who is responsible for the case from the outset. The client may be played by a teacher, lay person, or another student. When a student plays the role of the client, they may gain yet another perspective. Only students who did not take part in the same scenario in previous years are eligible for the role of the client. Just as in a real-life situation, the lawyer must have effective communication skills to gain all the necessary information from the client.

The simulation can be focused on any legal matter, whether civil or criminal, as well as on litigation and planning, deal-making matters regarding product liability, corporations, bankruptcy, international business transactions, public international law, administrative law, environmental law, social programs law, criminal procedure, juvenile law, or estates.[101]

The student, under the supervision of the teachers, develops a strategy step-by-step, filing motions, communicating with the court and authorities, as well as communicating with the client and opposing party. They also write memos within the law firm and negotiate on behalf of the client. The supervising teacher is kept informed of the case by being copied on communications and documents the student sends by email. At the end

[99] For the requirement of leadership for lawyers see RHODE, D. L.: Lawyers and Leadership. In *The Professional Lawyer*, no. 20, 2020, p. 12.

[100] MOLITERNO, J. E.: Legal Education, Experiential Education, and Professional Responsibility. p.107.

[101] *Ibidem*, p. 108.

of the case, the students must provide a recapitulation and explanation to the client, as well as present the case to the teachers—their senior lawyers. The client is instructed to ask about all the information provided in the closing statement.

This method is used to test both the students' awareness of professional responsibility issues, which are included in the scenarios, as well as their knowledge of substantial and procedural law.[102]

The relationship between client and lawyer involves many situations from which ethical issues may arise. The lawyer may take on a case with a client who is strong-willed, determined to stick to their ideas and unwilling to negotiate other strategies. Alternatively, the client may be passive and fall into a paternalistic relationship with their lawyer. How can a lawyer learn the limits of the client's goals and what is in the best interests of the client?

The agreement regarding the lawyer's fee is also part of this scenario, and it may include contingency fees on product liability, within limits stipulated by the law. When a lawyer is representing multiple clients, a conflict of interest may appear and must be reported. Such scenarios can also include breaches of confidentiality, which can occur in cases involving endangered minors or through negligence, such as by sending an email with too much information to the opposing party. A command from the client may be unethical, or even unlawful. Strategies to respond to knowledge of a client's perjury may be included in a code of ethics, as well as the limits by which a witness can be prepared and trained for a trial. What should a lawyer do when the assigned judge is a person they know, and can it affect the case?

Such training through simulation, done repeatedly on various legal issues, may prepare the student for more sensitive issues regarding professional ethics. Furthermore, '*it could enhance moral development of law students, and therefore lawyers,' and it could increase lawyers' perceptions of their preparation to face professional responsibility issues in practice'*.[103]

This type of simulation could be arranged at the law faculty one or two weeks before the ordinary semester, or it could start simultaneously with the semester. The whole case would last for two weeks, during which time the process of communication would be paced to fit the time allotted. The clients acting in the scenarios may respond to students' messages immediately or, surprisingly, up to 7 p.m. on the day before a deadline.

The case would be focused on a course that the student passed in the previous semester, assuming that the students have already finished the Legal Ethics course.

[102] '*The Program also provides students with experiential ethics education. The treatment of ethics within the context of the simulations allows the simulated experiences to be more than mere games. Although it is true that the deeply emotional impact of a live-client experience exceeds that of a simulated client representational experience, the inclusion of ethics makes the simulations much truer, better-textured representations of client service. For example, teaching the professional responsibility issues regarding truth-telling in negotiation in conjunction with teaching negotiation tactics imbues the negotiating experience with consideration of legitimate client and lawyer goals beyond the mere victory over an opponent'.* MOLITERNO, J. E.: Legal Education, Experiential Education, and Professional Responsibility, p. 108.

[103] MOLITERNO, J. E.: Legal Education, Experiential Education, and Professional Responsibility. p. 107.

Depending on the capacities and skills of the personnel at the faculty, such a course could be offered once, twice or more times within the curriculum. It would require a sizeable number of personnel, since for a group of 100 students, at least 10 teachers would be required to supervise the 10-person groups of students. These students would work in pairs, so each supervisor would have five teams. The teams of lawyers would stand against an opposing party of another two students, so 25 trials would be carried out in total.

The entire simulation would be carried out under supervision, from the initial client interview, through the fact investigation, research and writing activities, the filing of pleadings, the motion practice and discovery practice, up to the trial and a debrief, with explanations to the client, as well as the presentation of the case to the teachers. After all of this, the student would be provided with feedback on all issues: what the student handled well, forgot, or did not detect. The final interview with a teacher should give the student not only a grade but also a summary of the tasks that they did or did not solve and what consequences could follow in real-life situations.

Conclusion

With this paper, I do not intend to criticise the system of power structures. Leibniz's argument about the best of all possible worlds is fitting in this context. For a long time, disciplinary power has been the main guarantor that agents' actions are predictable. However, it seems that the disciplinary age is ending. Disciplinary power built social institutions that allowed for technological developments and economic growth unparalleled in history.[104] The behaviour of individuals became predictable and controlled, which facilitated the interactions and sharing of ideas among communities. Even today, a well-behaved person who takes care of others in their community is defined by their discipline.

In this paper, I claim that this discipline is diminishing in legal professions, while the public demand for discipline among lawyers is high. This attempt to reverse the entropy of discipline is furthered through excessive optimism towards regulations and the expectation that new codes will miraculously save the day. However, a norm in itself does not possess enough motivation to compel obedience to it. Rather, training and repetition of the required behaviour is the essence of an institution, which is a stable social structure defined by its repetition. As seen with the formal rule, it is impossible to talk about established institutions without repetitive practice.

Although the terms 'disciplinary proceedings' and 'disciplinary measures' are used widely in many jurisdictions, their meaning does not capture the complete nature of discipline. As was defined above, discipline is a positive, voluntary attitude of an individual in favour of obeying rules. What is misleadingly referred to as a disciplinary measure is merely an extension of sovereign power used to punish. Disciplinary power,

[104] For the mutual dependence of institutions in the West see NORTH, D. C.: *Understanding the Process of Economic Change.* p. 83.

conversely, does not punish. It moulds the individual and pushes them towards the desired outcome through repetitive training and a normalisation process. When discipline is broken, repressive power is there to decide whether to punish the breach.

A dependence on discipline is essential in legal professions. All legal professions, perhaps with the exception of procurator, enjoy broad independence. Accountability in these professions is mainly based on voluntary commitment to a duty.[105] Lawyers are essential for society to function and critically affect whether the public obeys or does not obey the rules. Lawyers are symbols of the institution of law itself. In particular, their actions set the tone for the public regarding how effective the law can be, such as whether the law can protect the rights of the weak or regulate the power of the strong. Lawyers should always keep in mind that the law's role is to secure equal rights for the powerless and the powerful.

A code might be helpful for strengthening accountability. However, it must be understood that a code is not fully concerned with ethics. Its efficiency is necessarily connected with the impact it can have. Any profession which does not have issues with members breaching its principles, or which works perfectly because of its members' well-rooted discipline, does not need a code. On the other hand, if a profession has issues with discipline, a detailed code alone will not help it. If the level of discipline does not improve, the code can be supported with sanctions. In such cases, the disciplinary proceeding may be a spectacle to punish the rule-breaker and, simultaneously, send a message to others who might be inclined to breach the standard. However, it will not solve the problem. Having a code of conduct or code of ethics without an infrastructure of continuous training on professional discipline skirts the issue of correcting a profession that does not defend its values or is too lenient to punish those who breach them.

A lack of discipline is the failure of an education system that did not properly fill a void following the fall of the previous regime.[106] The vacuum of discipline cannot not remain empty. If the ideological state apparatuses like schools and professions do not fill it, some other interests will, and interests of economic power and profit may replace virtue within some professions. Alternatively, the ideological apparatuses of other systems may infiltrate the current system. If the absence of disciplinary power is considered the liberation of an individual from power, I beg to disagree.

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[105] See MOLITERNO, J. E., BERDISOVÁ, L., ČUROŠ, P., MAZÚR, J.: Independence without accountability: The harmful consequences of EU policy toward central and eastern European entrants. In *Fordham International Law Journal*, vol. 42, 2018, no. 3.

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