Published by the decision of the Scientific Council
of Khachatur Abovian
Armenian State Pedagogical University

Department of Philosophy and Logic
named after Academician Georg Brutian

W I S D O M

Special Issue 1(1), 2021
PHILOSOPHY OF LAW

WISDOM is covered in Clarivate Analytics' Emerging Sources Citation Index service

YEREVAN – 2021

DOI: 10.24234/wisdom.v1i1.675
Igor KOLOSOV,
Valeriy KONNOV,
Igor MUKIENKO

AXIOLOGICAL ASPECT OF LEGAL CONSEQUENTIAL THOUGHT OF THE LATE 18th – EARLY 20th CENTURIES

Abstract

This article is devoted to a comprehensive review of the axiological measurement of legal consequentialism, analysing the ideas of law theorists representing the utilitarian and close to utilitarian branches on the view of values essential for society and state development. The purpose of the article is to identify what value is key for legal consequentialism as a whole, as a theory based on the significance of the result of legal actions, as well as for legal utilitarianism, which necessitates maximising utility. The article focuses on content analysis of key trends in the main legal doctrines of legal consequentialism. In these trends, the authors single out the main concepts, bearing in mind their value for legal science.

The conclusion section of the study generalises the categories that appear valuable for legal consequentialism and formulates the common values of legal consequentialism. The authors justify the need for preserving the axiological aspect of rights and freedom of man and citizen, for ensuring the principles of equality and justice, the humanistic basis for legal activity and the unacceptability of rejecting the said values for a utility or other maximisation.

Keywords: axiology, consequentialism, legal consequentialism, utilitarianism, legal utilitarianism, utility, value, classical utilitarianism.

Introduction

In post-nonclassical rationality that centres around the subject of cognition, his/her interests, needs, and values, the axiological approach to studying social phenomena appears especially relevant. With its growing focus on the essence and hierarchy of legal values, legal science is also not an exception (Tsintsadze, 2013). The utilitarian analysis occupies a special place here for being oriented towards analysing utility maximisation by the cognition subject and satisfying the needs he/she may have.

Due to the specificity of the research matter, cognising the essence of legal values is impossible without a well-grounded philosophy. Comprehensive analysis of the essence of legal values is still poorly reflected in academic literature, even compared with other categories of legal philosophy. Legal researches very often focus more on the definition of legal values for the results of such studies to be considered in practice to protect such values against infringement. At that, firstly, the nature of legal values as a deeply philosophical category is significantly underestimated. Secondly, even if this category is analysed, such studies do not reflect the collision between the nature of legal values and the essence of utilitarianism[1].

Nevertheless, to a certain extent, the issues of the axiological characteristics of law have been recently recognised in the philosophical, legal discourse, and the general theory of law. This is

[1] Thus, utilitarianism can justify lawlessness, arbitrariness, injustice in relation to certain people, if this maximizes the utility of others.

a complex but, at the same multifaceted and methodological relevant task, the fulfilment of which may bring modern law to a new level of perceiving legal reality. Reference to axiology in the legal category of consequentialism studies is brought about by a series of interrelated problems concentrated around the question of the effectiveness of law in the postmodern age.

One such problem is the estimation of values in the context of consequential legal thought. Obviously, a rational person is expected to prefer major values and avoid minor ones, questioning the axiological theory on the perception or opposition to the consequential approach. On the one hand, the consequential approach allows creating a methodology for estimating the subjective utility of categories and goods, which are valuable for that subject. On the other, opponents of such an approach may suggest that a real ethical deed must be motivated by the concepts of honour, duty, and other noble moral stances as opposed to one's individual aspiration to happiness.

Considering the above, the objectives of this research are as follows:

1. to determine the categories that bear any value in the context of legal consequentialism and to conduct a critical estimation of such;
2. to analyse the axiological approach described, first, in the doctrines of the classical legal utilitarianism, and, second, other philosophical and legal doctrines of the 19th and early 20th centuries based on the principle of achieving results.

The contribution this article makes to the philosophy of law is determined by the achieved results that represent the substantive content and external expression of law within the framework of the principles of consequentialism. This article presents an analysis of the nature of legal values both within the framework of utilitarian and non-utilitarian consequential concepts of the period of time slightly longer than the "lengthy nineteenth century"[2].

[2] Is I. Ehrenburg's term, which coined for the 125-year period comprising the years 1789 through 1914.

Analysis of Sources and Recent Research

In this research, existing works on the philosophy of law and the history of legal doctrines have key significance. Special attention, however, is paid to classical utilitarianism (utilitarianism by J. Bentham and J. S. Mill) as doctrines that are the product of philosophical thought (Malakhov, Mailyan & Sigalov, 2017, p. 23) and that laid the theoretical foundation for the appearance of all successive doctrines based on the need for utility maximisation, as well as the achievement for the subject of another significant result.

The axiological aspects of utilitarianism as defined by J. Bentham are reflected in the works of N. Rosenblum (1978), H. L. A. Hart (1982), G. J. Postema (1986), A. N. Ostroukh (2002), J. Dinwiddy (1989), J. H. Burns (2005), P. Schofield (2010), A. Perreau-Saussine (2004), and others.

The axiological aspects of utilitarianism as defined by J. S. Mill are reflected in the works of N. F. Alican (1994), R. Crisp (1997), W. Donner (1991), A. Ryan (1990), J. Skorupski (1989), H. Hollander (1985), T. Mawson (2002), and others.

The period chronologically following classical utilitarianism, the development of ideas by J. Bentham and J. S. Mill, and the axiological aspect of legal concepts based on the utility maximisation are reflected in the studies made by J. Anomaly (2005), K. J. Arrow (1963), N. B. de Marchi (1972), H. Hovenkamp (1993), E. Kauder (1965), G. Stigler (1950), and others.

Also worth noting is that a large contribution to the research of issues related to the axiological aspect of legal researches was made through studies in the fields of social philosophy, philosophic axiology, structural ontology, and cognition methodology by W. Windelband, J. Habermas, O. Hoeffe, A. A. Ivakin, W. Dilthey, M. S. Kagan, I. Kant, H. Rickert, L. N. Stolovich, V. P. Tugarinov, E. Fromm, A. Yu. Tsofnas, as well as

the authors of sociological theory and postmodern philosophy J. Baudrillard, P. Bourdieu, A. Giddens, J. Derrida, J.-F. Lyotard, and M. Foucault.

Without due regard to the aforementioned researches, it is impossible to consider the issues related to the axiological aspect of legal utilitarianism or other legal thought domains. Therefore, taking into account the achievements of Kantian and post-Kantian philosophy of law, it is possible to continue the researches that combine legal utilitarianism and legal intuitivism on a rational and metaphysical basis (Kolosov, 2021).

At that, it is important to notice that, apart from the neo-Kantian tradition popular in legal science that presents values as independent from both the subject and the object, the concept of the value and the problem of its relationship with the subject may have a broad range of different interpretations. The concept of value was studied from the point of view of the psychological approach by A. Meinong and G. Santayana and in the context of "naturalistic" axiology by R. B. Perry and J. Dewey. M. Weber and E. Durkheim implemented the sociological approach in axiology in an attempt to comprehend the sociological issues from an axiological point of view.

A strong impulse to the development of axiology was given by phenomenology, and the works of E. Husserl, M. Scheler, N. Hartman, G. Ingarden, G. Shpet, and M. Dufrenne led to the discovery of one of the milestone axioms for the modern understanding of values – the intentionality of axiological attitude. The phenomenological interpretation of values transformed into different representations brought up by the existentialists (J.-P. Sartre, A. Kamu) and hermeneuts (H.-G. Gadamer, P. Ricreur), as well as M. Heidegger (who refused to belong to either).

The majority of the researchers listed above define the concept of "value" by highlighting their basic characteristics that are somehow inherent in various forms of their existence: "significance", "normativity", "utility", "essentiality", etc. Similar to other trends of legal thought, legal utilitarianism expresses the concept of value in the characteristics relevant for the subject of law, defining his/her state, attitude towards various manifestations of the existing reality that influence him/her directly or indirectly. Emphasis is placed on the relationship between the concepts of "value" and "utility".

Therefore, it is quite fairly stated that, on the one hand, the emergence of value is related to some objects, phenomena, their properties, and capacity of satisfying the needs of people and society, and on the other, value functions as a judgement that is subsequent from the estimation of an existing object or phenomenon by people and society. There is a need for some reference point here, a coordinate system, or at least, common principles for such estimation. And these basic categories, although not indisputable in their content, are suggested by legal utilitarianism.

Despite a noticeable increase in researches focusing on legal axiology, some general issues still remain unsolved:

1. What can be considered legal values with regard to the emphasis on such claims by legal utilitarianism and other legal doctrines?
2. What are their meaning and objective?
3. How do legal values emerge and function?
4. What is their hierarchy, how should legal values be assessed, and is it possible to use the achievements of legal utilitarianism for such assessment?
5. By what means do values of law and legal values penetrate into the regulatory sphere of legal reality?
6. Are legal values and values of law immediate legal regulators?

This way or another, these and many other issues of legal axiology require adopting new approaches at the philosophical-legal and general legal theoretical levels. A proper study of these issues in the context of legal consequential' ideas appears to open the specificity of the dynamics of values in the legal sphere from a different perspective.

What is Valuable for Legal Consequentialism?

The fact that the emergence of values is caused by human needs is stated by many axiological theories. The maximisation of utility, being the main objective of any human life and achievable through the satisfaction of needs, enjoyment, and happiness, is the underlying concept of legal utilitarianism. The diversity of human needs to a certain extent determines the diversity of values related to all possible varieties of social relations regulated by law or morals. Therefore, it can be stated that every person has a set of values related to human needs in a diversity of regulated social relations.

At that, this set of values is not equal to the human set of values, as some forms of social relations, the aspiration for which is claimed by the values may satisfy different needs of a person. Therefore, the correlation of the set of values with the set of human needs may be only presented through an invariant structure of the values system manifesting only the values that are common to all people. On the one hand, people's needs are extremely diverse, with the common ones being only basic human needs; on the other hand, legal utilitarianism relies on the statement that everyone aspires to maximise their utility, also through the satisfaction of a maximum number of current subjective needs in the fastest way possible.

Correlating these two trends to maximise utility for the maximum possible number of people without reducing the utility of others, or, according to J. Bentham, ensuring the greatest happiness for the maximum possible number of people, is the main task of a lawmaker and law-enforcer in the utilitarianism framework.

Another key axiological problem of legal consequentialism, including legal utilitarianism – the objectivity of value, carries a principal meaning, also for the philosophy of law. It is hard to dispute that a man has no other way of judging the value of anything or a phenomenon apart from evaluating them. This thesis underlines the statements of many philosophers for whom value equals estimation, or, according to M. Heidegger, for whom "considering a value is an estimation". The works of the fundamental ontology author are often quoted by followers of the subjectivist vision of values to support their arguments. According to M. Heidegger (1993b), "if a value being continuously referred to is *not* nothing, its existence must be enrooted in being" (p. 183).

The axiological principle of classical utilitarianism is extremely eudaemonist: "Ensuring the greatest happiness of the greatest number" (J. Bentham). Therefore, the common final criterion of evaluating people's thoughts and deeds, the maximisation of utility due to the need to achieve pleasure or ensure happiness (depending on the utilitarianism branch). In this situation, the task of a rational person would be to find a "balance between pleasure and suffering". Utilitarianism is limited to a quantitative "calculation" of values – "felicific calculus" ("moral arithmetics"), similar to the receipts and expenditures calculation done for maximising profit.

However, it does not deny any qualitative criteria of evaluation (especially in J. S. Mill's doctrine). For example, in classical utilitarianism, spiritual values are considered superior to physical ones, intellectual pleasure to bodily pleasure etc. The utilitarian "calculation" of values is widely used in new utilitarianism and pragmatism (Dewey, Gems, Schiller), in phenomenology (Smart, Emerson, Branyat), in the "theory of justice" by J. Rawls, and in the "technology of behaviour" by B. Skinner.

Value as a judgement, as estimation, is always considered through the prism of a logical subject-attitude-object chain, which means they need for subjectification of a value only something that has been evaluated can become a value. Based on the aforesaid, the object cannot be a value as such, as value is always subjective. On the other, such an approach was mistaken according to M. Heidegger (1993a), who claimed

that "at last, it is time to understand how precisely through the characterisation of something as 'a value' what is so valued is robbed of its worth. That is to say, by assessing something as a value, what is valued is admitted only as an object for human estimation. ...Every valuing, even positively, is subjectivising. It does not let beings: be. Rather, valuing lets beings be valid solely as the objects of its doing" (p. 94).

That said, it is often subjectivism that is perceived as a dominating axiological concept in the philosophy of law. In the great diversity of different explanations of value and its role in law, the works of N. N. Alexeev, P. M. Rabinovich, N. Nenovsky, V. S. Nersesyants, and others are of special interest. The works of these outstanding law philosophers have many things in common since they reveal only one of the many aspects of value in law, which is valuable as a utility and a need. As such, subjectivism as a dominating axiological concept reaches its peak in legal utilitarianism.

Axiology focuses (with rare exceptions that do not, however, change the general picture) on the psychological phenomenon alone. In such a view, values are something that satisfies (or has a capacity to satisfy) needs, whatever they may be. Therefore, need already exists, so to say, before its encounter and contact with value. It is only left to find what can satisfy it and become valuable in this sense.

Only in the abstract analysis needs are primary in relation to the means of their satisfaction. In fact, values, even in the psychological sense, are not something associated with present needs but something that creates or is capable of creating them. Needs are oriented not as much towards objects as on values, and the satisfaction of such is about being connected to these values. Needs are the means of actualising values; there is nothing human in values, and the word "value" is just a senseless multiplication of notions.

Legal utilitarianists defined happiness as a "balance of satisfaction and non-satisfaction" established by the mind in unity with inborn feelings and instincts. This is an anticipation of the future positivist sociology, "calculation" of good and evil in the non-positive and new utilitarianism (Weber, Nowell-Smith, Hare, Smart).

As a result, legal utilitarianism, in general, comes to the following conclusions:

1. Individuals have needs and wishes in consuming some goods (including social goods manifested through legal regulations[3]), proper law exercise mechanism for authorised subjects, social order, etc.). However, the intensiveness of these needs and wishes declines as the consumption of these goods increases;
2. People react to stimuli comparing the "difference" of utilities, i.e., for any action, we compare the utility (pleasure) it may bring to the number of expenditures (suffering) it may cause;
3. Exercising certain legal policies, the state may control people's behaviour by measuring and further practical exercise of socially justified rewards for the socially desired activity or punishments for the socially undesired and (or) socially hazardous activity, but the state, at the same, also exists in the context of maximising its own utility;
4. Generally, the similarity of the individuals' needs to be determined by the evolutionary process (Darvinism effect) (Kolosov, 2019), the presence of pleasures and sufferings as "interim" results of decision-making allows comparing the level of utility of satisfying the same needs between different people, revealing, therefore, the most efficient legal norms from the utilitarian perspective.

[3] Legal regulations are good because, for example, in providing certain rights and freedoms, establishing a certain mechanism of legal regulation, they satisfy the needs of certain individuals whose utility function includes these goods (therefore, increasing utility), as well as certain social groups, the great majority of the population, or the nation as a whole. Thus, for example, the safety of an individual, protection of an individual from infringement on his / her life, health, property (and so on), is ensured through prohibition of such infringement established by criminal, administrative, and other laws and regulations, as well as the existing system of the law enforcement bodies.

These ideas resulted in quite a complete and consistent theory of individual decision-making and a corresponding model for exercising national policy, including legal policy. The theory is based exceptionally on the consumption of goods required for a person to satisfy his/her daily needs. Law is only required to optimise this consumption process in a way that would be the most useful for the greater number of people, i.e., maximise its utility.

In 1970, The Consumer Society by J. Baudrillard was published. It claims that consumption makes a man lose his creative essence, alienate from it and turn into a consumer. J. Baudrillard (2020) remarks, "As a consumer, man becomes solitary again, or cellular – at best, he becomes gregarious (watching TV with the family, part of the crowd at the stadium or the cinema, etc.)" (p. 115). Man is a small atom in a huge social system, exposed to the influence of mass media, fashion, advertising, and different stage performances. Man gets absorbed in an imaginary world, at the same time striving to escape through it, which is stimulated by unrestricted material consumerism, mindless fascination with mass culture, vulnerability to different addictions.

As an atomised and isolated subject, man gets overfilled with "sincere faith in consumerism", and "the rising generations are now inheritors: they no longer merely inherit goods, but the natural right to abundance" (Baudrillard, 2020, p. 21). In other words, the fascination with consumption is seen as natural, and the number of consumed items becomes a criterion of success. By the way, at present, the legislative and other law-making practice in the Russian Federation is oriented towards increasing the number of enacted legal regulations. But does a greater number of legislative acts and other regulations usually correlate with the quality of life and achievement of happiness?

As such, happiness, self-creation, and self-identification of man, as a result, according to legal consequentialism, are caused by his consumption capacity, but it must then raise a question on driving this consumption, on developing a mechanism for its distribution, control, and regulation. This creates both the background and the excuse for the bureaucratic machine that provides such consumption. However, the creation of such with a purpose to maximise consumption may stand on one scale, while freedom may be pushed out to the other. There may be nothing blameworthy in the first, as restricting some rights to guarantee such goods as security, stability and order, for providing the greater utility of other goods may become available as consequences of the previous legal solutions. However, the choice of the "scales" is a matter of values in the given community[4].

This way, based on the above, the following may be concluded.

The foundation for social life governed by legal regulations is values that basically do not exist in reality. Values are the matter that connects people and reality as a fragile bridge for their transition into the preferred reality, associated with maximising utility (or any other result, significant for the subject) manifested in pleasure or happiness (depending on the utilitarianism branch in question).

Values are what one should look up to regardless of their voluntary nature; this is why it is valued, not self-identification of the subject, that underlie freedom. Values only make sense as absolute reference points, as milestones. In attempting to make values relative, we dissolve the meanings and ideas they represent, replacing them with practical motivation; here, values are nothing but their costs. In such a "practical" community, everything is rational but fruitless.

Values are forms, not content. Values are absolute in their form and are therefore unchangeable. It is only their content that can change, that can be connected with value as their form in any voluntary way. On its own, value is an invariant spiritual state of people from the perspectives of their dominants, archetypes etc. Changing the

[4] This process goes back to modernism, which is pointed out by F. Jameson (2019, pp. 183-184).

attitude to values means changing the people.

Axiological Approach of Classical Utilitarianism Philosophers

According to the utilitarianism concept, the main axiological principle that should be followed is the principle of utility. It represents an endorsement of those actions that increase utility or decrease suffering: the first considered as "right" and the latter – "wrong". Given the division of actions into two "categories" by J. Bentham, the principle of utility becomes a moral imperative that should be followed in different domains, including legal activity, and ethics is defined as the art of managing people's actions for producing the maximum amount of happiness. Correspondingly, the law should establish such a mechanism for regulating social relations that would maximise the utility of the majority of people and minimise their sufferings, thereby ensuring "the greatest happiness of the majority".

Just like J. Bentham, J. S. Mill relied on the need for achieving happiness as a foundation of his moral and political philosophy. According to J. S. Mill (2013), happiness is the only goal of human life because happiness is what people actually desire (p. 137). "This, being, according to the utilitarian followers' opinion, the goal of human activities, is necessarily also the standard of morality; which may accordingly be defined, the rules and precepts of human conduct" (Mill, 2013, p. 61). According to J. Bentham and J. S. Mill, striving for happiness is a fundamental given of human nature. Happiness here acts as a fundamental value. This is why striving for happiness is the foundation of the principle of utility introduced by classical utilitarianists that "considers the greatest happiness of all those involved to be the true and right goal of any human action" and that is "the only genuine goal, the only imperative goal that is desirable from all perspectives".

The moral universality of classical utilitarianism (according to the general classification by Apressyan (2016) manifests itself through the principle of utility that expresses universality as an absolute and defines ethics as knowledge-oriented towards the search for moral truth. The prevalence is associated with constant changes in the structure of values. Generalisation constitutes the very method of moral estimation through which every deed must be correlated with the principle of general utility. In this regard, unlike J. Bentham, J. S. Mill does not deny the significance of universality, completing it with the "universal experience", i.e., the experience of entire mankind as a species. Thus, an imperative is formed, which, in contrast to the categorical imperative of I. Kant determines the global utility by the maxima of behaviour. This is the source of normativity for the most utilitarian theory that also creates normativity "outside the theory", formulating a general principle of action that ultimately appears as a value.

The source of normativity and recognition of the ethical system, including utilitarianism, lies in the proof of what exactly is *desirable*, i.e., what forms the final goal (and the only goal served as a criterion for morality). J. S. Mills (2013) draws an analogy between the observability of physical phenomena such as light and sound and the object of human desires: "The only proof capable of being given that an object is visible is that people actually see it. In like manner, I apprehend, the sole evidence it is possible to produce that anything is desirable is that people do actually desire it" (pp. 137-139). Relying on this analogy, he claims that people's final goals that form the notion of a moral good can be derived from their actual goals. Therefore, in utilitarianism, happiness is the only goal of human life because happiness is what people actually desire (p. 137). "This, being, according to the utilitarian followers' opinion, the goal of human activities, is necessarily also the standard of morality; which may accordingly be defined, the rules and precepts for human conduct..." (Mill, 2013, p. 61). Therefore, happiness that is primarily identified by utilitarianists in their observation

of human conduct is further promoted to a moral imperative.

For J. Bentham, the source of moral categories, as such, is beyond the sphere of his interests; he manifests them on a pragmatic ground, proceeding from the needs of legal practice and law-making activities. In his definition of the principle of utility, J. Bentham emphasises that this principle is applicable to any actions, including those related to the exercise of statutory and legal regulation.

From *An Introduction to the Principles of Morals and Legislation* by J. Bentham and his other works, we may conclude that in order to comply with the principle of utility, the legislative regulation must rely upon the following:

1. New laws must only be enacted in situations where they increase people's happiness compared to other alternative draft laws or the situation of total absence of the law regulating the given domain of social relations;
2. Laws must be rigorously followed (unless the law clearly causes the suffering of many people)[5];
3. Laws must be recognised as invalid and replaced with new ones if the old laws do not comply with the principle of utility.

Thus, the main value of legal utilitarianism is utility-maximisation. The law must facilitate such maximisation, not obstruct it.

The Value Approach in Non-Utilitarian Theories of Legal Consequentialism

After classical utilitarianism, a significant role in creating the environment and conditions for the development of consequential legal thought was played by R. Jhering. He was known as the German Bentham because his line of legal thought had a specific socio-utilitarian orientation and was even called social utilitarianism (Seagle, 1945, p. 71), although it is not utilitarianism in a strictly formal sense. While other works on the philosophy of law were mostly focused on the search and definition of the nature of law, R. Jhering drew everyone's attention to the relevance of the rule of law as a legal category. He emphasised the social purpose of the law and insisted that the law must be brought into conformity with the variable social situation for the law to comply better with the current social relations and to make legal regulation more socially beneficial. His thesis was that the protection of individual rights is dictated only by social considerations. What is known as "intrinsic rights" is nothing but social interests protected by law. The well-being of people is not the ultimate goal; it is recognised as such only to the extent to which it promotes the general well-being of society.

R. Jhering's social utilitarianism is a link between J. Bentham's individual utilitarianism and two important branches in the 20th-century legal science: "jurisprudence of interests" in Germany and sociological jurisprudence (sociological law school). Having written *The Spirit of the Roman Law at the Various Stages of Its Development*, one of his main treatises, R. Jhering developed a theory according to which the essence of rights is an interest protected by law. It brought him to the search for the purpose of rights. As a result, he defined the purpose of rights as a creation of laws, the foundation of which will rely on practice. Every action, including one that entails the legal fact, is performed with a specific purpose. The fundamental philosophy of law by R. Jhering is based on the theory of psychological causality. The physical world is completely subject to the laws of cause and effect. At the same time, all the actions of the subjects of law have always been guided by a concept of goal. Therefore, interest is a compulsory condition for any action, and the goal is the "creator" of a law.

In a certain sense, in contrast to utilitarianism, an idealistic concept of values is affirmed in German classical philosophy.

Kant's idea of values is based on the principles of the opposition of the two capacities of

[5] This is only an overview of J. Bentham's law, not a "call" to ignore the laws that do not comply with the principle of utility.

human existence: the world of nature and the "realm of ends". In the world of nature, everything obeys the law of necessity, although people's actions, observed by the philosopher as subordinate to nothing but their will, are actually determined by their sensual needs. Keeping up with Aristotle's tradition of correlating ends and means with ultimate ends, I. Kant suggests that in the realm of ends, a man becomes an intrinsic value (personality is an end for itself).

At the same time, I. Kant introduced the principle according to which the right to happiness must be considered as *quid Juris* (a matter of law). Contrary to the stereotypical perceptions of the analysed trends in philosophical and legal thought, Kantian philosophy is well aligned with consequential legal thought, including legal utilitarianism. A certain synthesis of legal utilitarianism and legal intuitivism is a given in post-Kantian philosophy of law and in modern trends of utilitarianism. Doubtlessly, there are some separate contradictions between the Kantianism-based philosophy of law and legal utilitarianism (Kantianism refers to the motive and intention as the root causes for the individuals' conduct (principle of will), while utilitarianism refers to nothing but maximising utility (principle of utility). Along with that, R. M. Hare (1995) wrote that "it is common to think that there are two schools in the philosophy of morals: Kantian and utilitarian and that their positions are opposed to one other. Thinking so demonstrates a superficial knowledge of both" (p. 18)[6]. N. N. Vitchenko (2006) remarks that in his opinion, I. Kant's categorical imperative is well aligned with classical utilitarianism, especially with J. S. Mill's theory that postulates a general principle addressed to everyone and oriented towards everyone's well-being (pp. 11-12).

Kant's idea of value as a moral absolute that determines the genuine, nominal essence of man brought the philosophical understanding of human value to a qualitatively new level, and his concept of opposing the world of nature and the "realm of ends" became a starting methodological mindset for many further researchers of values (R. Lotze, H. Rickert, W. Windelband etc.).

Following Kant's methodological postulates, R. Lotze distinguishes between the "world of phenomena" (which functions as "things in existence") and the "world of values" (which belong to the realm of "worths", significance). The being of a value is, therefore, of a non-material, spiritual, and idealistic nature. Since the value is reflected in the conscience, and the subject's conscience may be exposed to various subjective factors, according to R. Lotze, everything he considered as temporary, coincidental conditions or some individual manifestations of the soul are of less value. While the greatest value of all is that in which "the spirit becomes free in exercising its actual purpose... that is something pleasant to the constant mood of an ideal soul" (Stolovich, 1994, p. 125). Thus, it is necessary to strive for this, including within the legal sphere.

The same vision of idealisation of values is supported by the representatives of the Baden school, neo-Kantian philosophers W. Windelband and H. Rickert.

W. Windelband continues developing the ideas of I. Kant and R. Lotze on the need to find the being of values outside the empirical reality. According to W. Windelband (1904), "value presupposes general validity and is universally obligatorily recognised" (p. 298). In this regard, the task of philosophy is to comprehend "universally significant values". Philosophy "regards them not as facts, but as norms" (Windelband, 1904, p. 298). In this regard, the task of law is to implement the values learned through philosophy in real social relations.

In H. Rickert's concept, the being of values exists both outside the objects of cognition (surrounding reality) and outside the subject of cognition. He distinguishes between the object of estimation, the act of estimation, and estimations themselves (Fedorov & Blagova, 2016). Unlike W. Windelband, H. Rickert does not admit any

[6] Apart from that, R. M. Hare (1993) substantiated the suggestion that I. Kant was also an utilitarianist.

normativity or imperativeness of value. Value becomes a norm only when it begins relating to the subject of cognition and obeying its will. However, value does not belong to the immanent world of the cognising subject; it is a phenomenon of an independent and transcendent nature. The transcendent nature of value reveals itself in its "self-pressure" (Rickert, 1913, p. 56), which is blurred when the imperative quality is imposed on it. Opposing value to the objective reality, H. Rickert notices that as far as value is concerned, the question of whether it exists or not cannot be asked. The only characteristic value acquired or missing is validity. Therefore, the problem of values is the problem of their validity (gelten) (Rickert, 1911, p. 54).

Perception of value as a transcendent phenomenon may be fraught with some danger. A sacralisation of values may cause a reigning subject ruling the society to monopolise the right to the reproduction of values, presenting to the society his interests instead. Besides, S. Frank remarked that the "genuine and the deepest prerequisite of despotism lies in the idea of infallibility, a mystical, peculiar idea of possessing the absolute truth" (Frank, 1910, p. 146). According to V. V. Ilyin, from the praxiological point of view, idealisation of values may cause violence, "connection of the imperative with the existing through terror and destruction of 'practical humanism'". The author remarks that "absolutism, moralism is unacceptable in the interpretation of values; consistent attitude to values is determined by their obeyance by humanity. The source of values is not the mind, but the life and its needs" (Ilyin, 2005, p. 11).

Another important area that influenced legal theory was marginalism. In this regard, H. Hovenkamp (1993) puts forward the thesis of the marginalist revolution in legal thought. Neoclassicist forward-looking standards of value greatly contributed to the uncertainty and open-endedness of legal policymaking. Eventually, the doctrine appears according to which the average person was nothing more than the state's reification of a standard that its decision-makers wished to impose. "The most general and important implication of marginalism for legal thought was its destruction of the concept that law could be either private or self-executing" (Hovenkamp, 1993, p. 358).

The influence of marginalism on all spheres of public life, including the sphere of law, is difficult to overestimate. In *The Way of Law*, O. W. Holmes testifies to the position that the essence of law lies in the implementation of "marginal restraint" from committing socially undesirable and dangerous acts. When focusing on the result of both the citizen and the state, the law must adopt such norms (and ensure their observance) that minimise negative consequences and encourage positive behaviour. For instance, the purpose of punishment is to give people a motive for legitimate behaviour. O. W. Holmes presented a convincing argument in favour of limiting deterrence as the goal of bringing to legal responsibility, including criminal liability, which is further traced in the works of G. Becker dedicated to the analysis of non-economic, including legal, institutions. O. W. Holmes actually revised the existing system of individual incentives of common law, taking into account the achievements of marginalism.

The materialistic explanatory model emphasises the objects of values. Values identify certain properties of things. Following the traditions of B. Davanzati, J. Locke, T. Hobbes and other thinkers of the Enlightenment Period, a group of modern researchers bring the understanding of values to their property of utility, "goodness" of both material and spiritual objects. V. P. Tugarinov (1960) gives the following definition: "Values are the phenomena (or aspects of phenomena) of nature and society that function as goods in the life and culture of people belonging to a certain community or class as reality or ideal" (p. 3).

N. Nenovsky (1987) explains the objective nature of value with two circumstances: first, with the fact that the properties of the object that

allow a man to satisfy his needs objectively exist for that man; second, with the fact that human needs themselves have material (social) grounds (p. 26).

However, limiting values to needs is hardly reasonable. Needs and interests can be determined by objective psychophysiological factors. As a rule, the satisfaction of such needs mutes the psychophysiological reactions to possessing a particular thing for a certain time or forever. However, when the subject matter is the value of an object for man, the intention of the subject's conduct becomes absolutely different: then, the subject strives not to possess the object and not to be a part of it, but to restructure his life processes in accordance with the properties of the object the subject imposed on that object and made them relevant.

Neither idealistic nor materialistic explanation models cannot fully reveal the mechanism of axiological perception and development of values. On the one hand, values always become the subject matter of discussion when dissatisfaction with existence takes place. In this regard, values become material as far as their genesis is concerned. On the other hand, the conceptual, semantic meaning of values is always idealistic. Although materialism claims that human thinking bears the function of reflecting the surrounding reality, thinking hides a big creative potential. In this context, the axiological imperative differs from the imperative specific to a legal norm. Legal norms and legal values belong to different levels of legal being. If legal norms are material from both their genesis and the final goal points of view, the legal values are only material as far as their genesis is concerned. The idealistic nature of value and its unreachable nature to a certain degree provides its sustainability and system-forming capacity.

Conclusion

This study was carried out to formulate the following general values of legal consequentialism:

1. The ultimate principle of exercising any legal activity – achievement of the most valuable result for the subject of activity;
2. Pleasures and sufferings are motivations for human conduct ("two sovereign masters") in legal utilitarianism. They rule people in exercising legally relevant actions, and this is therefore what the law must rely on according to utilitarianism;
3. According to utilitarianism, justice and injustice are associated with individual utility (or other results), i.e., pleasure, suffering, and, subsequently, the happiness of specific people;
4. Exercising its state policy, legal regulation and law enforcement, state bodies must make all efforts to maximise the values of the population resident within a certain territory, which is how utilitarians define happiness.

More and more often, modern law is considered in the context of adaptation to the new conditions of social functioning. It is well-known that in such moments of significant social changes, the axiological vision of life gains special importance. It actualises questions about the objective meaning and external expression of law as a social and personal value; about the definition and nature of legal values, their relations with the values of law, legal regulations and principles; on the search for mechanisms and principles of interaction between different legal values and values of law. All these determine the urge of systematic axiological studies of law, as they are directly related to the problems of its functioning.

When society and citizens are presented only as components of the human spirit, it becomes extremely problematic to talk about any metaphysics of respect for external reality. With this in mind, the values of society, the values built as a result of public policy, matter. Modern legal values require, firstly, the recognition of objective autonomy and the objective value of civil society and the individual. The employment of

an axiological approach and anthropological methodology, in the long run, determines the need for preserving the axiological aspect of rights and freedoms of man and citizen, ensuring the principles of equality and justice, the humanistic foundation for legal activity and unacceptability of the domination of a cynical, purely pragmatic approach for the sake of maximum utility, if it allows for infringement of interests of any third persons.

References

Alican, N. F. (1994). *Mill's Principle of Utility: A defense of John Stuart Mill's notorious proof*. Amsterdam and Atlanta: Brill. doi: 10.1163/9789004463660

Anomaly, J. (2005). Nietzsche's critique of utilitarianism. *Journal of Nietzsche Studies*, *29*, 1-15. doi: 10.1353/nie.2005.0002

Apressyan, R. G. (2016). *Fenomen universal'nosti v etike: Formy kontseptualizatsii* (The phenomenon of universality in ethics: Forms of conceptualization, in Russian). *Voprosy Filosofii* (Philosophy Questions, in Russian), *8*, 79-88.

Arrow, K. J. (1963). *Social choice and individual values* (2nd ed.). New York: John Wiley & Sons, Inc., London: Chapman & Hall, Limited.

Baudrillard, J. (2020). *Obshchestvo potrebleniya* (The consumer society, in Russian). Moscow: AST.

Burns, J. H. (2005). Happiness and utility: Jeremy Bentham's equation. *Utilitas*, *17*(1), 46-61. doi: 10.1017/s09538208040013-96

Crisp, R. (1997). *Mill on utilitarianism*. London: Routledge.

Dinwiddy, J. (1989). Adjudication under Bentham's Pannomion. *Utilitas,* 283-289. doi: 10.1017/s0953820800000285

Donner, W. (1991). *The Liberal Self: John Stuart Mill's Moral and Political Philosophy*, Ithaca, New York: Cornell University Press. doi:10.1017/s09538208000058-72

Fedorov, V. A., & Blagova, S. A. (2016). *Evolyutsiya ponyatiya "tsennost'"* (Evolution of value as a notion, in Russian). *Vestnik Rossiyskogo universiteta druzhby narodov. Seriya: "Filosofiya"* (RUDN Journal of Philosophy, in Russian)*, 1*, 128-140.

Frank, S. L. (1910). *Filosofiya i zhizn' (etyudy i nabroski po filosofii kul'tury)* (Philosophy and Life (Etudes and Essays on Philosophy of Culture), in Russian). Saint Petersburg: D. E. Zhukovsky Publishing House.

Hare, R. M. (1993). Could Kant have been a utilitarian? In R. M. Dancy (Ed.), *Kant and critique: New essays in honor of W. H. Werkmeister. Synthese Library (Studies in epistemology, logic, methodology, and philosophy of science)* (Vol. 227, pp. 91-113). Dordrecht: Springer. doi: 10.1007/978-94-015-8179-0_4

Hare, R. M. (1995). *Kak reshat' moral'nyye voprosy ratsional'no? Moral' i ratsional'nost'* (How to solve moral questions in a rational way? Moral and rationality, in Russian). Moscow: RAS Institute of Philosophy.

Hart, H. L. A. (1982). *Essays on Bentham: Studies in Jurisprudence and Political Theory*. New York: Oxford University Press.

Heidegger, M. (1993a). *Vremya i bytiye: Stat'i i vystupleniya* (Time and being: Articles and speeches, in Russian). Moscow: Republic Publishing House.

Heidegger, M. (1993b). *Raboty i razmyshleniya raznykh let* (Works and contemplations of different years, in Russian). Moscow: Gnosis Publishing House.

Hollander, H. (1985). *The economics of John Stuart Mill* (2 Vols.). Toronto: University of Toronto Press.

Hovenkamp, H. (1993). The marginalist revolu-

tion in legal thought. *Vanderbilt Law Review, 46*, 305-359.

Ilyin, V. V. (2005). *Aksiologiya* (Axiology, in Russian). Moscow: Lomonosov Moscow State University.

Jameson, F. (2019). *Postmodernizm, ili kul'turnaya logika poznego kapitalizma* (Postmodernism, or Cultural Logic of Late Capitalism, in Russian). Moscow: Gaidar Institute Publishing House.

Kauder, E. (1965). *History of marginal utility theory*. Princeton, New Jersey: Princeton University Press. doi: 10.1515/97-81400877744

Kolosov, I. V. (2019). *Politik-pravovyye sledstviya evolyutsionnogo utilitarizma* (Political and legal consequences of evolutionary utilitarianism, in Russian). *Istoriya gosudarstva i prava* (History of State and Law, in Russian), *8*, 38-44. doi: 10.18572/1812-3805-2019-8-38-44

Kolosov, I. V. (2021). *Pravovye vozzreniya utilitaristov v XVIII–XXI vv.* (Utilitarian legal thought in 18-21 centuries, in Russian) (PhD in juridical sciences dissertation, Moscow, Russia).

Malakhov, V. P., Mailyan, S. S., & Sigalov K. E. (2017). *Doktrinal'noye pravosoznaniye: Kharakternyye cherty i tendentsii izmeneniy* (Doctrinal legal consciousness: Characteristics and trends of change, in Russian). *Yuridicheskaya Nauka i Praktika: Vestnik Nizhegorodskoy Akademii MVD Rossii* (Legal Science and Practice: Bulletin of the Nizhnygorod Academy of the Ministry of the Interior of Russia, in Russian), *4*(40), 21-27.

Marchi, N. B. de (1972). Mill and Cairnes and emergence of marginalism in England. *History of Political Economy, 4*(2), 344-363. doi: 10.1215/00182702-4-2-344

Mawson, T. (2002). Mill's proof. *Philosophy*, *3*(77), 375-405. doi: 10.1017/s003181-9102000359

Mill, J. S. (2013). *Utilitarizm* (Utilitarianism, in Russian). Rostov-on-Don: Don Publishing House.

Nenovsky, N. (1987). *Pravo i tsennosti* (Law and values, in Russian). Moscow: Progress Publishing House.

Ostroukh, A. N. (2002). *Ucheniye Bentama o prave* (Bentham's doctrine of law, in Russian). (PhD dissertation, Russian Academy of Sciences, Moscow, Russia).

Perreau-Saussine, A. (2004). Bentham and the boot-strappers of jurisprudence: The moral commitments of a rationalist legal positivist. *The Cambridge Law Journal*, *2*(63), 346-383. doi: 10.1017/S0-008197304006610

Postema, G. J. (1986). *Bentham and the Common Law Tradition.* Oxford: Clarendon Press.

Rickert, H. (1911). *Nauki o prirode i nauki o kul'ture* (Sciences of nature and sciences of culture, in Russian). Saint Petersburg: Obrazovaniye.

Rickert, H. (1913). *Dva puti teorii poznaniya* (Two ways of the theory of cognition, in Russian). Saint Petersburg: Obrazovanie Publishing House.

Rosenblum, N. (1978). *Bentham's theory of the modern state.* New York: Cambridge University Press.

Ryan, A. (1990). *The philosophy of John Stuart Mill.* Amherst, New York: Prometheus Books.

Schofield, P. (2010). Jeremy Bentham and HLA Hart's 'Utilitarian Tradition in Jurisprudence'. *Jurisprudence*, *1*(2), 147-167. doi: 10.5235/2040332107935242-58

Seagle, W. (1945). Rudolf von Jhering: Or law as a means to an end. *The University of Chicago Law Review*, *13*(1), 71-89. Retrieved from https://chicagounbound.-

uchicago.edu/uclrev/vol13/iss1/4

Skorupski, J. (1989). *John Stuart Mill*. London: Routledge & Kegan Paul.

Stigler, G. (1950). The development of utility theory. *The Journal of Political Economy*, *58*(4), 307-327. doi: 10.1086/256-962

Stolovich, L. N. (1994). *Krasota. Dobro. Istina.* (Beauty. Goodness. Truth, in Russian). Moscow: Republic.

Tsintsadze, N. S. (2013). *Kontseptual'nyye aspekty aksiologicheskoy teorii prava* (Conceptual aspects of the axiological theory of law, in Russian). *Vestnik Tambovskogo universiteta. Seriya: "Gumanitarnyye nauki"* (Tambov University Newsletter. "Humanitarian Sciences" Series, in Russian), *5*, 251-259.

Tugarinov, V. P. (1960). *O tsennostyakh zhizni i kul'tury* (On values of life and culture, in Russian). Leningrad: LOLGU Press.

Vitchenko, N.N. (2006). *Prakticheskaya filosofiya I. Kanta: dikhotomiya "epistemologicheskoye - sotsial'noye"* (Practical philosophy of I. Kant: Epistemological-social dichotomy, in Russian). *Vestnik Tomskogo gosudarstvennogo pedagogicheskogo universiteta* (Tomsk State Pedagogical University Newsletter, in Russian), *12*(63), 9-13.

Windelband, W. (1904). *Prelyudii. Filosofskiye stat'i i rechi* (Preludes. Philosophical articles and speeches, in Russian). Saint Petersburg: D. E. Zhukovsky's Publishing House.