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THE MAIN TYPES OF PROFESSIONAL JURIDICAL THINKING

OS PRINCIPAIS MODOS DO PENSAMENTO JURÍDICO PROFISSIONAL

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ABSTRACT: In his book *On The Three Types of Juristic Thought*, published in 1934, Carl Schmitt introduces his concept of concrete-order thinking which contrasts with two classical juristic ways of thinking: decisionism and normativism considered to be the passed stages of overall development of legal history. In comparative law the legal style, which includes a special way of thinking, is one of the traditional criteria that distinguish one national legal system from another. According to this point of view, German normativism and American decisionism are determined by typical features of corresponding legal systems. Our idea is that each type of thinking is connected neither with legal system nor with historical period of science development but with the specialty of legal profession. Judges in all countries have much in common in their style of thinking. But in a particular country you can find a great difference between the way of thinking of a judge and for example a notary or some enforcers. In our paper we tried to find a connection between three types of juristic thought by Carl Schmitt (rule and statute thinking, decisionist thinking, and concrete-order thinking) and the general structure of juridical profession.

KEYWORDS: Professional juridical thinking. Normativism. Decisionism. Concrete-order thinking. Legal profession.

RESUMO: em seu livro *Os três modos de pensar a ciência jurídica*, publicado em 1934, Carl Schmitt apresenta seu conceito de pensamento de ordem-concreta que contrasta com dois modos clássicos de pensamento jurídico: o decisionismo e o normativismo, considerados como etapas passadas do desenvolvimento geral da história jurídica. No direito comparado, o estilo jurídico, que inclui um modo especial de pensamento, é um dos critérios tradicionais que distinguem um sistema jurídico nacional de outro. De acordo com este ponto de vista, o normativismo alemão e o decisionismo americano são determinados por características típicas de seus sistemas jurídicos correspondentes. Nossa ideia é que cada modo de pensamento jurídico não se relaciona nem com o sistema jurídico nem com o período histórico do desenvolvimento científico, mas com a especialidade da profissão jurídica. Juízes de todos os países têm muita coisa em comum em seu estilo de pensamento. Entretanto, em um país particular, pode-se encontrar uma grande diferença entre o modo de pensamento de um juiz e, por exemplo, o de um cartorário ou oficial de justiça (*enforcer*). Em nosso artigo, buscamos encontrar a relação entre os três modos de pensamento jurídico de Carl Schmitt (pensamento normativo ou estatutário, pensamento decisionista e pensamento da ordem-concreta) e a estrutura geral da profissão jurídica.

PALAVRAS-CHAVE: Pensamento jurídico profissional. Normativismo. Decisionismo. Pensamento de ordem concreta. Profissão jurídica.

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INTRODUCTION. LEGAL THINKING AS A SYSTEM ATTRIBUTE OF LEGAL PROFESSION

It is the understanding of legal profession that has methodological significance. It is a known fact that the lawyer's activities are irregular in respect of subject matter, areas of application and legal status of implementing, which sometimes gives reason for scientists to doubt in the appropriateness of existence of the very notion "legal profession" reflecting certain internally uniform phenomenon. The question is: Does a juridical profession like something unified and indivisible exist in a particular country?

Some researches say that the profession of a lawyer has the following features: (a) the essence that consists in providing the legal regulation mechanism; (b) the contents in the shape of professional actions, which generally result in legal effect; (c) the subject matter of the professional activities being the behavior of people; (d) the aim, which is to establish the legality mode and to secure the sustainable law order; (e) instruments of juridical labor being the normative and individual legal prescriptions and other instruments of legal technique; (f) specific methods of performing professional actions that form juridical technology; (g) forms of professional activities subdivided into external (documents issued by lawyers) and internal (procedure) (SOKOLOV, 2011, p. 49-63).

It can readily be noted that this list of features is descriptive. They look like separate elements or qualities non-unified by certain system attribute. Not all of them relate to each specialty of legal profession. For instance, the quality of special social responsibility of a lawyer for his activities (SOKOLOV, 2011, p. 56) or the statement that any legal activities are aimed at general establishing the legality mode can be regarded solely as the wishes imparted to all the legal profession members, not least because it is the protection of private interest in the local point of the private law sphere (this interest should obviously be protected by legal means, however it can fall apart from the public or governmental interests).

Our idea is that the main quality or system attribute of legal profession, which makes it integral, is a juridical thinking. It's a special kind of thinking, which is based on a professional legal education and includes some specific mental models, its own logic and values.

The essence of legal education seems to be, first and furthermost, producing a specific method of information perceiving for an agent, rather than transmitting of a certain amount of such information perceived by this agent. The main instrumentality of professional thinking of a lawyer is represented by *legal construction*, thanks to which each notion, category and legal phenomenon is regarded as a complicated structure unit composed by a set of legally significant elements or

attributes (DAVYDOVA, 2009, p. 153). As Mr. N. M. Korkunov (2004, p. 427) precisely noticed, "the main hint of legal construction consists in objectifying the legal relations occurring between people and regarding them as separate essences, occurring and changing within the period of their existence and, finally, terminating". Constructions are the main category in specificity of professional legal thinking, yet not the only one.

Moreover, the thinking of lawyer is designated by existence of a certain paradigm, defining the basic presets of consciousness, which are the legal axiomatic statements. It is the juridical training that provides for the assimilating of the most significant values recognized within the framework of the legal paradigm to be the absolute and unconditional truth and answering for the ideal platform for professional thinking. Most of these truths have been widely known since the period of Roman law: (*Ius est ars boni et aequi* – The law is the art of good and fair; *Lex est quod populus iubet atque constituit* – The law is what the people order and establish; *Qui suo iure utitur, neminen laedit* – He who exercises his legal rights, harms no one's interests; *Audiatur et altera pars* – Let the other side be heard, too; *Cuius commodum, eius periculum* – He who gains the profit, bears the risk; *Ei incumbit probatio, qui dicit, non qui negat* – The burden of proof lies with who declares, not who; *Um nulla est obligatio* – Nobody has any obligation to the impossible; *Iura novit curia* – The court knows the law; *Manifestum non eget probatione* – The obvious needs no proof). From viewpoint of commonplace sense, such statements by no means always appear unconditional, but for professional sense they compose the platform for the "frame of references". The "paradigm effect" is activated: what is absolutely obvious for the protagonists of one paradigm can be concealed from the ones who support another (BAKER, 1993, p. 74-75). The mental models rooted deeply inside us arrange our perception of reality in a certain way. It is something like filters built in our eyes and brain (O'CONNOR; MCDERMOTT, 1997, p. 82).

So, the professional legal thinking is the most significant system quality of a legal profession. On the one hand it is caused by juridical education. And on the other hand it is the reason of legal education being universal (DAVYDOVA, 2013, p. 28-35) (sometimes lawyers, who studied in one country, can have a juridical practice in another).

1 THE GROUNDS OF THE CLASSIFICATION OF JURIDICAL THINKING

The foregoing doesn't mean that all the lawyers think in the same way.

Each legal system has its own way of thinking. In comparative law the legal style, which includes a special way of thinking, is one of the traditional criteria that distinguish one national

legal system from another (ZWEIGERT, 1998). This stile is determined by institutional, axiological, ethical, traditional, and other features of corresponding legal system. “Law” is not the same in those systems. That’s why the term “Law” has not the same meanings for lawyers in different countries (for example for French and American lawyers).

So, juridical thinking in various countries has both similarities and differences.

But even in one country professional thinking is not an indiscrete, phenomenon. Indeed, the differences in the activities of the lawyers in the spheres of law-making and law enforcement are substantial; most specialties of legal profession are deeply distinguished in respect of contents, targets and methods; the work areas of the lawyers operating in civil and criminal law are completely different in terms of their goals and directions.

Legal profession itself has some branches with more or less strict boundaries between them. For example in the USA the legal profession is unified, which establishes horizontal mobility between its branches (OSAKWE, 2002, p. 125), whereas in France there is no such notion of “legal profession” that would unite all the lawyers, each category of lawyers (attorneys, notaries, judges etc.) forming its own profession with the appropriate licensing procedure, system of training of new members, standards of ethics and disciplinary responsibility, so it would be more correct to speak of various *legal professions* (OSAKWE, 2002, p. 128-129) in the context of French law.

The exact number of lines of the legal profession is a separate matter of argument as well. Thus, C. Osakwe (2002, p. 125) relates about eight branches forming the structure of legal profession (including the specialist fields of scientific researcher and lecturer in law), while T. V. Kashanina (2007, p. 84) notes that the list of kinds of professions will never be exhaustive as the specialization of legal activities will increase due to complication of social life.

So, we conclude that in a particular country we can hardly speak about a juridical profession as something unified and indivisible.

Of course, it can’t be as many types of thinking as branches of legal profession. That’s why the aim of our research is to find what are the main types of professional legal thinking.

We tried to use the classification by Carl Schmitt. In his book “On The Three Types of Juristic Thought”, published in 1934, Carl Schmitt introduces his concept of concrete-order thinking which contrasts with two classical juristic ways of thinking: decisionism and normativism. The author criticizes “Rule and Statute Thinking” and “Decisionist Thinking” (SCHMITT, 1934, passim) which, according to his opinion, are passed stages of overall development of legal history (In this part he probably was wrong. Normativism and decisionism (in those new interpretations) retain their value in modern jurisprudence.)

He argues that while every legal theory does contain elements of all three types, determining factor is which concept of law is the fundamental one from which all the others are derived and therefore which concept of law uses the others as instruments in its own actualization.

Clearly, speaking about these kinds of juridical thinking Carl Schmitt means a scientific understanding of law, advantages and disadvantages of some classical theories of law.

But we tried to apply his classification to the analysis of legal profession. Our idea is that there is legal thinking for university and legal thinking for practice. Practicing lawyers usually don't remember any details or differences between the theories of law but they have general idea of what is law and legal reality, and what is their own role in this reality. That can be idea of a norm, or a decision, or some ideal order. And each idea is connected neither with legal system nor with historical period of science development but with the specialty of legal profession.

2 THE CLASSIFICATION ITSELF AND ITS USE

Thus, in our paper we tried to find a connection between three types of juristic thought by Carl Schmitt and the general structure of juridical profession.

As a result we have three types of professional juristic thinking: rule and statute thinking; decisionist thinking; concrete-order thinking.

1) *Rule and statute thinking (normativism)* is typical for officials whose job requires only strict adherence to rules.

2) *Decisionist thinking (decisionism)* relates primarily to judges whose activities are not limited to observance of the text of law. Sometimes they need to apply not only the letter but also the spirit of law making a *pure decision*.

3) *Concrete-order thinking* belongs to lawmaker who approves by his will some model of social organization. Existing law for him is only a part of an order – a part, which can be changed if it is necessary.

This classification doesn't mean that mental abilities or thinking skills of lawyers differ. But each specialty of legal profession needs a special method and scale of perception of law. Our vision of law and legal reality depends on our professional tasks.

There are a lot of lawyers who must only "mechanically" apply a norm to a situation. All cases when a norm and a situation do not completely correspond to each other are going beyond their competence and should be forwarded to the court.

Unlike them a judge deals with different cases. Sometimes a literal wording of the law is not enough to solve them. A judge considers the norm as part of a complex system. If the norm is obsolete or if it is in conflict with other rules, a judge must be guided by the general sense of law. He also can use different sources of law (such as legal custom or doctrine) to supplement or interpret the statute. By his decision he himself corrects the law. Thus his idea of the law will be quite different from that described above.

Legislator is looking at the law in a much broader context. Law for him is neither a norm nor a decision, but a part of a real life. He must see all the inconsistencies between the law and social system, all the defects or imperfections of the law because his job is to improve them. So he is far more critical to law than lawyers from the first two groups.

How can we use this classification? It helps to explain some questions connected, for example, with separation of powers, professional competence of lawyers, with different theories of law, and some others.

So, everything said about rule and statute thinking is especially true for employees of the executive branch. Strict adherence to rules is the main goal of these state officials, that's why the idea of normativism is more understandable for them. We can say that for this category of lawyers normativism is the only possible view of the law.

The desicionist thinking is typical for lawyers from the judiciary branch. A judge from every country can give us a lot of examples of situations when it is impossible to exactly comply the norm (because it is obsolete or inconsistent or manifestly unjust or even absurd). In such situations it is not enough to say: "law is a norm". The sociological view of law is far more suitable for judges.

The concrete-order thinking (we can also call it *idealist thinking* or *idealism* because it implies some ideal order which is to be established in the society) is right for the legislative branch. And the best theory for a legislator probably is the theory of natural law, because it shows him the limits of his power.

Of course, each jurist can have a complex concept of law including elements of different theories. But the main idea of his concept as a rule is connected with his personal experience.

So, the professional experience of lawyers determines a type of their thinking. And that is the reason of delimitation of their professional competence. An inspector can't solve a complicated case because he needs only exact instructions. His problem is to find only one norm suitable for a case. On the other hand a legislator in any cases can't think like an inspector. It's impossible for

him to change one norm without paying attention on its influence on the other norms and the society.

So, these three types have different scale of perception of the legal system. The executive thinking needs only a norm and is not interested in the content of other sources of law, except legislation. The judiciary thinking to make an adequate decision uses the whole legal system, all sources of law. A judge and his freedom in making a decision are limited not only by the concrete legislative act but also by the general logic of law.

It is necessary to say some words about the legislative thinking. We've noticed that a judge is not as free as a legislator. That is true because a legislator can change a law and establish a new order in the society. But a very important fact is that he is not free too. The legislative freedom is limited by the nature of a legal system, by the possibility and readiness of people to accept and assimilate the changes. The comparative jurisprudence has a lot of examples of unsuccessful adoption of some legal institutions and norms, which were rejected by the recipient country.

> Legal norms, rules, regulations, and decisions must grow out of the intrinsic way of life within each concrete order and speak to its values and needs. Thus, for concrete-order thinking, law must always be conceived of institutionality, but also broadly and flexibly, so that law reflects the existing, yet always-evolving social reality (BENDERSKY, 2004, p. 20).

Primarily, it means that a legislator must be reasonable. Reasonableness tells about motives of legislator, his capability and willingness to estimate all objective factors, to define an efficiency of a norm. Traditionally, reasonableness is considered a principle of realization of legal norms. "Reasonableness", as a term, is used in those formulas, in which the legislator leaves some gaps for self-regulation in expectation for prudence and common sense of subjects. It is necessary to correlate purposes of parties not only with claims of a norm, but also with possibilities of the reality. Such formulas as "reasonable time", "reasonable cause" and "reasonable doubt" bind to take into account all the possibilities of parties, to conform bona fides and common sense, and not to demand anything impossible.

That's why it seems to be strongly connected with the judicial thinking. But all the criteria of reasonableness completely refer to lawmaking activity, to the norm and its terms in particular. A norm, which sets excessive prohibitions and duties, a norm, which does not accord with already existing law and legal continuity, which conflicts with people's views on truth and justice, is ultimately unreasonable, because realization of such norm will inevitably meet resistance of law system.

Thus, reasonableness of legislator is defined by his readiness to admit that his abilities to change the law are restricted by the ability of law to be changed. Doing this, a legislator turns out to be captured by illusions, fancying that he does create the law and that the law will be such as he wants it to be. That is why instead of reasonableness he may conform populism, intention to make a political impression, subjective practicability. The reason of not paying attention to the principles of qualified lawmaking may be whether misunderstanding of law evolution logic or contempt of recipient. Indeed, to conform recipient's claims is not to demonstrate an infirmity of authorities, but to evidence their reasonableness. Norms, which do not conform the system of law, whether destroy it or are rejected by it.

If a legislator creates certainly "dead" norms, he practically denies being a lawmaker, since results of his activity do not become a positive law. The system of current norms does not cease to evolve in such case, but it has to compensate sabotage lawmaking activity of a legislator, activating a self-regulation mechanism, other sources of law, etc.

The *judicial thinking* is, of course, the main type, because it is the most complicated and the most important one.

The judge is to analyze the situation and all the sources of law connected with this situation. His decision can't be completely pure. Even if there are no any norms for that case, he can't feel himself free because he must make a decision corresponding to a general logic of the existing law. So he must know and understand this logic.

Of course, the judicial thinking can include some features of the other types. For example in easy cases it is enough to apply a norm to a situation and it is not necessary to look for another sources of law and to make a complicated and original decision.

And it can be some other cases when a judge must think like legislator. Sometimes he has to correct the law while its interpretation. The exact abilities of a judge in such cases are different in various countries but the situation itself is typical. And mental operations used by judges to salve such a problem are similar.

So, there are no strict borders between the types. Judicial thinking intersects other types. But that doesn't mean that all types intersect each other. As we've said a legislator must not think in terms of rule and statute thinking because his view of law must be more complicated. That's why we can say that judicial thinking occupies a central position among all types of juristic thought.

3 THE CONCLUSION

Speaking about this classification of juristic thinking we must understand if it is suitable for other legal systems or not. Of course, national differences are very important but there are universal professional situations and universal features of legal profession.

Judges in all countries have much in common in their style of thinking. For example Richard Posner in his book "Reflection on Judging" (POSNER, 2013) tells about the rising *complexity*, caused by modern technology and globalization, as one of the challenges that the US federal courts face today. He shows two ways using by judges to overcome this complexity: formalism and realism.

> The formalist wants to use a complex style of legal analysis (involving, for example, numerous "canons of construction" – principles of statutory interpretation) to resolve cases without having to understand factual complexities. The realist, in contrast, wants to impose a simple style of legal analysis on a sure understanding of the scientific or commercial complexities, factual rather than legal, out of which cases arise (POSNER, 2013, p. 4).

These ways are definitely understandable and usable for judges not only in US, but also in Russia or some other country, because the same professional situation causes the same style of thinking.

On the other hand in every country you can find a difference between the way of thinking of a judge and for example a notary or some enforcers.

That's why we can say that these three types of thinking are universal for all legal systems. And this is the reason of speaking about the juridical profession as a general concept. Certainly, the proportion of each type depends on some specific qualities of national legal tradition. As a result, in some countries judicial thinking is more widespread, and in the others even judges often think like state officials. But it doesn't mean that there are no any other types of thinking in these legal systems, because the same professional tasks cause similar understanding of law.

Thus, the three types of juristic thought determine and reflect the general structure of legal profession.

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