

Limits to applicability of types of rationality in legal activities

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Abstract— The article attempts to establish the limits of applicability for distinguishing between types of rationality in legal activity on the basis of philosophical criteria. The authors revealed differences in thinking of a legal official, judge and legislator, due to the peculiarities of their professional activities. Based on V. Stepina's classification of rationality types, the authors of the article try to prove that various specialties in the legal profession respectively require their representatives thinking at the level of classical, non-classical and post-non-classical rationality. Recognition of this distinction will allow substantiating the approaches to training lawyers, as well as explaining different views on the concept of law.

Keywords— types of rationality, judge, lawyer, legislator, legal thinking, levels of legal knowledge

I. INTRODUCTION

The structure of the legal profession in each country has its own characteristics [1]. As a rule, professional subjects of legal activity include a wide range of specialties: legal adviser, legal official, lawyer, notary, investigator, prosecutor, judge, legislator, lawyer scholar. Their thinking, professional skills, value orientations are traditionally considered in the context of the specifics of national legal systems [2], [3], however, in this article we will try to consider their supranational characteristics.

Each of the types of legal activity is rational and is implemented in different contexts. Therefore, along with the general characteristics of the legal profession [4], each specialty must have specific features.

In this regard, the most likely is the assumption that the content of the cognitive situation of these subjects cannot be uniform and homogeneous, but should differ from subject to subject due to professional characteristics, forming an interval of abstraction of a cognizable object or their own intellectual perspective in each specific activity context.

It is of interest to study these types of activities in the aspect of rationality itself through the description of the object of cognition of a particular subject, his professional goals and objectives, and the scheme of the cognition

method.

It requires focusing not on the content of the activity itself but on the content of the perception of these subjects of their aspect of law or their level of abstraction and the characteristics of their thinking of law, as well as the typification of possible cognitive positions in legal reality.

II. MATERIALS AND METHODS (MODEL)

The aim of the work is to establish the limits of applicability of types of rationality in legal activity and to identify formal-logical and structural-typological characteristics of legal thinking in the three most typed forms.

The basis for distinguishing the types of rationality is the work of V.S. Stepina "Classics, non-classics, post-non-classics" [5].

Law as a set of activities and knowledge is difficult to describe using the tools and characteristics of any single type of rationality.

It is necessary to look for a limited range of each type of rationality in the legal profession by "trying on" their generalizing characteristics to the main types of legal activity.

Such a transfer of methodology from the philosophy of science to the science of law, firstly, successfully organizes our observations and theories about law, and secondly, it is able to give a schematic, classified description of "cognitive positions" or "models of thinking" in legal activity.

III. RESULTS AND DISCUSSION

CLASSICS - the sphere of centralized and decentralized public administration (executive and administrative activities of legal officials of various state and municipal services, agencies, governments, ministries, administrations, departments, committees, inspections, departments, state funds, public companies and corporations, chambers banks, self-regulating organizations and their officials on operational-executive, operational-technical and law enforcement).

The reported study was funded by RFBR according to the research project № 19-011-00251

This area in terms of only supervisory functions includes the activities of the prosecutor's office.

Features of the systemic organization of law and ontology of legal thinking of a legal official.

The object of knowledge of a legal official is the system of norms as a simple systemic organization.

The law, as a multifaceted complex phenomenon, is reduced in the perception of a legal official to a simple system of legislation within its "narrow" competence, which is not something more than the sum of its parts.

The law for a legal official is a state will or a system of rules of behavior established and enforced by the state within its specific competence.

This is a positivist (clerical) legal sense or administrative picture of legal reality, where there is always an authoritative subject, or a subject with delegated quasi-authority in legal relations (for example, the bankruptcy trustee, notary, contract manager, etc.). Such a picture of the world is essentially mechanical. The law perception of such structures from the point of view of a lawyer is not and should not be holistic. There is a system of norms which he must obey because they establish and constitute his very office and authorize to subordinate mechanically the behavior of other subjects of law to their actions in case of necessity established by law.

The order of legally significant actions and decisions of such subjects is logically derived from the regulatory legal acts, i.e. strictly regulated.

Causality is essentially a hard version of the 'if-then-otherwise' determination.

Space and time are considered as external to the object.

In the frame of reference of such a subject of law, the question of the operation of law in time, space and in a circle of persons is an invariant objective event.

For example, regardless of the will of a particular subject of the right to it, certain legal requirements will be distributed through the actions of a legal officer if he is subject to the specific hypothesis of the norm (stopping a car by a traffic police officer, the need to obtain a building permit or reconstruction, license, appointment pensions, payment of taxes, customs duties, cadastral registration of real estate objects, registration of property rights, registration of legal entities, tax inspections, crossing the state border, obtaining citizenship, citizen passports, baggage screening and personal security screening at the airport, etc.).

Features of the cognitive activity method of a legal official.

The cognition scheme is still based on the postulate of the existence of an absolute observer as a privileged subject of truth in the person of a sovereign state, establishing and providing a system for an objective mechanism of legal regulation.

Legal officials act as conductors of his will, mechanically bringing the system of objective law into action through their legal thinking.

The system of norms functions as a "scheme of interpretation" of the surrounding reality by a legal official. The essence of this interpretation scheme lies in the objectification and formalization of the meaning of a real relationship as a legal relationship and subsequent legal qualification.

A legal official correlates the behavior of people with the requirements of legal norms within their competence as if verifies it, confirms its compliance with the established procedure.

All his decisions derive from the legal acts that govern his activities. Free discretion is practiced to a very limited extent, when, for example, administrative punishment is imposed in the case of a relatively specific or alternative sanction of an article. It can be also practiced in the case of relatively simple situations of application of the law by the analogy of the law, for example, in tax relations, when similar ones are used for the time gap.

In general, the free discretion of a legal official usually looks like arbitrariness. For example, a military commissioner for the loss of a military ticket in most cases imposes an administrative penalty on the maximum limit relative to a certain sanction of an article without justification. Such cases can be brought in abundance.

Ideally, the possibility of subjective discretion should be excluded. In any case, overcoming conflicts, the analogy of law as a means of settling the case is essentially not practiced here.

Such a verifying legal understanding of a lawyer-official can be likened to the method of explanation, when the life situation correlates with the norm for conformity, just as the essence of the studied subject is revealed when the phenomenon is brought under the action of a certain scientific law.

Understanding as a method of knowledge is characteristic of a legal official to a limited extent, like ordinary language communication occurring in dialogue but not as giving additional meaning to what they are trying to understand. A lawyer official explains the law so that it (the law) is better understood.

All cases where the norm and situation are not fully consistent with each other should be redirected to the court.

In general, a legal official is like a switchman of railways and acts strictly according to the cause-and-effect principle "if-then-otherwise." Features of valued orientations of a legal official and their reflection expressed in the specifics of philosophical and ideological grounds.

A feature of the valued orientations of a legal official is their essentially neutral character in the moral sense.

The purpose of such thinking is simply forced or voluntarily behavior, subordinating the behavior of other subjects to the requirements and prohibitions, recommendations and prescriptions expressed in the norm.

Moreover, a legal official is obliged to apply the rule of law, regardless of what he thinks about it and how the subjects of legal relations "react" to it, i.e. whether it is adequate or not, fair or not, it "simply refers to the fact that

this norm is positive”, “resorts to the final argument“ as it should be “according to the law”. The rule of law in these cognitive conditions is recognized as objectively valid until it is abolished.

There is a dogmatization of the rule of law as a pattern of behavior emanating from the unquestioned authority of the state.

This type of legal thinking is characterized by noncriticality. Turning to the legal norm, the lawyer acts according to the maxim “do not go deep, do not criticize, do not hesitate, but act strictly in accordance”, there is a sort of “breakage of reflection”.

NON-CLASSICS - the sphere of judicial activity and other types of legal activity.

Characteristics of a non-classical type of thinking are characteristic of the activities of a legal adviser, a lawyer, an inquisitor, an investigator, and a prosecutor as direct participants in substantive and procedural legal relations.

It is through the prism of thinking of these subjects that such a slice of living conditions is revealed, a combination of circumstances and an intellectual-volitional perspective of a legal result in which the same set of norms can manifest themselves in different ways.

The possibility of pluralism of points of view on the same legal situation is precisely the main essence of non-classics, which allows alternative theoretical descriptions of the same reality, each of which may contain a moment of objectively true knowledge. It also interprets the correlations between various aspects of the law and the characteristics of the method by which it is learned.

In the sphere of contractual relations of private-law subjects and in the sphere of public-private partnership, this effect is manifested especially clearly.

However, in a conflict situation when a certain legal result is at stake, a judge comes in. And since it is the judge who ultimately is the source of this legal result, which competing parties are striving for, the role of the above subjects of law is rather auxiliary than the main one in describing the non-classical type of rationality.

Therefore, speaking of the boundaries of non-classics in jurisprudence, we will describe the thinking of the judge, as the most complete version of this model.

Nevertheless, it is necessary to realize that only in aggregate these subjects provide for the activation of chains of direct and reverse connections between the simple level of organization of law as a local body of law and the more complex level of organization of law as a self-regulating system.

The judge perceives the norm in the context of the entire legal system, which allows him “complementing” and “correcting” the existing rules, overcoming conflicts and gaps, applying the rules by analogy, including using sources of law that are not typical for the system (judicial precedents, messages from the President, departmental legal acts that have lost their force, teaching aids, doctrinal interpretations). Although the activity of the judge is regulated, he is also guided by the letter of the law, but this

does not exhaust the very meaning of his existence. After all, he is guided by the spirit of the law, the principles of law, its own discretion. The content of his discretion is based on the rule of law in qualifying but is not completely deducible from the system of norms, being, so to speak, a “pure” decision or a “pure” conviction, the source of which is in the sphere of the judge's thinking [6].

The judge's mindset includes a positivistic view of the world of legal realities, since often at its own level of competence; it also requires simple legal qualifications, without introducing any subjective discretion. This applies to relatively simple situations, for example, in simplified or custom proceedings. But it does not exhaust the process.

In the process of applying appraisal concepts such as guilt, good reasons, amount of compensation, extenuating circumstances, the identity of the accused, reduction of the penalty, reasonable time, recognition of the missing, etc. the role of the judge in the decision-making process cannot replace the rule of law; the situation requires the introduction of a “clear decision” to resolve it.

Conceptually, the content of judicial thinking is described and explained by sociology, psychology, hermeneutics, phenomenology and neither normativism nor positivism is clearly enough here.

The picture of legal reality is rather characterized by legal thinking in the “broad” sense of the Soviet legal school.

The legal system as a whole does not only depend on the properties of its constituent parts but through the activities of the judge these properties are supplemented, corrected, harmonized, stabilized, i.e. they become something more than a sum of parts, acquire a new system quality.

In this compensating influence of the judge, the property of the self-regulation of the legal system manifests itself, preserving the internal stability of the rule of law at a certain, relatively constant level.

The effect of the law in time, space and in a circle of persons in a trial situation is no longer an invariant objective event in all cases.

On the contrary, here subjects of law can correct such invariance within certain limits (declare a law invalid or unconstitutional, remove barriers to use, reclaim property from another's unlawful possession, appeal against actions or decisions of officials, urge to enter into contracts, recognize a person incapable, seek unjust enrichment, change the contract price or pension, etc.).

In other words, it depends on a particular person in varying degrees whether the particular law and its individual provisions will apply to it or not. And, of course, the court is the authority on which such corrective specification of legal norms depends on. Space, time and action in the circle of persons of law become relative.

The causality of law is no longer purely mechanical, as in the hands of a legal official. Judicial discretion in resolving various cases complements the mechanism of legal regulation with probable causality.

Features of the cognitive activity method of the judge.

The scheme of the judge's method as well as in the case of a legal official is still based on the postulate of the existence of an absolute observer in the person of a sovereign state, establishing and providing a system of an objective mechanism of legal regulation.

The judge is also a conductor of his will, often mechanically bringing the system of objective law into action through his legal thinking.

However, a court can never be a fully nationalized institution due to its own nature. The court acts as an intermediary between society and the state, often performing the role of a pacifying instance.

The system of norms also functions in the judge's thinking as a "scheme of interpretation" of the surrounding reality but its activity is not limited to simple legal qualifications, i.e. correlation of the rule of law and the life situation.

If the legal understanding of a legal official can be likened to the method of explanation, then the judicial understanding of the judge will be not only verifying but also falsifying, which along with the method of explanation is no less inherent in the method of understanding.

"Understanding" of a judge will no longer be a simple language communication occurring in a dialogue but a procedure for penetrating another consciousness through external designation, the ability to comprehend the meaning of signs transmitted by one consciousness and perceived by other consciousness through their external expression (gestures, poses, speech, texts) with the subsequent giving additional meaning to what they are trying to explain to him, since the judge is an authoritative subject. This additional meaning is contained in the "pure decision" of the judge.

If a legal official only interprets the law so that it (the law) is better understood, then the judge, in addition to this, must understand the situation in order to better explain it (bring it under the law). In addition, judicial thinking tends to become more active and fully functional, when a relatively difficult life situation appears. It is impossible to fully foresee and formalize in a regulatory and legal manner as it involves several competing options for its legal qualification and contradicts the same norms, but it is legal and justified from the point view of the aggregate of other legal norms.

Such thinking is manifested when concluding that authoritatively removes initial doubts about which position to take for granted, in accordance with the law, proved by one or another party.

Any difficult law-enforcement situation in the activities of a judge is resolved due to his ability to perceive the norm as part of an internally consistent system. Judges are endowed with a special control competence to detect hierarchical conflicts of legal acts between themselves, as well as between laws and the constitution in order to restore their internal consistency.

Features of the valued orientations of the judge and their reflection expressed in the specifics of philosophical and ideological grounds.

A distinctive feature of the valued orientations of judicial thinking is their dual nature since the judge must combine the objectivity of the case with fullness and completeness in his work.

In the sense of the basis of their actions and decisions, a judge cannot be an interested person but must remain objective, mechanically like a legal official, observing the procedural ritual and applying the law.

However, for the implementation of a comprehensive and complete study of the materials of the case, he cannot be completely neutral, since he cannot do without understanding penetration into another consciousness with the help of external designation for the purpose of evaluation, including moral evaluation.

The judge is not spared from the need for value judgments not only in the criminal process when he is convinced of the guilt or innocence of the accused, imposing or changing the measure of restraint or punishment, sentencing, taking into account the identity of the perpetrator, etc.

He is not immune from moral assessments in civil proceedings, when, for example, he decides to deprive his parental rights or leave a child with one of his parents, to assign a certain amount of compensation for moral harm, to establish the right of joint ownership of the hereditary property owned by the deceased in property, etc.

The same can be said with regard to the arbitration process, where there are also cases related to the damage to business reputation, intellectual property, reduction of the number of penalties, evaluation of representative services in monetary terms, the sufficiency of the evidence presented of the absence of fault in tort, etc.

The Code of Administrative Judicial Procedure prescribes active participation in the proceedings of the case, which does not imply neutral self-sufficiency.

Constitutional justice is by its nature the least morally neutral since it implies action in a public space, based on the Constitution, permeated with valuable political and legal judgments.

It is the judges who exercise operational control over the observance and implementation of the fundamental principles of law as its value reference points for all levels of law enforcement.

When making a decision the judge can use creative element, the ability to move away from a rigid template, while remaining within the procedural framework [7]. Judicial authorities are the indispensable subject that is necessary for the implementation of law-enforcement concretization, which brings the content of legal concepts as close as possible to real life circumstances. As a result, the law, as a regulator, turns out to be more changeable, relative, adaptable to the conditions of time and place, which contributes to the fair resolution of cases.

The judge's value thinking turns out to be that additional level organization, eliminating the inevitable legal gaps and thereby ensuring the self-regulating character in the managerial mechanism of law.

POST- NON-CLASSICS - the sphere of the cognitive activity of the legislator as a collective subject (deputies, drafters of laws, scholars, lawyers). Features of the systemic organization of law and the ontology of the legal thinking of the legislator.

The object of knowledge of the legislator is the legal system of society in a particular historical context and the directions of its evolution.

"The context in which the legislator considers the rule is even wider. It cannot be limited either by the norm itself, or by the legal system but is obliged to correlate them with the social system, with real public life, to see the shortcomings of the current law and the ways of its development, corresponding to the directions of the society's development, or setting such directions." The legal system of society is an object organized as a complex self-developing system. This type of system objects is characterized by development when there is a transition from one type of self-regulation to another.

Each of the constituent components of a legal system in the form of a legal system, legal ideology, and legal practice is a self-regulating complex subsystem, and an inevitable mutual transition occurs in its interaction and functioning.

These subsystems mutually generate and reproduce each other in each interaction act, representing a hierarchy of the level organization of elements.

Each of these subsystems or levels has a direct and reverse effect on each other, as well as on the control unit itself, and this is the legislator, the most direct embodiment of the sovereign state.

"Unlike classical and non-classical, post-non-classical rationality is not purely cognitive rationality, claiming to model reality" as it is, it acts as a form of socio-humanitarian design-constructive rationality.

The activity of the legislator consists not only in making laws but in strategic planning of changes on the basis of forecasting and adapting them to the achievement of basic goals and ideological attitudes, which provide society with a certain guideline for assessments and decisions.

The choice of goals and means for each specific type of action seems arbitrary but at the same time is due to the characteristics of the social system as a whole.

The space of choice of these goals and means for each specific case of reforms is limited. It allows for variations of means and objectives only within certain limits. These frameworks are set by the historically established system of values, mentality and other sociocultural features of society which act as information codes and in accordance with them the reproduction of social life is carried out.

Nevertheless, this choice of goals and means is made by the legislator, and it manifests his post-non-classical socio-humanitarian project-constructive rationality.

Paraphrasing J. Piaget, the thinking of the legislator organizes social life, organizing itself.

Conceptually, the picture of the socio-legal reality of the legislator is described by the natural-law school which develops the social ideal or model of a social structure that

is most appropriate for the mentality of society and the ways of its development.

"Any external authority can be valid only as long as people are convinced of the need to obey it ... A positive right loses the meaning of the right when it ceases to be the subject of conviction of one or another social environment. This irrefutably proves the existence of norms of moral or — what is the same thing — natural law which constitute the ideal basis and the ideal criterion of the entire legal order." The functioning and realization of goals and means of legislative thinking are justified by the idea of target and cyclic causality.

Target causality is manifested in the authoritarian-idealistic orientation of legislative activity, its generating character.

Cyclic causality is reflected in the reformist nature of such an orientation.

In the sphere of public consciousness, the legislator himself is an operator of time and space, setting, changing and terminating the laws.

Features of the cognitive activity method of the legislator.

The historicity of the legal system of society and the variability of its behavior involve the use of special methods of restructuring and prediction of its states - the construction of possible development scenarios at bifurcation points, at intersections by changing the parameters on which it depends.

The key parameter which the image of the legal system depends on is the finding of such a legislative model of a social system, the majority of society would be convinced of the need to subordinate.

In order to explain to society what the right is to subordinate its behavior to the laws, the legislator must manifest an understanding of the needs of society which the society as a whole can only have a vague or distorted view about [8].

The next problem for the legislator is to find such ways of development of the legal system which would lead to the public interests while maintaining society as a whole. If the legislator fails to do this, the harm from the law adopted by him may be much more than good [9]. Only when "ideas" are combined with interests, instincts, "trends", they indirectly gain power and the possibility of influence.

Thus, the pattern of the legislator's method is not limited to the intellectual dialectic of explanation and understanding but includes a volitional element of the need to translate into real life the most appropriate idea for transforming society itself in the direction given by the idea.

This moment is substantiated by the method of constructivism which is perceived as the subject's active construction of the interpretation of a model of the world, and not its mere reflection.

Legislative thinking not only reflects social life but tries to transform it purposefully. At the same time, the transformation of law requires complex intellectual activity [10]. The legislator forms the legal system on the basis of a

certain idea of its future state, realizing this by means of a monopoly right to manipulate the form and measure of freedom of the entire set of actors, transforming certain social roles into legal status or legal status back into social roles.

Features of the valued orientations of the legislator and their reflection expressed in the specifics of philosophical and ideological grounds.

The goal of legislative thinking is the search for a rational technology of streamlining public life and introducing the ideal into the consciousness of the majority of society.

Taking into account the sociocultural features of the controlled society and the existence in the public consciousness of the ideal norms of natural law that form its ideas about the proper and the permitted, the legislator, being a part of this society, is inevitably obliged to take into account these ethical regulations in their activities.

Without carrying out the necessary reflection on the value bases of the laws, their correlation with the value-accentuated ideals of society, the legislator risks arousing dissatisfaction of certain social groups. And the less correlated the legislative innovations with the foundations of society, the more likely they are to sabotage. With a complete separation of the content of the laws from the natural-legal ideas of the people, a violent change in the state system is inevitable.

Therefore, in the activities of the legislator, value-targeted structures become a special subject of analysis.

In other words, on the one hand, the legislator acts as a subject of active construction of an object, on the other - he is involved in the initial sociocultural features of this human-sized object and cannot be disregarded with them, defining the limits of possible intervention for themselves in each specific historical period.

IV. CONCLUSION

Professional legal thinking is heterogeneous. Depending on the specialty of the legal profession in the system of perception of the subject, the object of knowledge, the type of legal understanding, the scheme of the method of knowledge, the purpose varies. It follows that the existence of a single notion of law is impossible due to the different pictures of legal reality arising from their professional tasks of lawyers.

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