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Idealni tipi prava v luči psihološke tipologije

Prispevek prinaša predstavitev idealnih tipov prava glede na pravo, ki se je razvijalo skozi zgodovino, in tudi s stališča sodobnega prava. Idealne tipe prava zasnujem s pomočjo dveh velikih zgodovinskih tipologij: Webrove in Jungove. Izhodišče analize so Webrovi idealni tipi prava. Te najprej skušam razumeti v luči Jungove psihološke tipologije, kar pa me obenem vodi tudi do modifikacije Webrovih idealnih tipov prava. Pri vsakem posamezniku prevladuje neka psihološko-tipološka slika, ravno tako na ravni neke družbene skupnosti. Tudi glede prava, tako v času kot prostoru – o tem nam pričata pravna zgodovina in pravna geografija (tj. primerjalno pravo). Glede na štiri kognitivne funkcije je mogoče razviti štiri splošne tipe prava. Če k temu dodamo še vpliv pomožnih kognitivnih funkcij, pa jih je mogoče razširiti na osem specifičnih tipov prava.

Ključne besede: Webrovi idealni tipi prava, Jungova psihološka tipologija, pravna zgodovina, štiri kognitivne funkcije, pomožne kognitivne funkcije

1 UVOD

Pri obravnavi idealnih tipov moramo najprej opredeliti, kam ciljamo s pridevnikom »idealen«. Z idealnim tipom tu razumem »hipotetični konstrukt, ki zajema teoretsko označitev vseh možnih značilnosti, ki jih je mogoče empirično preveriti«.[1] Enaka ugotovitev bi seveda veljala tudi za idealne tipe prava. Tipologija, ki jo obravnavam, izvorno izhaja iz Webrovih idealnih tipov, a jo tu v pomembnem delu razvijam in spreminjam. Pravzaprav jo oblikujem na temelju Jungove psihološke tipologije. Ta je bila skupaj z njeno dopolnitvijo pri njegovih naslednikih podlaga za razlago in nadaljnji razvoj Webrovih idealnih tipov prava. Jung je gotovo poznal Webrovo delo, še posebej idejo iz *Protestantske etike*, a se z njim ni nikoli znanstveno ukvarjal. Sicer pa Weber ni živel tako dolgo, da bi dočakal objavo Jungovih psiholoških tipov.[2] Tako kot Weber jemljem empirični material za preizkus idealnih tipov prava iz pravne zgodovine. Zato bi takšne idealne tipe prava lahko poimenoval tudi zgodovinski (idealni) tipi prava.

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1 Sharyn L. Roach Anleu, *Law and Social Change,* London, SAGE Publications, 2000, 22.

2 Gavin Walker, Sociological theory and Jungian psychology, *History of the Human Sciences* (2012) 25 (I), 69.

V nadaljevanju so na kratko opisani Webrovi idealni tipi prava (2) in jedrnato predstavljena jungovska psihološka tipologija (3). Zatem na kratko utemeljujem pomen skupne obravnave dela Webrove in Jungove misli za tovrstno analizo (4). V okviru zgodovinske pravne analize oblikujem posamezne idealne tipe prava v luči psihološke tipologije, tj. kognitivnih funkcij, z nekaj spremembami glede na Webrovo delo (5). Rezultat tega pa so štirje idealni splošni tipi prava in osem posameznih ali specifičnih tipov prava, ki se izražajo v osmih različnih osebnostih, povezanih s pravom, ali pravnih poklicih (6).

2 WEBROVI IDEALNI TIPI PRAVA

Eden najpomembnejših delov Webrove misli o pravu so gotovo njegovi idealni tipi prava. Te je razvil v osmem poglavju posthumno izdanega dela *Gospodarstvo in družba*,[3] ki ga je naslovil Gospodarstvo in pravo ter podnaslovil Sociologija prava. Poleg tega, da je klasično pravnosociološko delo, se zdi ta Webrova analiza tudi odlična pravnozgodovinska študija.[4] Rdeča nit njegovega sociološko-zgodovinskega dela o pravu je v ločevanju med predmodernim in modernim pravom, pri čemer Weber razlikuje štiri idealne tipe prava.

Prvič, karizmatična odkritja prava pravnih prerokov[5] so po Webrovem mnenju iracionalno-formalne narave, saj si ustvarjalci in uporabniki prava pomagajo s sredstvi, ki jih ne nadzira razum, ko se npr. sklicujejo na oraklje ali božanska razodetja.[6] Med iracionalne načine sojenja šteje ordalijo, žrebanje kot sredstvo za reševanje sporov, dvoboj, prisego, institut prisežnih pomočnikov in tudi uporabo občutka za pravično, ki je po njem emocionalne narave.[7] Na ta seznam dodaja tudi poroto oz. porotno sojenje.

Pri takšnem pojmovanju prava so pomembno vlogo v družbeni skupnosti igrali starešine, ki so poznali upoštevne svete običaje. Najpogosteje so to bili vrači, preroki ali magi. Pri tem pravzaprav ni šlo za ustvarjanje prava, temveč predvsem za njegovo odkrivanje prek razodetja omenjenim karizmatičnim osebam. Za magične tehnike, ki so jih pri tem uporabljali, so značilni izraziti obredni formalizmi. Tako so te osebe npr. poročale skupnosti o tem, da je božanska sila zahtevala, da se problem reši na takšen ali drugačen način, pri čemer

3 Max Weber, *Economy and Society,* Berkeley, University of California Press, 1978.

4 Weber je študiral pravo v času vrhunca nemške zgodovinske jurisprudence ter je učil gospodarsko pravo in pravno zgodovino na Univerzi v Berlinu. Roach Anleu 2000 (op. 1), 21.

5 Weber 1978 (op. 3), 882.

6 Weber 1978 (op. 3), 656.

7 Jung bi rekel, da je občutek za pravično veliko bolj pogojen z intuitivnim kot pa emocionalnim dojemanjem stvarnosti.

za konkretno odločitev niso bile uporabljene nikakršne racionalne podlage, saj je prerok prejel takšno pomembno sporočilo v stanju ekstaze ali v sanjah.[8]

Drugi tip prava, ki ga je razvil Weber, je poseben tip empiričnega ustvarjanja prava in sodstva, ki ga opravljajo honorati prava; štel ga je za racionalno-materialno. Tu na odločitev o pravnem problemu ne vplivajo norme, ki bi bile oblikovane na podlagi logične racionalizacije abstraktnih razlag določenih pomenov, temveč zlasti etični imperativi, utilitaristična in pragmatična pravila ter tudi politične maksime.[9] Takšen tip prava se je po Webru najbolj razvil v času rimskega imperija, ko so pravniki, vzgojeni v praktičnem in empiričnem razmišljanju, razvili specialni poklic pravnika. Ti so ustvarjali kazuistično pravo (lat. *casus* – primer), ne pa sistematičnega, kar je značilno šele za moderno dobo. Tu Weber vleče zanimivo paralelo z vzgojo anglo-ameriških pravnikov, ki so jih v preteklosti kot »vajence« izobraževali in vzgajali predvsem pravniki praktiki. Ti so bili bolj usmerjeni v praktično pravo ali kazuistiko in so kodifikacijo prava dolgo zavračali.[10] Še danes anglo-ameriško pravo ni tako obsežno kodificirano kot evropsko kontinentalno.

Tretji tip prava je Weber imenoval postavljanje prava svetovnih imperijev in teokratske oblasti.[11] To je po njem iracionalno-materialno, saj gre za odločanje, na katero vplivajo konkretni dejavniki posamičnega primera, ki se ocenjujejo na podlagi etičnih, emocionalnih ali političnih temeljev, ne pa na podlagi splošnih norm.[12] Tu Weber govori o prehodu iz karizmatičnega prava v pravo, ki temelji na oblasti (lat. *imperium*), nakazuje pa na delno sekularizacijo plemenske družbe ob zatonu antike, na katero so ob selitvi narodov močno vplivale vojaške razmere. Tako so bila pravna pravila pogosto zavestno ustvarjena na podlagi ukazov vojaških poveljnikov ali soglasja v skupnosti (vojščakov). Ni šlo več toliko za karizmatično razodetje prava, temveč bolj za vojaške ali podobne ukaze. Tako je vojaška organizacija družbe pomembno vplivala na sekularizacijo prava, vsaj kar zadeva njegovo patrimonialno dimenzijo.[13]

Na drugi strani je teokratska narava pri takšnem tipu prava pomenila moč duhovnikov kot organiziranih varuhov prava, kar se je še posebej izražalo v naraščajočem pomenu kanonskega prava. Seveda sta bili tako patrimonialna kot teokratska oblast v tem smislu omejeni s tradicionalnim pravom, kanonsko

8 Weber 1978 (op. 3), 758–775.

9 Weber 1978 (op. 3), 657.

10 Weber 1978 (op. 3), 784–802.

11 Weber 1978 (op. 3), 882.

12 Weber 1978 (op. 3), 656.

13 Patrimonialen pomeni očetovski in se nanaša na prisvajanje včasih celo vseh funkcij oblasti na nekem teritoriju (zakonodajne, izvršne in sodne) s strani lokalnega fevdalca nad svojimi podložniki. To je pravzaprav izum fevdalizma in se začne kot proces pojavljati v njegovih začetkih. Več o tem glej *infra,* pri poglavju o tradicionalnem tipu prava.

pravo pa je odigralo pomembno vlogo pri razvoju prava v smeri racionalnosti. Četudi bi takšen sistem lahko šteli za racionalnega glede uporabe določenih načel, ne gre za racionalnost v instrumentalnem, torej logičnem, lahko bi rekli tudi formalnem smislu, temveč bolj v smeri veljave materialnih načel socialne pravičnosti politične, utilitaristične in etične vsebine. Takšno pravo, predvsem v patrimonialni obliki, pri razreševanju sporov pogosto uporablja diskrecijo ter šteje podeljene privilegije kot nekakšno darilo milosti. Taka neformalna materialna narava patriarhalne uprave je dosegla svoj vrhunec, ko je sekularni vladar postavil sebe v službo pozitivističnih religioznih interesov, ki so presegali zgolj ritualne okvire.[14]

Navsezadnje po Webru sistematično uzakonjanje prava in poklicno izvrševanje sodne funkcije s strani oseb s formalno pravno izobrazbo[15] pomeni del racionalno-formalnega prava, kjer gre za profesionalni, legalistični in abstraktni pristop k pravu v modernem smislu. Za zadnjo skupino je po njem značilen pristop na podlagi abstraktne metode, ki uporablja logično razlago pomena in sistemizira veljavna pravna pravila v notranje kompleksen in koherenten sistem abstraktnih pravnih pravil.[16] Do tega po Webru pride po zaslugi razsvetljenega absolutističnega vladarja, ki s pomočjo svojega državnega aparata, ki ga sestavljajo univerzitetno šolani pravniki, vzgojeni v duhu recepcije rimskega prava, izgradi enotno državno oblast. Naravna posledica takšne usmeritve so velike sistemske pravne kodifikacije 19. stoletja.[17]

Po Webru naj bi zgodovina prava na splošno potekala po temle ključu: najprej je šlo za primitivne pravne postopke v zvezi s kombinacijo magično pogojenega formalizma in iracionalnosti, pri čemer je pomembno vlogo igralo razodetje. Sledil je izrazito specializiran pravniški in racionalno-logični pristop, ki se je sicer kombiniral s teokratsko ali patrimonialno pogojeno neformalno prikladnostjo. Na koncu pa imamo pravo logično sublimacijo in deduktivni pristop z razvijanjem vse bolj racionalnih tehnik v pravnih postopkih.[18]

V nadaljevanju tega dela bomo videli, kako je webrovski koncept idealnih tipov prava mogoče razumeti skozi prizmo Jungove psihološke tipologije. Temu pa sledijo tudi predlogi za spremembo in nadaljnji razvoj webrovskih idealnih tipov.

14 Weber 1978 (op. 3), 809–859.
15 Weber 1978 (op. 3), 882.
16 Weber 1978 (op. 3), 657.
17 Weber 1978 (op. 3), 848–859.
18 Weber 1978 (op. 3), 882.

3 JUNGOVA TIPOLOŠKA TEORIJA

Ena najvplivnejših različic psihološke tipologije je gotovo tista Carla Gustava Junga. Jungovo temeljno delo o psiholoških tipih je izšlo leta 1921.[19] V njem je zajeto eno od področij njegove obširne misli, ki bi bilo lahko zanimivo tudi za pravo in pravnike.

V tem okviru Jung najprej loči med vedenjskima tipoma ekstravertiranosti in introvertiranosti. Ti dve osnovni vedenjski obliki ponazarjata razdelitev psihične energije med ljudmi glede na to, čemu posvečamo pozornost in kaj nam daje energijo. Ekstravert in introvert sta prisotna v določenem obsegu v vsakem izmed nas. Ekstravertno vedenje motivira zunanjost in ga usmerjajo zunanji, objektivni dejavniki in razmerja. Pri ekstravertni osebi, ki prejema energijo od zunanjih elementov, teče energijski krog navzven proti svetu, medtem ko pri introvertni osebi, ki prejema energijo od notranjega sveta in tudi jemlje energijo svetu, teče energijski krog iz sveta navznoter, pri čemer jo navdihuje notranji svet idej, saj njeno vedenje motivirajo notranja, subjektivna dejstva. Bolj ekstravertni prejemajo energijo iz zunanjega sveta ljudi in objektov, stvari. Ti bodo navadno težili k interakciji, skupinskemu delu, najprej delujejo ali spregovorijo, šele nato pomislijo, so obrnjeni navzven, radi govorijo, imajo radi različnost in aktivna dejanja, porabljajo energijo, radi hodijo ven, mislijo na glas in imajo radi diskusijo.[20] Ekstravertnost in introvertnost se med seboj izključujeta: če nekdo izoblikuje zavestno vedenjskost ene oblike, postane druga oblika nezavedna in deluje kompenzatorno. Tisti, ki imajo raje introvertnost, prejemajo energijo od notranjega sveta idej, vtisov in misli. Takšni so raje v samoti, imajo raje pogovor le dveh udeležencev, najprej pomislijo, šele nato spregovorijo, varčujejo z energijo, so osredotočeni navznoter, so bolj tihi, raje se posvečajo eni stvari v danem trenutku, so zadržani, mislijo s »svojo« glavo in radi premišljujejo.[21]

Nadalje je Jung poleg vedenjskih oblik razvil tudi funkcionalne tipe ali štiri funkcije duše, da je prikazal njen značaj. Štiri funkcije duše je tako razvrstil v dva nasprotna para. Na eni strani imamo dve racionalni ali ocenjevalni funkciji, s pomočjo katerih lahko ocenjujemo zaznave ali izkušnje, kar nam omogoča odločanje: tj. mišljenje in čustvovanje. Na drugi strani imamo dve iracionalni ali zaznavni funkciji: senzualno ali čutilno funkcijo in intuicijo, ki ne pomenita ocenjevanja, temveč zaznavanje v smislu sprejemanja informacij.

19 Carl G. Jung, *Psychologische Typen,* Duesseldorf, Patmost Verlag GmbH & Walter Verlag, 1921, 1971.

20 Te temeljne Jungove koncepte so morda še preprosteje razložili nekateri njegovi nasledniki. Glej npr. Renee Baron, *What Type Am I?,* London, Penguin Books, 1998, 10, 13.

21 Carl G. Jung, From Psychological Types, v Violet S. de Laszlo (ur.), *The Basic Writings of C. G. Jung,* Princeton, New Jersey, Princeton University Press, 1990, 187–298. Baron 1998 (op. 20), 10, 13.

Čutilnost nam pove, da nekaj obstaja. Tisti, ki jim je čutilnost blizu, namenjajo največ pozornosti informacijam in podatkom, do katerih pridejo prek petih čutov, in se osredotočajo na to, kar je ali je bilo. Čutilci imajo navadno raje dejstva, konkretne podatke, bolj jih zanima tekoče dogajanje, posvečajo se specifikam, so praktični in realistični, usmerjeni na sedanjost, cenijo zdravo pamet in so pragmatični.[22] Funkcija mišljenja nam pove, kaj je nekaj. Misleci se torej odločajo na logičen in objektiven način. Navadno so odločni, analitični, objektivni, prepriča jih logika, so neposredni, cenijo kompetentnost, odločajo se z »glavo«, cenijo pravičnost, dajejo vtis nerahločutnosti, radi so kritični in navadno ne jemljejo stvari osebno.[23] Funkcija čustvovanja pove, ali je nekaj dobro ali ne. Tisti, ki jim je čustvovalnost blizu, se odločajo na oseben, vrednostni način. Navadno so tenkočutni, sočutni, subjektivni, vrednostno naravnani, cenijo odnose in razmerja, se odločajo s »srcem«, cenijo harmonijo, lahko so videti preveč čustveni, znajo ceniti stvari in navadno jemljejo stvari osebno.[24] Intuicija pa nam sugerira, od kod kaj prihaja in kam gre. Intuitivci navadno zelo upoštevajo svoj »šesti čut«, notranje vzgibe in sugestije ter so pozorni na možnosti. Še posebej cenijo vpoglede, abstraktne informacije, zanimajo jih možnosti, celovitost pogleda, domišljija, navdih, usmerjeni so na prihodnost, cenijo inovacije in so spekulativni.[25]

Posameznikova zavest je naravnana v eno od teh smeri. Če je pri nekom dominantna funkcija npr. mišljenje, bo inferiorna in najmanj razvita funkcija čustvovanje, in nasprotno. Preostali dve funkciji pa sta pomožni in služita dominantni funkciji, pri čemer ima druga seveda večji vpliv na dominantno kot tretja.[26]

V tem smislu je Jung kombiniral dve vedenjski obliki s štirimi funkcijami in izoblikoval osem psiholoških tipov: ekstravertne mislece,[27] introvertne mislece,[28] ekstravertne čustvovalce (npr. voditelji pogovornih oddaj),[29] introvertne čustvovalce (npr. menihi, nune, glasbeniki),[30] ekstravertne čutilce,[31] in-

22 Baron 1998 (op. 20), 10, 20.

23 Baron 1998 (op. 20), 11, 26.

24 Baron 1998 (op. 20), 11, 26.

25 Baron 1998 (op. 20), 11.

26 Jung 1990 (op. 21), 187–298.

27 Svoje delovanje usmerjajo glede na fiksna pravila in načela, zanimajo jih realnost, red, materialna dejstva. Lahko gre za znanstvenike, ki odkrivajo naravne zakone, ali ekonomiste, ki ustvarjajo teoretične formule. Glej Maggie Hyde, Michael MacGuinness, *Introducing Jung,* Cambridge, Icon Books, 1999, 82.

28 Ti si radi postavljajo vprašanja, povezana z razumevanjem svojega bivanja. Navadno zanemarjajo zunanji svet in sledijo svojim idejam (npr. filozofi). Hyde, MacGuinness 1999 (op. 27), 82.

29 Hyde, MacGuinness 1999 (op. 27), 83.

30 Hyde, MacGuinness 1999 (op. 27), 83.

31 Navadno se osredotočajo na zunanja dejstva, so praktično naravnani in sprejemajo svet, npr.

trovertne čutilce (npr. esteti),[32] introvertne intuitivce (npr. mistiki ali pesniki)[33] in ekstravertne intuitivce (npr. osebe za stike z javnostjo ali avanturisti).[34] Ugotovitev osebnostnega tipa omogoča boljšo sliko o svetovnem nazoru ali vrednotah osebe. Tipi ponazarjajo osebnost in pogosto določajo tudi izbiro poklica ali pričajo o določenih nagnjenjih oz. talentih znotraj določenega poklica v smislu kariernega napredovanja.

Jung se je zavedal, da v vsakem posamezniku prevladuje določen mehanizem delovanja, ki se drugih mehanizmov v tej isti osebnosti ne more znebiti, četudi so prevladujočemu popolnoma nasprotni. Ne gre za čiste tipe, temveč idealni tip pomeni prevladovanje določenega mehanizma v določenem posamezniku.[35]

Njegova metodologija pri razvoju psiholoških tipov se je opirala na ideje, ki jih je dobil pri delu s pacienti, vendar je sledil tudi podobnim poskusom drugih velikih umov v preteklosti. Tako je študiral dela Schillerja, Nietzscheja, Jamesa in drugih velikanov človeške misli.[36] Te poskuse je analiziral in jih poskušal razumeti prek določenih kategorij, ki jih je razvil v okviru svoje teorije idealnih psiholoških tipov.

Danes nekateri psihologi naprej razvijajo jungovske tipe z odkrivanjem novih dimenzij. Glede na navedeni tipološki okvir so nekateri postjungovci naprej razvili nekatere značilnosti kognitivnih funkcij, na podlagi katerih so zasnovali tudi poseben indikator tipa (indikator MBTI).[37] Četudi je izvirnost misli glede tovrstne psihološke tipologije treba pripisati Jungu, so nekateri njegovi nasledniki pomembno razvili nekatere vidike na tem področju. Tako je dodatno raziskovanje na tem področju s posebnim poudarkom vpliva pomožne kognitivne funkcije na dominantno prineslo razširitev osmih Jungovih tipov na šestnajst.[38] Značilnosti teh tipov so bile v zadnjih desetletjih empirično potrjene s številnimi rezultati testov MBTI. Tako je bilo delo postjungovcev na področju psiholoških tipov zelo pomembno tudi za razvoj idealnih (tako splošnih kot posebnih) tipov prava in idealnih osebnosti, povezanih s pravom, ali pravnih poklicev, ki sledijo v nadaljevanju tega dela.

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graditelji, gradbeniki. Nekateri izmed njih so lahko pravi uživalci življenja. Hyde, MacGuinness 1999 (op. 27), 83.

32 Hyde, MacGuinness 1999 (op. 27), 84.

33 Hyde, MacGuinness 1999 (op. 27), 84.

34 Hyde, MacGuinness 1999 (op. 27), 84.

35 Jung 1990 (op. 21), 9.

36 Jung 1990 (op. 21), 9.

37 T. i. indikator tipov Myers-Briggs so razvili, da bi ugotovili prisotnost posameznih tipov pri testiranih osebah. Glej Isabel Briggs-Myers, Peter B. Myers, *Gifts Differing,* Mountain View, California, Davies-Black Publishing, 1995.

38 Briggs-Myers, Myers 1995 (op. 37).

Zdaj pa si poglejmo, kako so nekateri postjungovci opisali temeljne značilnosti posameznih kognitivnih funkcij. Te značilnosti bodo pomembne za razlago in modifikacijo Webrovih idealnih tipov prava v petem poglavju tega dela.

Glede omenjenih psihološkotipoloških razlik npr. Quenk dokaj ilustrativno opisuje značilnosti posameznih kognitivnih funkcij. Tako za čutilno funkcijo pravi, da ima nekaj značilnosti, ki se nanašajo predvsem na naša čutila. Najprej je tu (1) konkretnost, ki se kaže v osredotočanju človeka, ki mu je ta funkcija primarna, na konkretno, otipljivo, na dobesedne zaznave, konkretne in otipljive komunikacije, takšne načine učenja, svetovni nazor in vrednote. Takšna oseba zaupa temu, kar je mogoče preveriti s čuti, in je previdna predvsem glede tega, kar presega dejstva. Značilnost čutilne funkcije je tudi (2) realističnost, zato oseba s primarno čutilno funkcijo daje prednost temu, kar prinaša otipljive koristi in kar je skladno z zdravo pametjo. Takšna oseba tudi ceni učinkovitost, udobnost in varnost. Nadaljnja značilnost te funkcije je (3) praktičnost, ki se kaže v uporabnosti idej bolj kot v idejah samih ter v delovanju z znanimi sredstvi z uporabo praktičnih in znanih metod. Takšna oseba bolj ceni skromne, a otipljive nagrade namesto tveganih priložnosti za večjo korist. Nadaljnja značilnost je (4) eksperimentalnost pri zaupanju lastni ali tuji izkušnji kot kriteriju resnice in upoštevnosti ter učenju na podlagi neposredne izkušnje. Takšna oseba se tudi bolj osredotoča na preteklost in sedanjost kot pa na prihodnost. Končno je pomembna značilnost te funkcije (5) tradicionalnost, saj oseba, pri kateri je ta funkcija primarna, ceni predvsem kontinuiteto, varnost in družbeno afirmativnost, ki jo zagotavljajo tradicija, uveljavljene institucije in znane metode. Pri tem pa jo begajo nekonvencionalni odkloni od ustaljenih norm.[39]

Nekakšen antipod čutilni funkciji je intuicija. Zanjo je po Quenkovi najprej značilna (1) abstraktnost, kar pomeni osredotočanje na koncepte in abstraktne pomene idej ter njihovih medsebojnih razmerij. Abstraktnost nadalje pomeni uporabljanje simbolov, metafor in mentalne »skoke« pri razlaganju interesov in pogledov. Naslednja značilnost intuitivne funkcije je (2) domišljijskost, kar pomeni bolj ceniti možnosti od otipljivosti in predvsem nove izkušnje pri reševanju problemov. Sledi (3) konceptualnost s poudarkom na znanju zaradi znanja samega ter na osredotočanju na koncepte same, ne pa toliko na njihovo uporabo. Ta lastnost je bolj usmerjena na kompleksnost in implicitne pomene kot pa na otipljive podrobnosti. Nato sledi (4) teoretičnost, ki vidi pomembnost onkraj tega, kar je otipljivo, ter zaupa teoriji, ki ima sama svojo realnost. Je usmerjena v prihodnost ter ceni povezave med abstraktnimi koncepti. Končno je značilnost intuitivnosti tudi (5) izvirnost, ki ceni enkratnost, inventivnost pri iskanju pomenov v vsakdanjih aktivnostih.[40]

39 Naomi Quenk, *Essentials of Myers-Briggs Type Indicator Assessment*, Hoboken, New Jersey, John Wiley & Sons, Inc., 2009, 10.

40 Quenk 2009 (op. 39), 10.

Za mišljenje kot kognitivno funkcijo je zelo značilna (1) logičnost, ki pomeni, da je uporaba logične analize in zanesljivih podatkov najboljša pot pri sprejemanju odločitev, pri čemer se je primarno treba osredotočati na vzroke in posledice ter tehtati prednosti in slabosti. Sledi (2) razumnost, ki pomeni uporabo logičnega razmišljanja, pravičnosti in nepristranskosti pri dejanskem odločanju, pri čemer gre za jasnost glede ciljev in odločitev. Zatem sledi (3) spraševanje v smislu razumevanja, pojasnjevanja in doseganja skupnega imenovalca, reševanja problemov ter ugotavljanja pomanjkljivosti v lastnih in tujih stališčih. Naslednja značilnost je (4) kritičnost, kar pomeni uporabo neosebnih kritik glede idej, situacij in postopkov, zato da bi dosegli resnico ter da bi se izognili pomanjkljivostim v idejah in načrtih. Tu je še (5) trdnost, pri čemer gre za trdna stališča, ki so premišljena in kritično zastavljena ter ki naj se izvršijo hitro in učinkovito.[41]

Končno utemeljuje Quenkova funkcijo čustvovanja na osebnih ali družbenih vrednotah z osredotočenostjo na razumevanje in harmonijo. Najprej tako govori o (1) empatičnosti, pri čemer je v ospredju vpliv neke odločitve na ljudi ter na vrednote in odnose. Nadalje navaja (2) sočutnost kot upoštevanje posameznikovih unikatnih in osebnih potreb pri odločanju bolj kot objektivnih meril. Nadaljnja lastnost je (3) prilagodljivost v smislu poudarjanja pomena harmonije in vključevanja različnih stališč kot poti, ki so primernejše od konfrontacije. Nato sledi (4) sprejemljivost v smislu upoštevanja tolerantnosti do drugih z namenom doseganja skupno zadovoljujočega načrta ali postopka, ki je dovzeten za široko polje idej in stališč. Končno gre tu za (5) tenkočutnost kot uporabo vljudnega prepričevanja in osebnega pristopa pri iskanju dogovora.[42]

Pred uporabo jungovske psihološke tipologije za razlago in razvoj Webrovih idealnih tipov prava pa naj najprej na kratko naznačim ter poskusim utemeljiti, kaj pravzaprav povezuje omenjena velika misleca.

4 PRIMERJAVA WEBROVIH IN JUNGOVIH IDEALNIH TIPOV

S splošnimi povezavami med Webrovo sociologijo in Jungovo psihologijo se je ukvarjal Walker.[43] Po njegovem mnenju Webra in Junga povezuje sociološka teorija. Trdi, da je Jungova psihologija sociološko koherentna, če jo gledamo v luči temeljnih sociooloških teoretičnih tradicij, kar pomeni, da je sociologom blizu, če jo gledajo skozi oči Webrove sociologije. Walker nadalje šteje, da je Webrova historična sociologija zelo blizu Jungovi kulturni zgodovini duše.

41 Quenk 2009 (op. 39), 11.
42 Quenk 2009 (op. 39), 11.
43 Walker 2012 (op. 2).

Nadalje Walker predlaga, naj sociologija prizna in upošteva Junga, saj bi se s tem odprla nova področja raziskovanja in bi to tudi pripomoglo k refleksivni analizi določenih sociooloških debat.[44] To je tudi namen tega prispevka: osvetlitev Webrove sociologije prava v luči Jungovih psiholoških tipov ter modifikacija in nadaljnje razvitje Webrovih idealnih tipov prava na temelju Jungovih psiholoških tipov. Na podlagi analize, kako specifične kombinacije razmerij med dominantnimi in pomožnimi kognitivnimi funkcijami določajo posamezne tipe prava, bo analiza v nadaljevanju temeljila na razvoju določenih idealnih tipov osebnosti, ki se ukvarjajo s pravom, ali pravnih poklicev. V kakršnikoli družbeni strukturi in kulturni situaciji bodo namreč nekateri psihološki tipi prevladovali ter skušali oblikovati strukturno in kulturno okolje, v katerem se pojavljajo.

Oba avtorja bi se bržkone strinjala, da se je v družbenem razvoju evolucija predmodernega v moderno pravo ujemala s prehodom od pomembne vloge iracionalnosti v pravu h kasnejšemu prevladovanju racionalnosti v pravu. Poglejmo Webrovo idejo razvoja od iracionalnih predmodernih tipov prava k modernim, ki temeljijo na racionalnosti (tako v formalni kot materialni različici), ali Jungovo primerjavo med iracionalnimi (intuicija, čutilnost) in racionalnimi (mišljenje, čustvovanje) kognitivnimi funkcijami – oba sta zatrjevala določen napredek ali vsaj pomembno spremembo v človeških kognitivnih funkcijah v času razvoja kulturne zgodovine. Oba bi tudi zagovarjala stališče, da ima oblikovanje idealnih tipov prava po eni strani pravnozgodovinsko vrednost, saj ponazarja odvisnost zgodovinskega spreminjanja prava od družbenih sprememb in tudi od sprememb posameznika, po drugi strani pa izpričuje hkratni obstoj nekaterih zakonitosti in stalnosti v človeški in družbeni pojavnosti. Razlaga takšnih zakonitosti in njihova stalnost v luči psihološke tipologije poudarja projekcijo človekovih ter prevladujočih družbenih ali kolektivnih kognitivnih funkcij, ki se izraža v pravu določenega časa in prostora. Četudi velja, da se pravo z družbo spreminja (lat. *Ubi societas ibi ius*), je vseeno mogoče najti njegove tipične poteze, ki so značilne za določen čas. Tako je mogoče oblikovati določene idealne tipe prava, katerih značilnosti se izražajo v najbolj tipičnih ali prevladujočih splošnih elementih družbe določenega časa in prostora.

Weber in Jung bi tudi soglašala, da v nobeni dobi ni mogoče najti čistih idealnih tipov prava, ampak več idealnih tipov prava soobstaja in so hkrati prisotni v različnih dimenzijah glede na to, kateri je prevladujoč oz. pomožen ali dopolnilni glede na prevladujočega. Kljub temu so seveda obstajale tudi razlike med njunim razumevanjem teh tipov, zato je Jungovo bolj razvito splošno teorijo tipov mogoče uporabiti za kritiko, spremembo ali dopolnitev Webrovih idealnih tipov prava v sobesedilu zgodovinskega pravnega razvoja.

V naslednjem poglavju bomo s pomočjo značilnosti psiholoških kognitivnih tipov, ki sem jih predstavil v tretjem poglavju, analizirali Webrove idealne

44 Walker 2012 (op. 2), 52–53.

tipe prava skozi posamezna obdobja pravne zgodovine, tudi z namenom njihove spremembe oz. dopolnitve.

5 SPLOŠNI IN POSAMIČNI IDEALNI TIPI PRAVA Z VIDIKA PSIHOLOŠKE TIPOLOGIJE

Webrova študija zgodovinskih idealnih tipov prava je vsaj v pretežnem delu še vedno aktualna, kar bo dokazala razlaga idealnih tipov skozi prizmo Jungove psihološke tipologije. Potrebna je sicer delna korekcija njegovih modelov oz. njihovega razumevanja, še posebej, če upoštevamo tudi razvoj psihološke tipologije po Jungu.

Webrove idealne tipe prava sicer v nadaljevanju rahlo modificiram, tako da v naslednjih poglavjih obravnavam naslednje idealne tipe: religijski tip, tradicionalni tip, logični tip in harmonični tip prava. Modifikacija Webrove misli prek analize Jungovih ali postjungovskih psiholoških tipov je prispevala k nekaj spremembam glede na Webrove idealne tipe prava: (i) nekatera imena tipov sem spremenil; (ii) nekatere podskupine so bile premeščene v drug tip, (iii) oblikovani pa so bili tudi nekateri novi tipi ali podtipi. Na podlagi uporabe psihološke tipologije sem štiri klasične Webrove idealne tipe prava nekoliko preimenoval, dodal tudi nekatere nove podtipe in razvil idealne osebnosti, povezane s pravom, ali idealne pravne poklice.

Vrh tega je treba ponovno poudariti, da so v času prevladovanja nekega idealnega tipa soobstajali drugi idealni tipi, ki v tem času niso bili tako dominantni. Poleg tega je treba dodati, da vse do modernega časa ne moremo govoriti o kakšnem oblikovanem ali razvitem pravnem sistemu – vsaj ne v smislu kompleksnosti, ki jo premorejo sodobni pravni sistemi in z njimi povezani idealni tipi prava.

5.1 Religijski tip prava

Prvemu splošnemu tipu prava, ki ga obravnavam, pravim religijski tip. Sestavljata ga dve različici: mistično pravo in teološko pravo. V nekem smislu oba ustrezata temu, kar je Weber poimenoval karizmatično odkritje prava in teokratsko pravo. A v nasprotju z Webrom, ki je med svojimi idealnimi tipi ta dva obravnaval v različnih obdobjih, v katerih sta se pojavljala, ju tu analiziram kot en splošni tip, ki pa ni omejen na specifično obdobje, temveč se lahko pojavlja kadarkoli in kjerkoli. Sicer sta mistično pravo in teološko pravo različna in se tudi pojavljata v različnih obdobjih; prvo je bolj značilno za primitivne družbene skupnosti, drugo pa za razvita in organizirana družbena okolja. Čemu ju potem obravnavam skupaj, na enem mestu?

Glavni razlog za njuno skupno obravnavo je v tem, da oba temeljita na intuiciji kot eni izmed iracionalnih kognitivnih funkcij. Razlika med njima pa je v tem, da eden temelji na pomožni kognitivni funkciji čustvovanja, drugi pa na pomožni funkciji mišljenja. O teh razlikah bom podrobneje govoril v nadaljevanju pri posamičnih tipih.

5.1.1 Mistično pravo

Za prvi podtip prava je značilno delovanje karizmatične oblasti prerokov in svečenikov z nadnaravnimi sposobnostmi. Ljudstvo tedanjega časa takšnim oblastnikom kot nekakšnim razlagalcem delovanja višjih sil na splošno verjame, jih spoštuje in njihovo oblast šteje za legitimno. Tipu prava, ki temelji na delovanju višjih, onkrajzemeljskih sil in na njihovem razodetju človeku, pravimo religijsko pravo prerokov in magov. Takšen iracionalni način sklicevanja na božanski izvor zakonov in drugega prava je še posebej značilen za staroveško orientalsko pravo in njegovo izrazito teokratsko usmeritev. Kljub vzniku racionalnosti se še pojavlja v stari Grčiji, bistveno manj v zgodnjem začetku starega Rima, v pomembnem vidiku pa je prisoten še v obdobju srednjega veka, vsaj dokler še govorimo o predmodernem pravu. Kasneje pa se vse bolj uveljavlja novoveško, bolj ali manj pretežno racionalno sekularizirano dojemanje prava, ki ga imenujemo tudi moderno pravo. V nadaljevanju predstavljam nekaj tipičnih primerov oz. poudarkov iz mističnih elementov v dojemanju prava.[45]

Glede nastajanja oz. ustvarjanja prava vzemimo kot tipični primer najprej prolog k Hamurabijevemu zakoniku iz Babilona iz časa skoraj dveh tisočletij pred našim štetjem. Vladar ga je sestavil po nareku boga Marduka, ki mu je naročil, naj ljudem v deželi omogoči pravo in pravičnost.[46] Nekaj podobnega najdemo že kakšnih 320 let prej v Ur-namujevi pravni zbirki; takrat je sprejem pravnih pravil zaukazal bog Nana.[47] V tem sobesedilu ne moremo tudi mimo Mojzesovih desetih zapovedi iz hebrejskega prava v *Svetem pismu stare zaveze*, ki mu jih je razodel Bog. Pomemben mistični element staroveškega orientalskega prava se denimo kaže v postopkih z ordalijami ali božjimi sodbami kot preizkusom z reko,[48] sodnim dvobojem, preizkusom z vrelo vodo, ognjem, razbeljenim železom itd. Ordalija se je večinoma uporabljala ne le v starem, temveč

45 V tem delu primere navajam po krestomatiji Katje Škrubej, *Pravo v zgodovini, Odlomki virov s komentarji,* Ljubljana, GV Založba, 2010.

46 Viktor Korošec, Slovenski prevod Hammurabijevega zakonika, *Zbornik znanstvenih razprav Pravne fakultete* (1954), 53–55.

47 Martha T. Rot, *Law Collections from Mesopotamia and Asia Minor,* Scholars Press, Atlanta 1997, 15–18, nav. po Škrubej 2010 (op. 45), 37.

48 Tipičen primer je tako iz Hammurabijevega zakonika, ko je nekdo drugega obdolžil npr. čarovnije, pa mu tega ni dokazal, zato se je obdolženi moral potopiti v reko, in če bi ga ta izvrgla, bi tako sklepali, da je nedolžen, zato bi bil tisti, ki mu je to očital, usmrčen. Korošec 1954 (op. 46), 53–55.

tudi v zgodnjem srednjem veku in vse do začetka 13. stoletja, ko je Sveti sedež duhovnikom prepovedal sodelovanje pri njej.[49]

Kljub izrazitejši racionalizaciji je mistični pristop k pravu poznala tudi stara Grčija, predvsem v začetni dobi. Tako je npr. biograf Plutarh poročal, da kralj Likurg svojih zakonov ni zapisal, saj naj bi mu to prepovedovala ena izmed reter.[50] Tudi kralj Solon v svoji Veliki državni elegiji govori o Dikinih svetih postavah (Dika je boginja pravičnosti).[51] Celo v precej racionalnem obdobju starega rimskega prava je vsaj v začetku zaznaven metafizični naboj, npr. v obdobju kraljev ali arhaične dobe, ko je rimska družba še pred Zakonikom XII plošč živela po običajnem pravu, ki je vsebovalo močne primesi sakralnega prava.[52] Kasneje se staro rimsko pravo precej racionalizira.

Iracionalnost metafizičnega elementa v pravu se spet izraziteje pojavi v določenem vidiku v začetku srednjega veka, ko so denimo še prisotne ordalije. Posebnost zgodnjega srednjeveškega prava, predvsem v germanskih običajnih pravih (t. i. *leges barbarorum*) so bili prisežni pomočniki kot osebe, ki so s svojo prisego npr. potrdile izjavo ene izmed obeh strank ali podkrepilne indice o obdolženčevi nevarnosti in verjetnosti, da je storil kaznivo dejanje. Sicer je prisega dokazno sredstvo, ki je izrazito sakralnega izvora. Pri prisegi so se morale takšne priče, ki niso bile priče v današnjem pomenu besede, dotakniti kakšnega svetega predmeta, v krščanski dobi razpela ali evangelija, Židje pa *Dekaloga.* Po Vilfanu naj bi bila prisega pravzaprav le ena najprvotnejših, vendar tudi najdlje ohranjenih oblik božje sodbe.[53]

Tudi še v zgodnjem srednjem veku so predvsem na zahodu pri germanskih plemenih karizmatični preroki s pomočjo razodetja ugotavljali oz. odkrivali v določenih pravnih postopkih vsebino metafizičnega prava. Takšni preroki so denimo bili *brehon* na Irskem, *druid* pri Galcih, *rachimburgi* pri Frankih in *lag saga* pri nordijskih plemenih.[54]

Ob tem tipu prava, ki je nekako bolj značilnost zgodnjega starega veka in delno zgodnjega srednjega veka, so seveda soobstajali tudi drugi tipi prava, ki jih bomo obravnavali v nadaljevanju. Tu so bili v prvi vrsti pravni običaji, njihove zbirke, različni vladarjevi ukazi in odloki, tudi preprostejši zakoni, odločitve sodišč itd., ki niso bili nujno metafizičnega izvora. Ob siceršnjih pomembnih sakralnih koreninah tedanjih družb je bilo treba pravno urejati tudi povsem

49 Rene David, Guenther Grasmann, *Uvod v velike sodobne pravne sisteme*, Ljubljana, Cankarjeva Založba, 1998, 119.

50 To je zakonska odredba kot sklep bogov, ki naj bi bil posredovan v obliki prerokbe. Rajko Bratož, *Grška zgodovina,* Ljubljana, Zveza zgodovinskih društev, 2003, 75.

51 Anton Sovre, *Starogrška lirika,* Ljubljana, DZS, 1964, 76–79.

52 Škrubej 2010 (op. 45), 63.

53 Sergij Vilfan, *Pravna zgodovina Slovencev,* Ljubljana, Slovenska matica v Ljubljani, 1996, 272.

54 Weber 1978 (op. 3), 768–769.

posvetne zadeve. Tako imamo iz starih mezopotamskih časov, npr. iz leta 2112 pr. n. št., ohranjeno notico o čisto »navadni« (tj. obligacijski) pogodbi.[55]

Kateri pa so najbolj tipični pravni viri metafizičnega prava?

Kar zadeva splošne pravne akte, kamor spadajo religiozne norme, ki imajo tudi pravno veljavo, je treba najprej omeniti t. i. metafizične ustave, kakršna sta npr. *Sveto pismo* (predvsem stare zaveze) in *Koran*, ki sta vsaj v nekem obdobju ne le vrhovna religiozna dokumenta, temveč tudi pravna dokumenta. Nekatere metafizične pravne norme so se pojavljale tudi v zgodovinskih zakonikih ali pravnih zbirkah. Tu imamo v mislih npr. določbe Hamurabijevega zakonika o božjih sodbah. Seveda pa so zakoni ali zakoniki na splošno imeli vse do modernih kodifikacij predvsem kazuistično naravo, ne sistematične, o čemer sicer več v nadaljevanju. Med metafizične pravne norme lahko štejemo tudi obredne pravne običaje, ki so bili uvrščeni v različne pravne zbirke ali pa so bili preprosto del ustnega izročila. Sicer pa je bilo v starejših dobah večino prava vse do večjega razmaha pismenosti predvsem v običajnopravni ustni obliki.

Kako pa je s takšnim tipom prava v kasnejših obdobjih? Bržkone ga razvoj novoveškega, modernega prava, ki je pretežno racionalno, vse bolj potiska na obrobje. Že moderno naravno pravo ga izrine iz območja sakralnega v dimenzijo posameznikovega moralnega dojemanja sveta. Danes ga morda srečamo le še v kakšnih občutkih za pravičnost ali v krogih, ki gledajo na pravo v smislu njegovega klasičnega (tj. predvsem religioznega) naravnopravnega ideala.

Kakšna je torej psihološkotipološka značilnost mističnega ali preroškega prava? Kateri so njegovi prevladujoči elementi?

Ker pravimo, da je to pravo iracionalno, mora biti v ospredju ena izmed t. i. iracionalnih kognitivnih funkcij, ki sta funkciji zaznave. Ob dejstvu, da gre za (religiozno) razodetje, je v ospredju kot poglavitna ali primarna funkcija seveda introvertna intuicija. O intuiciji (lat. *intueri* gledati na ali v) Jung zapiše, da se vsebina predstavlja kot celota in popolnoma, ne da bi lahko razložili ali odkrili, od kod prihaja. Gre namreč za nekakšno instinktivno dojemanje danosti (*a priori*), za nekakšno notranjo gotovost in prepričanje. Spinoza in Bergson bi *scientio intuitivo* označila za najvišjo vrsto znanja. Po Jungu je intuitivnost tako kot čutnost del infantilne in primitivne psihologije. V različici introvertne intuicije lahko govorimo o videnjih prerokov, mistikov, ki po Jungu črpajo svojo »snov« predvsem iz nezavednega sveta in arhetipov.[56]

Weber je takšen staroveški tip prava označil tudi kot iracionalno-formalen. Formalnost se nanaša na pazljivo upoštevanje obrednih ritualov, ki naj vodijo k ugotavljanju pravične sodbe. Iracionalnost se v tem okviru seveda nanaša na poglavitnost intuicije kot specifične kognitivne funkcije. Pri tem formalnost

55 Russ VerSteeg, *Early Mesopotamian Law,* Carolina AP, 2000; nav. po Škrubej 2010 (op. 45), 37.
56 Jung 1990 (op. 21).

obreda ali ritualnih postopkov daje svečenikom, ki na ta način ugotavljajo vsebino pravične sodbe, nekaj oblikovne zaslombe in varnosti pri soočanju z numinoznimi vsebinami.

Intuicija je kot zaznavna kognitivna funkcija iracionalna. Če določimo zaznavno funkcijo kot dominantno, pomeni, da je ena izmed ocenjevalnih funkcij pomožna in zato drugotne veljave. Vsaj kar zadeva pravo in pravni poklic, se glede tega tudi kaže tipična razlika med predmodernim in modernim pravom, kajti kot bomo videli v nadaljevanju, sta dominantni kognitivni funkciji v primeru modernega prava racionalni, medtem ko sta bili v predmodernem pravu bolj iracionalni.

Kot sem že nakazal, smo z dodajanjem pomožne funkcije dominantni funkciji intuicije prišli do prvega izmed dveh podtipov religijskega prava, namreč mističnega prava. Tu je pomožna funkcija čustvovanje, ki ima kot ocenjevalna funkcija nalogo ocenjevati zaznavo intuicije. Čustvovanje tu dodaja intuiciji nekakšno popolno, harmonično in vrednostno nabito izkušnjo numinoznih vsebin, kot razodetje, ki ga prerok deli z drugimi ljudmi. V sobesedilu pravnih postopkov je torej razodetje tisto, ki je pomembno za izid teh postopkov. Ker v tem času še ne moremo govoriti o pravnih poklicih, pa lahko vsaj opišemo osebnosti, ki so tipične za uporabo takšnega prava, torej preroke oziroma mistike.

5.1.2 Teološko pravo

Za drugi podtip religijskega prava štejem teološko pravo. To pravo je v svojem temeljnem izvoru intuitivno, saj temelji na zaznavi metafizičnih vsebin, a je drugačno od mističnega prava. Pravim mu teološko pravo, kajti z vidika psihološke tipologije je po mističnih razodetjih iz časa antičnega orientalskega prava in začetkov srednjega veka teokratska oblast, npr. katoliške cerkve, postala bolj dogmatska in se je tako delno oddaljila od t. i. žive vere.

Nekdaj razodete verske vsebine so se kasneje zapisale, kodificirale in tudi dogmatizirale. Razvil se je sistem religijskih pravil, postopkov in ustanov. Lahko bi rekli, da se je začetna močno intuitivna zaznava svetega kasneje vse bolj ocenjevala s pomožno funkcijo mišljenja, ki zajema predvsem značilnosti logike, sistematike in formalnosti. Etimologija besede teologija je naslednja: gr. *Theo* – bog + *-logia* iz *logos* – znanje, študij. Iz nekdanjega izvirnega metafizičnega razodetja se je razvil obsežen racionalni sistem religijskih naukov. Četudi gre za pomemben razvoj mišljenjske funkcije pri razvoju tega sistema, npr. kanonskega prava, je dominantno funkcijo še vedno mogoče pripisati intuitivni zaznavi, brez katere bi se povezava z metafizičnimi vsebinami povsem izgubila, tako da več ne bi mogli govoriti ne o religiji ne o religijskem pravu.

Takšno zvezanost s teološkim pravom gotovo predstavlja tipična osebnost, namreč teolog (tudi duhovnik). Na Zahodu so številni teologi in kanoniki pri-

spevali k razvoju obsežnega korpusa kanonskega prava. Toda tudi v islamski sunitski tradiciji so pravne šole (npr. hanafitska), sestavljene iz teologov in pravnikov, pomembno prispevale k razvoju islamskega prava z razlago primarnih religioznih besedil.

5.2 Tradicionalni tip prava

V okviru splošnega tipa tradicionalnega prava obravnavamo dve specifični ali posamični vrsti prava: (a) imperialno pravo in (b) običajno pravo. Kot bomo videli v nadaljevanju, oba zaznamuje vloga prevladujoče kognitivne funkcije čutilnosti, ki je kot zaznavna funkcija iracionalne narave. V pravni različici (imperialno pravo) to podpira pomožna funkcija mišljenja, v drugem primeru (običajno pravo) pa pomožna funkcija čustvovanja.

Tradicionalno pravo je značilno za bolj predmoderni tip prava (delno starega, delno pa novega veka). Sicer njegove poteze lahko najdemo tudi v današnjem pravu. Tako lahko pravne običaje (npr. ustavne običaje v Veliki Britaniji, pravne običaje v gospodarskem pravu) najdemo še v sodobnem pravu, tudi v najrazvitejših državah, pri čemer pa se imperialno pravo pojavlja le od časa do časa v nekaterih bolj absolutističnih političnih režimih (npr. v vojaških diktaturah, ki vzniknejo po državnih udarih).

5.2.1 Imperialno pravo

Weber pri tradicionalnem pravu govori o imperialnem postavljanju prava (npr. ukazi, povelja vladarja) v smislu posvetne in sakralne »oblasti«. Imperij (lat. *imperium)* pomeni ukaz, povelje, vrhovno oblast ali poveljstvo. S tem izrazom je Weber mislil predvsem na oblast in povelja vojaških poveljnikov v času preseljevanja ljudstev v zgodnjem srednjem veku. V tistem času so bili vojne in vojaški spopadi pogosti in plemena so se morala nanje hitro odzvati, navadno na podlagi ustnega ukaza oz. povelja poveljnika, ki je začasno lahko razveljavilo celo tradicionalno običajno pravo nekega plemena. Takšno imperialno pravo se razvija še v obdobju patrimonializacije (lat. *patrimonium* iz *pater* oče) kot »privatizacije« javne oblasti lokalnih fevdalcev in oblasti vladarjev v okviru širšega kraljestva. Takšno večinoma ustno pravo je dopolnjevalo lokalne pravne običaje, kasneje pa z razvojem družbe vodi v bolj racionalne oblike zakonodaje.

Takšno patrimonialno pravo ni racionalno v smislu logične racionalnosti, saj je vladar odločal po svoji diskreciji od primera do primera, ne da bi bil vezan na kakršnakoli predhodna pravna pravila. Tako je bil rezultat nekega postopka odvisen od vladarjeve milosti ali privilegija, ki ga je nekomu naklonil. Če pa je bil vladar hkrati tudi najvišji svečenik, potem je bila njegova oblast popolna.[57]

57 Weber 1978 (op. 3), 844–845.

Seveda pa takšna diskrecija ni bila absolutna, saj je moral delno upoštevati tudi lokalne običaje in religiozne norme.

Tovrstna patrimonialna oblast je bila patriarhalna (gr. *patriaches* iz *patria* – rod) ali »očetovska«. V jeziku simbolike arhetip očeta predstavlja čutilno, torej telesno funkcijo, ki se nanaša predvsem na »zemeljsko« pravo.[58] Pravni viri takšnega imperialnega prava so bili raznovrstni, večinoma ustni ukazi ali navodila v smislu posamičnih pravnih aktov, npr. glede števila dni, ki jih je moral kmet preživeti na dvorni tlaki. Temu bi lahko dodali darovnice ali podelitvene listine v pisni obliki kot izjave volje, s katerim so vladarji zemljo darovali svojim vazalom v alod ali jim jo podelili v fevd. Na drugi strani imamo npr. kapitularje frankovskih vladarjev, ki so pomenili navodila za urejanje posameznih področij. Ti so bili sicer že precej podobni temu, čemur danes pravimo splošni akti, četudi so bili pisani v bolj kazuistični obliki.

Kot je bilo že omenjeno, so vladarje, poglavarje in druge voditelje navadno šteli za avtoritete z očetovskimi značilnostmi, nekakšne očake določene družbene skupnosti. To je sovpadalo z njihovo vrhovno zemeljsko avtoriteto. Morali so reševati konkretne in zelo praktične probleme, navadno precej hitro, da bi tako rešili in zavarovali svoje pleme, ko je bilo v nevarnosti. V takšni situaciji ni bilo časa za razmišljanje ali racionalno odločanje glede na prednosti in slabosti neke odločitve. Tako je v ospredju takšnega odločanja in reagiranja čutilna funkcija kot reakcija na fizično nevarnost. V smislu zaznavanja takšno avtoriteto usmerjajo povsem konkretni, praktični in realni izzivi, o katerih je treba odločiti. Njihova avtoriteta izhaja iz tradicionalne potrebe po spoštovanju družbenega reda in družbenih pravil. Čutilno kognitivno funkcijo tu podpira pomožna funkcija mišljenja (če je časa za miselno refleksijo sploh dovolj in če vladar kot postavljavec pravil ni neposredno vpleten v boj). Čutilna zaznava realnosti je ocenjevana na način mišljenja: logično v smislu uporabe nekaterih sredstev za dosego določenega cilja, tj. neosebno in ne glede na posledice za kogarkoli (v smislu hladne preračunljivosti absolutista: »Ker jaz pravim tako, saj sem božji namestnik na zemlji!«), in na grob način v smislu neizprosne zahteve po izvršitvi odločitve, ki naj bo izpeljana hitro in učinkovito.

Tipična osebnost, ki ponazarja omenjeni tip imperialnega prava, je seveda vladar (bolj absolutističnega oz. despotskega tipa).

5.2.2 Običajno pravo

Tradicionalno pravo se kaže tudi v razvejenosti raznovrstnih pravnih običajev. Ti so poleg metafizičnega prava zelo močno zaznamovali predmoderno

58 Tom Chetwynd, *Dictionary for Dreamers,* London, Paladin Books, 1982, 38. »Oče je simbol razmnoževanja, posesti, gospodovanja, vrline.« Jean Chevalier, Alain Gheerbrant, *Slovar simbolov,* Ljubljana, Mladinska knjiga, 2006, 398.

pravo vse od starega orientalskega prava prek stare Grčije, deloma starega Rima in še kako pomembno v srednjem veku, ko so pravzaprav pomenili njegovo ustavo. Pravne običaje so morali spoštovati tudi sami vladarji ne le v starem veku, temveč tudi v celotnem srednjem veku,[59] zametke srednjeveške zakonodaje pa pravzaprav pomenijo zbirke pravnih običajev (bodisi plemstva – deloma njihovi pravni običaji, ki jih prizna vladar v privilegijih; bodisi mest – deloma privilegiji ali statuti; bodisi podeželskih skupnosti – npr. Gorske bukve v Sloveniji[60]). Njihovo marginalizacijo povzročijo šele velike pravne kodifikacije, predvsem civilnega prava. Tako je denimo avstrijski ODZ določal, da pravni običaji ne veljajo sami po sebi, temveč se je nanje »moč ozirati le, kadar se kateri zakon sklicuje nanje«.[61] V današnjem, pretežno racionaliziranem pravu so med formalnimi pravnimi viri pravni običaji zgolj nekakšna obrobna zadeva.[62]

Za pravnega se šteje tisti običaj, torej neko (neprestano) ponavljanje določenega dejanja, ki ga neka skupnost, za katero velja, šteje za obveznega, torej veljavnega. Kot takšen se zdi, da je povezan s čutilno kognitivno funkcijo, ki zaznavanju dejanskosti, tudi zavezi, ki vlada v njej, oz. njeni nespremenljivosti daje določeno težo. Kot zaznavna funkcija je čutilnost sicer iracionalnega izvora. Pri pravnem običaju se ta v skrajnosti kaže v nekakšnem »slepem« zaupanju v tradicionalnost pravnih običajev, v njihovo ponavljanje, tudi zavoljo njih samih, četudi to morda ni vedno povsem racionalno in bi jih kazalo vsaj delno spremeniti. Dominantno čutilno funkcijo zaznamuje vezanost ali fiksiranost petih čutov na objekt oz. njihovo čutilno zaznavo. V ekstravertni obliki je takšna čutna zaznava objekta bolj dobesedna, v introverni različici pa bolj ustvarjalna ali subjektivno razložena.[63] Če oseba s prevladujočo intuitivno kognitivno funkcijo zaupa možnostim in je nagnjena k spremembam, je čutilni tip bolj zavezan dejanskosti, ceni konservativnost ter spoštovanje običajev in tradicije. Skratka sprejema svet in vrednote, kot obstajajo.[64] Ena izmed potez dominantne čutilne funkcije naj bi bila tudi tradicionalnost kot upoštevanje kontinuitete, varnosti, družbene afirmacije, ki jih zagotavljajo tradicionalnost, uveljavljene institucije in znane, uveljavljene metode. Pri tem pa je čutilna funkcija nenaklonjena spremembam in nekonvencionalnim odklonom od uveljavljenih norm.[65]

V nasprotju z imperialnim tipom prava je pomožna kognitivna funkcija tu čustvovanje. (Pravni) običaji so družbene norme, ki organsko vzniknejo v sami

59 Paolo Grossi, *Pravna Evropa,* Ljubljana, Založba/*cf., 2010, 29–30.

60 Sergij Vilfan, *Uvod v pravno zgodovino,* Ljubljana, ČZ Uradni list RS, 1991, 84–85.

61 Škrubej 2010 (op. 45), 267.

62 Veljajo npr. kot uzance ali pravni standardi predvsem v civilnem pravu. Kot formalni pravni viri se tu in tam pojavljajo še tudi v ustavnem in mednarodnem pravu. V modernem pravu je bila velika težnja po njihovi kodifikaciji.

63 Jung 1990 (op. 21).

64 Briggs Myers, Myers 1995 (op. 37), 57–58.

65 Quenk 2009 (op. 39), 10.

družbi. So nekakšen izraz kompleksnih in prepletenih odnosov med ljudmi, vrednot, morale in interesov. Zato jih je mogoče ocenjevati kot nekakšno celovito, vseobsegajočo izkušnjo družbenih norm, ki veljajo od nekdaj, v nasprotju z današnjimi pravnimi normami, katerih oblikovalec je znan in so tudi kratkotrajnejše. Običaji nastanejo kot produkt celotne družbe in njene potrebe po družbeni regulaciji. Ker temeljijo na konkretnih elementih, so sami po sebi bližje osebnim potrebam posameznikov kot abstraktna in splošna pravila moderne zakonodaje.

Za takšno pravo so tipične osebnosti starešine[66] v družbi, v kateri so varuhi njenih običajev. To dokazuje tudi zgodovinsko dejstvo, da so še posebej v predmodernih družbah spraševali starejše ljudi po obstoju (pravnih) običajev kot veljavne pravne podlage za rešitev kakega (pravnega) spora.

Končno lahko z vidika pravne zgodovine ugotovim naslednjo pomanjkljivost v Webrovi teoriji idealnih tipov: kljub kompleksni analizi pravne zgodovine glede tradicionalnega tipa prava sploh ne omenja pravnih običajev, četudi jih pravni zgodovinarji na splošno štejejo za najpomembnejše vire prava v obdobju predmodernega prava vse tja do začetkov modernega prava.

5.3 Logični tip prava

Četudi pri tem tipu prava deloma analiziram, kar je Weber opisoval kot (a) pravo honoratov prava in (b) sistematično pravo in kar je štel k racionalnemu pravu, ko je oblikoval idealne tipe prava, uporabljam drugačno ime. Takšen splošni tip prava imenujem logično pravo. Prvi razlog je v tem, da od teh tipov prava ločujem t. i. harmonično pravo, ki je tudi racionalni splošni tip prava in ki ga obravnavam na koncu. Tako logično pravo kot harmonično pravo sta racionalni vrsti prava, saj v njunem ozadju delujeta racionalni dominantni kognitivni funkciji: pri logičnem pravu mišljenje, pri harmoničnem pa čustvovanje. Drugi razlog za imenovanje takšnega splošnega tipa prava logično pa je v tem, da sta oba podtipa ali specialna tipa, ki spadata v ta splošni tip in ju obravnavam v nadaljevanju, povezana z logiko oz. vrstami logičnih metod: pri kazuističnem tipu gre za indukcijo, pri sistematičnem tipu pa za deduktivno logiko.

Trditi, da je racionalno pravo le proizvod modernega prava oz. moderne države, bi bilo z zgodovinskega stališča vsekakor neverodostojno. Gotovo je, da so deli racionalnega prava obstajali že v preteklosti, celo pred obdobjem stare Grčije, ki sicer pomeni izrazit prelom logosa z mitosom.[67] Seveda pa je npr. orientalsko pravo, če zanj sploh lahko rečemo, da je bilo racionalno, tudi v svojem racionalnem delu bilo močno prežeto z metafizičnim in tradicionalnim pravom. Tako v Hamurabijevem zakoniku najdemo nekaj racionalnih potez,

66 V nekaterih lokalnih skupnostih so bile takšne osebe lahko župani, v frankovskem pravu (*Lex salica*) pa poznamo institut *tunginus* kot osebo, ki je izvrševala sodno funkcijo.

67 Artur Kaufmann, *Uvod v filozofijo prava,* Ljubljana, Cankarjeva založba, 1994, 51.

toda te gredo z roko v roki z metafizičnimi elementi (npr. božje sodbe ordalije) in tudi tradicionalnimi elementi (npr. običaj, ki je prevzet v to pravno zbirko). Poleg tega se moderne in stare družbe razlikujejo v tem, da je moderno pravo v večini racionalno pravo, v katerem so metafizični in tradicionalni elementi nekakšna redkost. Medtem ko sta anglo-ameriški in evropski kontinentalni pravni sistem značilna za zahodne družbe, sta običajno pravo kot tradicionalno pravo in metafizično pravo veliko bolj ohranjena v skupini sicer heterogenih tradicionalnih in religioznih pravnih sistemov nezahodnih družb (npr. v Afriki, na Daljnem vzhodu in v islamskem svetu).

V tem poglavju sicer razčlenjujem dva podtipa splošnega racionalnega (pravzaprav mišljenjskega) tipa prava. Najprej obdelujem kazuistični, zatem pa še sistematični tip prava.

5.3.1 Kazuistično pravo

Kazuistični podtip prava je sicer starejši kot sistematični, vendar je še danes prisoten. Tako so bili različni zakoni že v starem Orientu, stari Grčiji in še kasneje vse do obdobja velikih kodifikacij predvsem kazuističnega tipa, saj so primeroma navajali situacije, v katerih naj bi veljale pravne norme. Sistematika in urejenost tvarine v zakonu nikakor nista bila taki, kot ju poznamo v današnjem času in kar je še posebej značilno za kodifikacije iz 19. stoletja (npr. *Code civile,* avstrijski ODZ, nemški *BGB*). V ta tip prava spada tudi staro rimsko pravo, ki je obširnejšo kodifikacijo doživelo šele z Justinijanom v 6. stoletju našega štetja (tj. *Corpus iuris civilis*), toda tudi ta se po svoji sistematiki težko primerja z modernimi kodifikacijami, kar pomeni, da tovrstni racionalizem v tedanjem času še ni bil razvit. Kazuistično pravo v veliki meri najdemo tudi pri (današnjem) anglo-ameriškem pravu, predvsem v sodniškem pravu *common law,* kjer je bil tradicionalno najpomembnejši igralec v igri prava sodnik, četudi se danes z vse večjim pomenom zakonodaje sistematika vse bolj razvija tudi v tem svetu.

Za kazuistični tip prava je v psihološkotipološkem smislu značilen primat mišljenjske funkcije, ki jo močno podpira čutilna, torej senzualna funkcija. Za mišljenjsko funkcijo je sicer značilna logičnost, v smislu zanašanja na logično analizo, na vzroke in posledice. Za logičnost je značilna razumskost kot sekvenčno utemeljevanje, nepristranskost pri odločanju itd. Čutilna funkcija, ki daje v tem primeru podton mišljenjski, pa vodilno racionalno rdečo nit usmerja v konkretnost, realističnost, praktičnost, eksperimentalnost in tradicionalnost.[68] Ta je danes značilna predvsem za sodno prakso. Tako je mogoče razumeti tudi racionalnost in materialnost tovrstnega prava pri Webru, namreč kot mišljenjsko-čutno (ali tudi eksperimentalno) dimenzijo. V tem smislu bi bila tipična pravna poklica, značilna za ta podtip, sodnik in tudi odvetnik.

68 Quenk 2009 (op. 39), 10–11.

5.3.2 Sistematično pravo

Drugi podtip racionalnega prava je sistematični. Značilen je predvsem za najkasnejši razvoj prava, ki je dosegel vrh v modernih kodifikacijah in je danes značilen predvsem za splošne pravne akte (predvsem ustave in zakone, podzakonske akte, tudi mednarodne pogodbe). Kot takšen pomeni pri Webru zadnji korak v razvoju človeške racionalnosti. Mišljenjska funkcija kot racionalna funkcija je tu podprta z intuicijo, za katero so med drugim tipične značilnosti: abstraktnost, konceptualnost in teoretičnost. Tako abstraktnost v psihološko-tipološkem smislu pomeni osredotočanje na koncepte in abstraktne pomene idej ter na njihova medsebojna razmerja. Konceptualnost pomeni osredotočanje na same koncepte, ne na njihovo uporabo; pomeni tudi kompleksnost. Navsezadnje je za teoretičnost značilno iskanje modelov in povezav med abstraktnimi koncepti.[69] Tako je tudi Webrovo racionalnost in formalnost mogoče razumeti kot mišljenjskost in intuicionalnost, slednjo predvsem v smislu abstraktnosti in konceptualnosti. Takšen pristop je bolj značilen za evropski kontinentalni pravni sistem. V njem so v preteklosti k razvoju takšnega prava veliko prispevale predvsem pravne fakultete, glavna figura takšnega sistema pa je bil univerzitetni profesor.

Osebnosti, povezane s pravom, pravni poklici ali pravne funkcije, ki bi spadale v takšno kategorijo, bi bržkone bili tudi moderni zakonodajalci, katerih zgodovinski pravni ideali so gotovo velike kodifikacije 19. stoletja. Sem bi torej lahko prišteli tudi profesorje prava, tiste iz evropske kontinentalne pravne družine, katere pravna znanost na renesančnih evropskih univerzah je tradicionalno temeljila na recepciji rimskega prava vse od 12. stoletja. Ta je prispevala k oblikovanju evropskega *ius commune* in kasneje k oblikovanju velikih kodifikacij.

Pravni viri, ki so tipični za kazuistični podtip, so seveda sodbe kot posamični pravni akti, toda v tipičnih, tj. precedenčnih primerih z učinki *erga omnes*. To velja predvsem za anglo-ameriško pravo. Za kazuistično pravo starega rimskega imperija so bržkone značilna tudi mnenja klasičnih pravnikov, ki so jih v Avgustovem principatu izrekali s cesarsko avtoriteto. Tako je v starejših obdobjih nastajala tudi zakonodaja, ki pa je bila do moderne dobe bolj kazuističnega tipa in ne toliko sistematično zarisana kot v kodifikacijah evropske kontinentalne pravne družine. Za sistematični podtip racionalnega tipa so, kot je bilo že rečeno, značilne predvsem (zgodovinske) kodifikacije z začetka 19. stoletja, danes pa zelo razvejeni splošni pravni akti, kot so ustave, zakoni in podzakonski akti.

Seveda je danes pravo večinoma logične narave, bodisi da gre za povsem sistematično pravo ali pa kazuistično. Tradicionalno pravo je danes manj prisotno, še manj pa religijsko.

69 Quenk 2009 (op. 39), 10–11.

5.4 Harmonični tip prava

Številni sodobni pravni teoretiki pišejo o pojavljanju novih elementov v pravu, da bi tako opozorili na specifičen tip prava, ki ga včasih imenujejo tudi sodobno ali postmoderno pravo. Takšno novo pravo dopolnjuje moderno pravo v smislu njegovih klasičnih značilnosti, ki vključujejo splošnost, abstraktnost, sistematičnost, logičnost, formalnost[70] v luči skupnega imenovalca instrumentalne racionalnosti (*ratio*).[71]

V sodobnem času postaja ne le priljubljeno, temveč tudi nadvse pomembno pravno področje alternativno reševanje sporov (ARS), ki zajema različne postopke mediacij, poravnav, konciliacij itd. ARS ima že dolgo zgodovino. Tako naj bi že v kraljestvu Mari (v današnji Siriji) kakšnih 1800 let pr. n. št. uporabljali mediacijo in arbitražo pri reševanju sporov z drugimi kraljestvi. Feničani naj bi v letih 1200–900 pr. n. št. pogosto uporabljali pogajanja, obliko arbitraže z imenom *pančajat* pa naj bi okoli leta 500 pr. n. št. uporabljali v Indiji. Približno okoli leta 400 pr. n. št. so stari Grki v svojih mestnih državah imeli javnega arbitra, tako da naj bi celo Aristotel kakšnih sto let kasneje takšno vrsto razreševanja spora bolj cenil od sodne poti. Na Kitajskem je zahodna dinastija *Zhou* oblikovala posebno službo mediatorja. Zanimivi so tudi izsledki raziskav različnih antropologov in sociologov, ki so preučevali vlogo ARS v tradicionalnih skupnostih (npr. med Bušmani v puščavi Kalahari, prebivalci Havajskih otokov, pri plemenu Kpele v Centralni Liberiji, med Abhazi v Kavkaškem gorovju).[72]

Takšno harmonično pravo je imelo velik vpliv v zgodovinskem razvoju kitajskega prava. Na podlagi Konfucijevega nauka in načela *li* so Kitajci razvili mrežo postopkov za reševanje sporov zunaj sodišč, ki so jih vodili družinski poglavarji, bližnji ali daljni sorodniki ali preprosto starešine skupnosti.[73] Načelo *li* pomeni primerno vedenje in določa družbene vloge za različne družbene situacije, npr. glede odnosov med nadrejenimi in podrejenimi, starejšimi in mlajšimi, plemiči in (navadnimi) državljani, med sorodniki, prijatelji, tujci, očeti in sinovi, starejšimi in mlajšimi brati ali med možmi in ženami. Takšna pravila vedenja naj bi pomenila naravni red.[74] »To je odsev konfucijanske doktrine, ki zakonodajo razume kot nujno zlo, ki naj se oblikuje le tam, kjer mora država naložiti kazensko sankcijo, ker je bil kozmični red preveč porušen, ali ko gre za

70 V slovenskem prostoru je o teh elementih modernega prava prvi diskutiral Anton Perenič v delu *Relativna samostojnost prava*, Ljubljana, DDU Univerzum, 1981.

71 To vrsto racionalnosti je močno kritiziral Max Horkheimer v delu *Eclipse of Reason,* Oxford University Press, 1947.

72 Jerome T. Barrett, Joseph P. Barrett, *A History of Alternative Dispute Resolution,* San Francisco, Jossey Bass, 2004, 2–19.

73 Konrad Zweigert, Hein Kötz, *Introduction to Comparative Law,* Oxford, Clarendon Press, 1998, 291.

74 Zweigert, Kötz 1998 (op. 73), 288.

organizacijo državne uprave.«[75] Takšen pogled je na Kitajskem prevladoval nekako do druge polovice 19. stoletja, ko se je država bolj usmerila na Zahod in so se začeli zgledovati po zakonodaji držav evropske kontinentalne pravne tradicije. Nekaj podobnega se je dogajalo na Japonskem, do obdobja *Meidži* ob koncu 19. stoletja, kjer so tradicionalnim naravnim pravnim pravilom pravili *giri*.[76]

Tudi v srednjeveški kontinentalni Evropi je bila arbitraža kot sredstvo reševanja sporov v nekem obdobju pomembnejša od sodne poti. Njena vloga ni bila toliko v pomoči nekomu pri izvrševanju pravic, temveč bolj v varovanju in zagotavljanju miru v družbi in pomirjanju sprtih skupin. V Prvem pismu Korintčanom je Pavel priporočal ljubezen namesto pravičnosti in je vernike pozival, naj svoje zahteve ne naslovijo na sodišče, temveč raje na duhovnike in brate. V tistem času so pravo zaradi njegove zemeljskosti razumeli kot nekaj slabega, kot takšno pa je bilo na nizki stopnji moralne pomembnosti.[77]

Navedene so le nekatere točke v razvoju ARS. Zdi se, da je takšno harmonično pravo bilo na svetu vedno prisotno, v nekaterih družbah in ob določenem času sicer bolj kot drugje in drugič. A zdi se, da ni bilo še nikoli tako prisotno kot danes, vsaj v zahodnih družbah. Kako se ta različica prava razlikuje od tipičnega modernega (logičnega) prava, je v nadaljevanju opisano skozi prizmo razumevanje psihološke tipologije.

Za klasično moderno (ali logično) pravo je značilna predvsem mišljenjska racionalna evalvacijska funkcija, ki temelji na logični analizi z osredotočenostjo na objektivnost in nepristranskost ter je blizu binarnemu razmišljanju.[78] Tako npr. nekdo pravdo dobi, drugi izgubi, nekdo je kriv ali ni kriv kaznivega dejanja, nekdo je zavezan plačevanju preživnine ali pač ne, kajti v teh primerih praviloma velja *tertium non datur.* Pri alternativnem reševanju sporov pa gre za drugačen način evalvacije oz. odločanja. Tu je t. i. čustvovalna (torej *feeling*) bolj odločilna kot evalvacijska funkcija, saj se izstopa iz okvirov logične racionalnosti in formalnosti ter vstopa bolj v vode empatičnosti, harmoničnosti, kompromisa, medsebojnega prilagajanja itd.[79]

Ta tip prava imenujemo harmonični, saj je ohranjanje družbene harmonije na ravni individualnih odnosov med ljudmi in družbe kot celote ena najpomembnejših značilnosti čustvovanja. Če logični tip prava rešuje spore v družbi na binaren način, ki ima navadno škodljive posledice za nadaljevanje družbenih odnosov, je kot že omenjeno eden od ciljev harmoničnega tipa prava, da skuša ohraniti nivo družbenih odnosov, ne da bi se ti preveč okrnili. Logični

75 Zweigert, Kötz 1998 (op. 73), 290.

76 David, Grasmann 1998 (op. 72), 440.

77 David, Grasmann 1998 (op. 72), 108.

78 Marko Novak, Legal thinking: a psychological type perspective, *Dignitas* (2011), 49/50, 140–177.

79 Quenk 2009 (op. 39), 11.

tip prava z osrednjo in dominantno funkcijo mišljenja bi lahko povezali s splošnim (kulturnim) načelom logosa, katerega značilnost je »razlikovati, razumeti, presojati, ločevati in razumeti na določen način«. Kultura logosa »je usmerjena k poimenovanju idej, njihovem določanju, izražanju, oblikovanju pojmov«. Na drugi strani imamo funkcijo čustvovanja, ki jo lahko povežemo s splošnim (kulturnim) načelom erosa, ki je »načelo odnosa, pripadanja, združevanja stvari, ustvarjanja povezav med njimi […], puščanja stvari *in suspenso;* ni jih treba niti izreči«.[80] Toda Jung je opozarjal, da sta načeli logosa in erosa intuitivna pojma, ki ju ni mogoče povsem opredeliti, ampak lahko na njiju opozorimo le v omejenem obsegu.[81] Zato ju ne moremo niti šteti za sinonima za mišljenje in čustvovanje niti ju ne moremo okrniti na razliko med moškimi in ženskami.

Tu ne gre za »borbeno« binarno (črno-belo) rešitev kot v klasičnem sodnem reševanju spora, temveč za »mirno« iskanje sivih polj kompromisnih rešitev, s katerimi se reši spor. Podobno kot v terapevtskem postopku. Alternativni reševalec spora torej ni »hladno-logično« objektiven, nepristranski sodnik, ki je odmaknjen od obeh strank, temveč je bolj svetovalec: subjektiven in pristranski, a seveda do obeh strank enako, zato da bi ju »pripeljal skupaj,« ne pa oddaljil od njiju samih po sistemu zmagovalcev in poraženčev. Rezultati postopkov ARS torej niso črni ali beli, temveč sivi, torej kompromisi. Toda pri tem gre še vedno za racionalno kognitivno funkcijo v smislu ocenjevanja in odločanja glede na dana dejstva.

V ZDA, kjer je takšen način razreševanja sporov že dodobra uveljavljen in se še naprej razvija, k ARS poleg že omenjenih oblik prištevajo še preventivno pravo, terapevtsko jurisprudenco, sodišča za razreševanje problemov, metode kreativnega reševanja sporov itd.[82] Pravnikom, ki se ukvarjajo s temi področji reševanja sporov, gre predvsem za blagor človeških odnosov, vrednote, cilje, potrebe, čustva, kar je precej tipično za omenjeno čustvovalno kognitivno funkcijo ali za t. i. etiko skrbi ali sočutja.[83] Ti pristopi poudarjajo predvsem altruizem, nematerializem, netekmovalnost in so nasprotni adversarnim bojem na sodiščih, kar je (bilo) značilno vsaj za moderno pravo. Medtem ko so za sodne »spopade«, ki razrešujejo spore predvsem glede preteklih dejstev in konfliktov, značilni črno-beli izidi, je pristop pri ARS bolj holističen in usmerjen tudi v prihodnost.

Po opisu specifičnih idealnih tipov prava, pri čemer smo ugotavljali vpliv posamezne psihološke tipologije na oblikovanje posameznih tipov in podtipov,

80 James L. Jarret (ur.), *Jung's Seminar on Nietzsche's Zarathustra*, Princeton, New Jersey, Princeton University Press, 1998, 102.

81 Jarret 1998 (op. 80), 104.

82 Susan Daicoff, *Lawyer, Know Thyself,* Washington, American Psychological Association, 2006, 169–196.

83 Daicoff 2006 (op. 82), 169–196.

se lahko vprašamo, ali lahko tudi v harmoničnem tipu prava oblikujemo dva podtipa. Tu bi lahko razlikovali med postopki ARS, ki so bliže klasičnim sodnim postopkom, in tistimi, ki so v primerjavi s temi atipični. V prvo skupino bi bržkone lahko šteli arbitražne postopke, ki so bliže klasičnim in tradicionalnim sodnim postopkom. Glede na svojo formalnost in posledice arbitraža večinoma sledi tradicionalnim načinom razreševanja sporov in se ne oddaljuje veliko od uveljavljenih pravnih institucij, institutov, postopkov in pravnih norm. Tako se zdi, da so arbitraža in arbitri kot tipične osebnosti, poklicna skupina ali funkcionalna skupina nekako bližje funkciji čutilnosti. Ta bi bila v tem primeru pomožna kognitivna funkcija, ki podpira dominantno čustvovanje. Na drugi strani pa bi mediatorji kot osebnosti oz. strokovnjaki, udeleženi v postopkih mediacije, spadali v drugo navedeno skupino v zvezi z ARS. Mediacija je bolj oddaljena od klasičnih in tradicionalnih sodnih postopkov, pravnih institucij in institutov kot arbitraža. Še posebej si prizadeva najti najboljše ustvarjalne rešitve glede rešitve spora, da bi ohranila vzpostavljeni odnos. Dobra mediacija se opira na domišljijo, vrednostno razmišljanje, iskanje najrazličnejših možnosti in izvirnih rešitev, ki so navadno unikatne. Vse to pa so značilnosti kognitivne funkcije intuicije. Ta je v tem primeru pomožna kognitivna funkcija, ki podpira čustvovanje kot dominantno kognitivno funkcijo v primeru postopkov ARS.

6 SKLEP

Preden predstavimo razpredelnico, ki povzema gornje ugotovitve glede idealnih splošnih in specifičnih tipov prava, se za trenutek ustavimo pri temi, ki je navadno pomembna za razpravo o Jungovih psiholoških tipih, namreč pri razliki med ekstravertnostjo in introvertnostjo. Jung je ti dve obliki vedenja kombiniral s temeljnimi kognitivnimi funkcijami in prišel do osmih različnih tipov, njegovi nasledniki pa so z dodajanjem vpliva pomožne funkcije na dominantno dodatno razvili skupno 16 tipov. Zavedamo se, da bi bilo to mogoče tudi glede pričujočih idealnih tipov prava, toda ta možnost v realnosti obstoječim idealnim tipom ne bi prinesla dodane vrednosti.[84] Vsaj v vsebinskem smislu ne bi šlo za pomembno novost glede idealnih tipov, temveč bi to le vodilo k večji fragmentaciji in s tem k zmedi. Še najbolj bi lahko introvertnost in ekstravertnost povezali s teoretičnim oz. praktičnim vidikom teh idealnih tipov. Toda to bi glede prava imelo smisel bolj za moderno dobo in moderne poklice, manj pa za obdobje starega in srednjega veka, ko področja prava gotovo še niso bila tako razvejena kot v kasnejših obdobjih.

84 O tem, kako je takšna razlika lahko upoštevna za pravo, glej Marko Novak, Lawyers' Ideal Psychological Type Preferences, http://works.bepress.com/myaccount.cgis (28. marec 2013); in Novak 2011 (op. 78), kjer obravnavam razlike med psihološkimi tipi glede modernih pravnih poklicev.

Tako na podlagi predstavljenih idealnih splošnih tipov in specifičnih podtipov prava, osebnosti, povezanih s pravom, oz. pravnih poklicev, pravnih virov ter različnih zgodovinskih obdobij, v katerih so ti prevladovali, lahko sestavimo razpredelnico:

Splošni tipi prava	*Specifični tipi prava*	*Idealne osebnosti / poklici*	*Kognitivne funkcije*[1]		*Tipični pravni viri*
			dominantne	*pomožne*	
RELIGIJSKO PRAVO	mistično pravo	mistik, prerok	I	Č	razodetja prava
	teološko pravo	teolog, duhovnik	I	M	"kodificirano" religijsko pravo (kanonsko pravo, šeriatsko pravo)
TRADICIONALNO PRAVO	imperialno pravo	vladar, voditelj	S	M	ukaz, predmoderni zakon
	običajno pravo	starešina	S	Č	pravni običaj
LOGIČNO PRAVO	kazuistično pravo	sodnik, odvetnik (pravnik)	M	S	sodna praksa, pravno mnenje
	sistematično pravo	zakonodajalec, profesor prava	M	I	kodifikacija, moderni zakon
HARMONIČNO PRAVO	arbitražno pravo	arbiter	Č	S	arbitražna odločba
	mediacijsko pravo	mediator	Č	I	sporazum, pogodba

Okrajšave za kognitivne funkcije v okviru jungovske psihološke tipologije so:
M – mišljenje, Č – čustvovanje, S – senzualnost (čutilnost) in I – intuicija.

Marko Novak*

Ideal Types of Law from the Perspective of Psychological Typology

This article presents ideal types of law in view of the law's evolvement through history, and also concerning its contemporary manifestation. The presented ideal types of law have been developed on the basis of two great typologies: Weber's and Jung's. The starting point of my analysis is Weber's ideal types of law. I tried to understand them in the light of Jung's psychological types, however, this lead me to their modification with regard to their original understanding by Weber. In every individual certain cognitive functions prevail so is the case with every social community. Also with respect to law, both in terms of time and place – we can find proof for that in legal history and legal geography (i.e. comparative law). Concerning the four cognitive functions four general types of law can be developed, and on the basis of the influence of auxiliary functions on the dominant functions these can be further developed to eight specific types of law.

Keywords: Weber's ideal types of law, Jung's psychological typology, legal history, four cognitive functions, auxiliary cognitive functions

1 INTRODUCTION

When dealing with ideal types, we should define what we mean by the term 'ideal' at the outset. Thus what I understand in this article as an ideal type is a "hypothetical construct that involves the theoretical enumeration of all the possible characteristics against which empirical material may be compared".[1] The same would refer to the ideal types of law. The typology that is developed originates from Weber's ideal types but, to some extent, is further developed and even modified in relation to his types. Moreover, this kind of typology has been constructed on the basis of Jung's psychological typology. Jung, and post-Jungians with their development of psychological typology, helped to interpret and extend Weber's ideal types of law. Jung must surely have been aware of Weber, especially the Protestant Ethic thesis, but he never discussed him, while Weber did not live to see Jung's psychological types emerge.[2] As in the case of Weber, the empirical material for testing the ideal types of law has been taken from

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1 Sharyn L. Roach Anleu, *Law and Social Change,* London, SAGE Publications, 2000, 22.

2 Gavin Walker, Sociological theory and Jungian psychology, *History of the Human Sciences* (2012) 25 (I), 69.

legal history. So these ideal types of law could also be called historical (ideal) types of law.

What follows is, firstly, a short description of Weber's ideal types of law and a concise presentation of Jungian psychological typology. Secondly, a short justification of the relevance of tackling Weber and Jung together in such an analysis is provided. Thirdly, in the form of legal historical analysis, individual ideal types are constructed in light of psychological typology, i.e. the cognitive functions, with some modifications and developments with respect to Weber's thought. Fourthly, in such a framework the ideal types of four different general versions of law and eight specific types of law are discussed before finally being reflected in eight ideal types of persons which are typical of such types or (legal) professionals.

2 WEBER'S IDEAL TYPES OF LAW

One of the most important parts of Max Weber's work on law was certainly his ideal types of law that he developed in Chapter 8 of his posthumously published book Economy and Society,[3] which he entitled 'Economy and Law' and subtitled 'Sociology of Law'. In addition to being a classical work in legal sociology, this Weberian analysis is also an excellent study in legal history.[4] The gist of this sociological-historical work on law was in emphasizing the distinction between pre-modern and modern law, in which Weber differentiated between four ideal types of law.

First, the charismatic revelation of law associated with the legal prophets[5] was, in Weber's opinion, of an irrational-formal character since those who "created" and "applied" the law used means that were not controlled by reason, e.g. they based their decisions on oracles or divine revelations.[6] What could be added to such a type of law was, according to Weber, the irrational manner of judgments based on ordeals, the drawing of lots, duels, the swearing of an oath, sworn assistants, as well as on a sense of justice that was, in Weber's opinion, of an emotional character.[7] Moreover, Weber added jury trials to the above mentioned list.

What was important for such a conception of law was the role of elders in the society who knew the relevant sacred rites. Most often, the elders includ-

3 M. Weber, *Economy and Society,* Berkeley, University of California Press, 1978.

4 Weber studied law during the height of German historical jurisprudence and then taught commercial law and legal history at the University of Berlin. Roach Anleu 2000 (op. 1), 21.

5 Weber 1978 (note 3), 882.

6 Ibid., 656.

7 Jung would assert that such a sense of justice is conditioned much more by the role of intuition than emotions.

ed magicians, prophets and magi. As charismatic persons these were allegedly capable of discovering, not creating, laws through revelation. It was typical of their magical techniques that they used rites which were very highly formalized. Such persons, for example, reported to their community that the divine authority required for a certain dispute to be resolved in one way or another, in the context of which they usually "received" the higher message while in a state of ecstasy or through a dream.[8]

Secondly, Weber developed a special type of law for empirical law creation and a judiciary that was carried out by legal *honoratiores*, which he termed the rational-substantive. What is typical of this type of law is that deciding on a legal problem is not affected by norms that are created on the basis of the logical rationalisation of abstract interpretations of certain meanings, but by ethical imperatives and utilitarian as well as pragmatic rules and political maxims.[9] Following Weber, such a type of law mostly developed during the time of the Roman Empire, when practically and empirically educated lawyers in particular created the special profession of the lawyer. They, however, developed a casuistic law (Lat. *casus* – legal case) which is unsystematic and thus not typical of the modern age. Weber highlighted many similarities between this type of law and the education of lawyers by various legal practitioners (particularly judges and attorneys) in Anglo-American legal systems. Such lawyers have traditionally been oriented to practical law and casuistry and for a long time declined legal codification.[10] Even today Anglo-American law is codified to a lesser extent than European Continental law.

The third type of law was, in Weber's opinion, the law which was created and applied by great empires and theocratic authorities.[11] In his opinion it is irrationally-substantive as it concerns deciding what is mostly affected by the concrete factors of a specific case which are evaluated on the basis of ethnic, emotional, and political foundations rather than on the basis of general legal norms.[12] Here Weber pointed to the transition from charismatic law to a law that was based on power *(imperium)*, which occurred at the time of the partial secularization of tribal society at the end of the Roman Empire and which was strongly conditioned by the military circumstances present at the time of the Migration Period. It concerned the conscious creation of legal rules on the basis of commands issued by military chieftains or a consensus reached inside the community. The central position was no longer given to charismatic revelation of law but to military commands. Thus the military organisation of society

8 Weber 1978 (note 3), 758–775.

9 Ibid., 657.

10 Ibid., 784–802.

11 Ibid., 882.

12 Ibid., 656.

played a very important role in the secularisation of the law, which was also to some extent connected with the patrimonialisation of the law.[13]

Furthermore, the theocratic element in such a type of law signified the power of priests as the organised guardians of law, something which was especially reflected in the increasing importance of canon law. Certainly, in such a respect the patrimonial and theocratic powers were limited by the traditional law while canon law played an important role in development of the legal system towards rationality. Despite the fact that such a system could still, to some extent, be considered as rational in terms of the application of certain principles, the matter did not concern rationality in its instrumental meaning and logical in the formal sense, but rationality more in the direction of applying certain substantive principles of social justice, or of political, utilitarian or ethical content. Such law, particularly in its patrimonial version for resolving disputes, often used discretion and considered vested privileges as some kind of a gift of grace. Such an informal patrimonial administration reached its peak when the secular ruler put himself in the service of positivistic religious interests that exceeded mere ritual frameworks.[14]

Fourthly, and finally according to Weber, the systematic enactment of law and the professional carrying out of the judicial function by persons having a formal legal education[15] is part of rational-formal law, which concerns a professional, legalistic and abstract approach to law in the modern sense. What is, in his opinion, typical of this last type of law is the application of an abstract method that uses the logical interpretation of meaning and systematizes existing legal rules into a complex and coherent system of abstract legal rules.[16] Following Weber, this occurred due to the existence of the enlightened absolutist emperor, who, with the aid of his state apparatus composed of university educated lawyers trained in the spirit of the reception of Roman law, managed to build a uniform state power. The natural consequences of such a direction to law were the great legal codifications of the 19th century.[17]

Weber opined that the history of law has continued and evolved in the following manner: firstly, there were primitive legal procedures in connection with a combination of magically conditioned formalism and irrationality and in which revelation played an important role. Then, an explicitly specialized legalistic and rationally-logical approach ensued and that was occasionally combined

13 'Patrimonial' signifies "father-like" and sometimes refers to the seizing of all three branches of power within a certain territory by the local feudal lord, which was typical of the beginning of the Middle Ages.

14 Weber 1978 (note 3), 809–859.

15 Ibid., 882.

16 Ibid., 657.

17 Ibid., 848–859.

with theocratic or patrimonial informal complacency. Finally, a genuine logical sublimation and the deductive approach with the development of rational techniques in legal procedures followed.[18]

In the continuation of this work we will see how this Weberian concept of ideal types of law can be understood through the prism of Jung's psychological typology. However, what follow are suggestions for modifications and extensions of Weber's types.

3 JUNGIAN TYPE THEORY

One of the greatest theories of psychological types was that which was elaborated by Carl Gustav Jung in his Psychological Types.[19] The field of psychological types seems to be an area of Jung's intellectual heritage that could also be of interest to lawyers and the law.

Initially, I should emphasize perhaps Jung's most well-known concepts of extraversion and introversion. These two basic "attitudes" describe how psychic energy is divided in human beings, where we prefer to focus our attention, and what energises us. The extravert and introvert attitudes are present in everyone to a varying degree. The extraverted attitude is motivated from the outside and directed by external, objective factors and relationships. In the case of the extravert, who gets their energy from external elements, psychic energy flows outwards towards the world whereas, in the case of the introvert, who mainly gets his or her energy from within and also withdraws energy from the world, e.g. from the world of ideas, his or her attitude is motivated from within and directed by inner, subjective facts. Those who prefer extraversion get their energy from the outer world of people, activities, and things. Extraverts usually seek interaction, enjoy groups, act or speak first and then think, expend energy, focus outwardly, are talkative, like variety and action, are outgoing, think out loud, and enjoy discussing.[20] Extraversion and introversion are mutually exclusive: if one forms the habitual conscious attitude, the other becomes unconscious and acts in a compensatory manner. Those who prefer introversion get their energy from their inner world of ideas, impressions, and thoughts. They usually like to be alone, enjoy one-on-one interactions, think first and then speak or act, con-

18 Ibid., 882.

19 Carl G. Jung, *Psychologische Typen*, Duesseldorf, Patmost Verlag GmbH & Walter Verlag, 1921, 1971.

20 These fundamental Jungian concepts are perhaps more simple explained by some of his contemporary followers. See Renee Baron, *What Type Am I?*, London, Penguin Books, London, 1998, 10, 13.

serve energy, focus inwardly, are quiet, like to focus on one thing at a time, are reserved, think by themselves, and enjoy reflecting.[21]

In addition to the two attitudes, Jung introduced four functional types or four functions of the psyche to describe the character of the psyche. Jung posited four functions of the psyche and grouped them into two pairs of opposites. On one hand there are two rational or evaluative functions as they evaluate experience by helping us to make decisions: i.e. thinking and feeling. On the other hand there are two irrational or perceptive functions: sensation and intuition, as they do not evaluate but depend on acts of perception by referring to how we prefer to take in information.

Sensation tells us that something exists. Those who prefer sensing pay attention to information taken in directly through their five senses and focus on what is or what was. Sensors usually prefer facts, concrete information, are more interested in what is current, pay attention to specifics, are practical and realistic, focus on the present, value common sense, and are pragmatic.[22] Thinking tells us what it is. Those who prefer thinking make decisions in a logical and objective way. Thinkers are usually firm minded, analyse the problem, are objective, convinced by logic, are direct, value competence, decide with their head, value justice, can be seen as insensitive, are good at critiquing, and usually do not take things personally.[23] Furthermore, feeling suggests that it is good or not. Those who prefer feeling make decisions in a personal, values-oriented way. They usually are gentle-hearted, sympathize with your problem, are subjective, convinced by values, are tactful, value relationships, decide with their heart, value harmony, can be seen as overemotional, are good at appreciating, and usually take things personally.[24] Finally, intuition suggests where it has come from or is going to. Those who prefer intuiting pay attention to their "sixth sense," to hunches and insights, and they focus on what might be. Intuitive people usually prefer insights, abstract information, are more interested in what is possible, focus on the big picture, are inspired and imaginative, focus on the future, value innovation, and are speculative.[25]

An individual's innate conscious orientation will be towards one of these four directions. For example, if thinking is one's superior or most differentiated function then feeling would be one's most undifferentiated or inferior function, or vice versa. At the same time, the remaining two functions are the so-called

21 Carl G. Jung, From Psychological Types, in V. S. de Laszlo (ed.), *The Basic Writings of C. G. Jung,* Princeton, New Jersey, Princeton University Press, 1990, 187-298. Baron 1998 (note 20), 10, 13.

22 Baron 1998 (note 20), 10, 20.

23 Ibid., 11, 26.

24 Ibid..

25 Ibid., 11.

auxiliary functions, which serve the superior function.[26] Every person has a preference for one of the other auxiliary functions.

In accordance with this, Jung has combined the two attitudes with the four functions and created eight psychological types. These are the following: extravert thinkers[27], introvert thinkers[28], extravert feelers (e.g. chat show hosts)[29], introvert feelers (e.g. monks, nuns, musicians)[30], extravert sensers[31], introvert sensers (e.g. connoisseurs, aesthetes)[32], introvert intuitives (e.g. mystics and poets)[33], and extravert intuitives (such as PR people or adventurers)[34]. Locating a person's type enables us to make better sense of his or her world view and value system. The types describe personality and frequently determine the choice of vocation and, within such and based on the chosen profession, also the special area that the individual in inclined to focus on in his or her career.

Jung was aware of the fact that in every person there predominates a certain mechanism of activity which, however, cannot get away from the other mechanisms being present in the same person, although they might be completely opposite to the predominant one. Therefore, according to Jung, there are no clear types but the notion of ideal types only point to the predominant existence of the said mechanism in a person.[35]

His methodology of creating ideal psychological types proceeded from insights that he obtained while dealing with his patients. Furthermore, these insights were appropriately reflected through the study of some previous attempts in history at creating certain ideal types in different areas of human thought. For that reason he studied the works of Schiller, Nietzsche, James and other great men.[36] He finally analysed all such previous attempts and tried to compre-

26 Jung 1990 (note 21), ibid.

27 They direct themselves and others according to fixed rules and principles since they are interested in reality, order and material facts. They could be scientists, who discover natural laws, or economists who create theoretical formulations. See Maggie Hyde, Michael MacGuinness, *Introducing Jung,* Cambridge, Icon Books, 1999, 82.

28 They formulate questions and seek to understand their own being. They usually neglect the world and dwell on their own ideas (e.g. philosophers). Ibid.

29 Ibid., 83.

30 Ibid.

31 They tend to focus on external facts, are practical, hard-headed and accept the world as it is, such as builders, speculators. Some of them might be affable enjoyers of life. Ibid.

32 Ibid., 84.

33 Ibid.

34 Ibid.

35 Jung 1990 (note 21), 9.

36 Ibid.

hend them through developing appropriate categories that resulted in his own theory of (ideal) psychological types.

Today, certain psychologists continue to develop Jungian types by discovering new dimensions. Concerning the above-mentioned typological framework, some post-Jungians have further developed the characteristics of the cognitive functions and, on the basis of such, even designed a special type indicator (the so-called MBTI).[37] Although the originality of the above-mentioned dimension of psychological typology must be attributed to Jung, the post-Jungians importantly developed certain aspects of his thought. Thus, additional research into the psychological types, especially of the influence of the auxiliary function on the dominant function, contributed to the extension of Jung's eight types to sixteen.[38] Furthermore, the existence and characteristics of these types were confirmed by the results of numerous MBTI tests undertaken in last decades. Therefore, the work of the post-Jungians concerning psychological typology was very important in order for the ideal (general and specific) types of law and their corresponding ideal persons or (legal) professionals to have been developed in this article.

Now let us see how some post-Jungians described the basis facets of specific cognitive functions. These facets will be important for the interpretation and modification of Weber's ideal types of law in section 5.

Thus, for sensing as a cognitive function Quenk emphasizes that it focuses on what can be perceived by the five senses. Initially there is the (1) concrete that focuses on concrete, tangible, and literal perceptions, communications, learning styles, world view, and values. It trusts what is verifiable by the senses, and is cautious about going beyond facts. Then what is typical of sensing is the (2) realistic which prefers what is useful, has tangible benefits, and accords with common sense. It values efficiency, cost-effectiveness, conformity, and security. Furthermore, as a characteristic of sensing the (3) practical is more interested in applying ideas than in the ideas themselves and likes working with known materials and using practical, familiar methods. It prefers modest, tangible rewards over risky opportunities for greater gain. The (4) experimental as another characteristic of sensing trusts its own and other's experience as the criterion for truth and relevance and learns best from direct, hands-on-experience. It focuses more on the past and present than the future. Finally, what is typical of sensing is also the (5) traditional, which likes the continuity, security, and social affirmation provided by traditions, established institutions, and familiar

37 The so-called Myers-Briggs Type Indicator that was developed in order to establish the presence of certain types in persons tested. See Isabel Briggs-Myers, Peter B. Myers, *Gifts Differing,* Mountain View, California Davies-Black Publishing, 1995.

38 Ibid.

methods. It is uncomfortable with fads and unconventional departures from established norms.[39]

A certain antipode to sensing is the cognitive function of intuition. According to Quenk what is firstly typical of it is the (a) abstract that focuses on concepts and abstract meanings of ideas and their interrelationships. It tends to use symbols, metaphors, and mental leaps to explain its interests and views. The next characteristic of intuition is the (b) imaginative, which values possibilities over tangibles and likes ingenuity for its own sake. It is also resourceful in dealing with new experiences and solving problems. Moreover, what is characteristic of intuition is the (c) conceptual. It likes knowledge for its own sake and focuses on the concept, not its application. It enjoys complexity and implied meanings over tangible details, and likes to take risks for large potential gains. Another characteristic of intuition is the (d) theoretical that sees relevance beyond what is tangible and trusts theory as having a reality of its own. It is future oriented and sees patterns and interrelations among abstract concepts. A final characteristic of intuition can be the (e) original that tends to value uniqueness, inventiveness, and cleverness to put meaning into everyday activities. Also it enjoys demonstrating its own originality, and believes that sameness detracts from meaning.[40]

Furthermore, for thinking as a cognitive function what is firstly typical is the (i) logical that believes that using logical analysis and hard data is the best way to make decisions, and focuses on cause and effect, pros and cons. The next characteristic of thinking is the (ii) reasonable, which uses sequential reasoning, fairness, and impartiality in actual decision making, and is confident and clear about objectives and decisions. What is also characteristic of thinking is the (iii) questioning that asks questions to understand, clarify, gain common ground, solve problems, and find flaws in its own and others' viewpoints. Thinking is also (iv) critical since it uses impersonal critiquing of ideas, situations, and procedures to arrive at truth and avoid the consequences of flawed ideas and plans. Last, but not least, is (v) tough by means of standing firm on decisions that have been thoroughly considered and critiqued and wishing them to be implemented quickly and efficiently.[41]

Finally, according to Quenk, the feeling function bases conclusions on personal or social values with a focus on understanding and harmony. The first facet of feeling is 'empathetic' in believing that a decision's impact on people should be primary and focusing on values and relationships. The second is 'compassionate' in considering the unique and personal needs of individuals rather than

39 Naomi Quenk, *Essentials of Myers-Briggs Type Indicator Assessment,* Hoboken, New Jersey John Wiley & Sons, Inc., 2009, 10.

40 Ibid.

41 Ibid., 11.

objective criteria as important in decision-making. Following Quenk, 'accommodating' is the third facet. It values harmony and the incorporation of diverse viewpoints as more effective ways to gain common ground than confrontation. The fourth facet of 'accepting' uses tolerance of the other to arrive at a mutually satisfying plan or procedure and is open to a broad range of ideas and beliefs. Finally, the 'tender' facet uses gentle persuasion and a personal approach to reach an agreement.[42] Before I begin to use the Jungian psychological types to interpret and modify Weber's ideal types of law, I should at least indicate, if not justify, what actually brings these two great thinkers together.

4 THE WEBERIAN AND JUNGIAN TYPES COMPARED

The general relations between Weber's sociology and Jung's psychology have been considered by Walker.[43] In Walker's opinion what brings Weber and Jung together is actually sociological theory. He contends that Jung's psychology is sociologically coherent when seen in the light of sociology's major theoretical traditions, which entails that it makes sense to sociologists when seen in the light of Weber's sociology. He also asserts that Weber's historical sociology comes quite close to Jung's cultural history of the psyche. Walker further suggests that sociology should acknowledge Jung in order to orient new enquires, as well as for reflexive analysis of certain sociological debates.[44] This is precisely my intention in this article: to reflect upon Weber's sociology of law on the basis of the Jungian psychological types as well as modify and extend the former on the basis of the latter. Upon analysing how specific combinations of the dominant-auxiliary functions' relation determines certain types of law, the analysis which follows will focus on developing ideal types of persons dealing with the law or legal professionals. In any given structural and cultural situation, certain personality types will predominate and tend to shape their structural and cultural settings around them.

Both authors would certainly agree that in the course of social development, the evolution from pre-modern to modern law to some extent corresponds to the progress from the important role of irrationality in law to the subsequent importance of rationality. Take Weber's development from irrational pre-modern ideal types of law to those modern based on rationality (both in the formal and substantive versions) or Jung's comparison between the irrational (intuition, sensation) and rational (thinking, feeling) cognitive functions: both of them support the idea of a certain progress or at least an important change in people's

42 Ibid.

43 Walker 2012 (note 2).

44 Ibid., 52–53.

cognition over time within the course of our cultural history. Both would also support the view that the presentation of the ideal types of law has, on the one hand, a legal historical value as it points to the dependence of the historically changing of law on the changes in society and taking into account the changing of the individual while, on the other hand, it demonstrates that there exist certain laws and permanence with respect to human beings and society. The interpretation of such laws and their permanence through psychological typology emphasizes the projection of people's cognitive elements and the prevailing social or collective cognitive elements into the law of a specific time and place. Despite the fact that law changes together with the society *(Ubi societas ibi ius)*, it is still possible to establish certain specific, typical appearances of the law of a certain time. On the basis of such, there is the possibility to create certain ideal types of law, the characteristics of which reflect the most typical or prevailing elements of the society in general at a certain time and place.

Weber and Jung would also agree that at a certain historical period the matter does not concern pure ideal types of law but the co-existence of several ideal types and their mutual presence to a certain extent in each other, concerning which one of them is prevalent or predominant and others being complementary to the prevailing one. Nevertheless there are differences between their comprehension of the types so Jung's more developed general theory of types will serve to criticize, change, reallocate or extend Weber's ideal types of law in the context of legal historical development.

In the next section, by referring to the characteristics of the psychological cognitive types presented in section 3, we will be analysing Weber's ideal types of law through the individual periods of legal history and also trying to modify them.

5 GENERAL AND SPECIFIC TYPES OF LAW FROM THE PERSPECTIVE OF PSYCHOLOGICAL TYPOLOGY

Weber's description of the ideal types of law seems to still be applicable to a certain extent, which is also supported by their interpretation below made in light of Jungian psychological typology. However, a certain correction of his models or their understanding is necessary when the (post)Jungian psychological typology is applied to them.

Thus, Weber's ideal types of law are to some extent modified so that the pages below consider the following general types of law: the religious type, the traditional type, the logical, and the harmonious type. The modification of Weber's thought through an analysis from the perspective of Jungian and post-Jungian psychological typology thus contributed to the development of a certain num-

ber of changes with respect to Weber's ideal types of law: (i) certain types' names were altered; (ii) certain subtypes were allocated from one to another type of law; as well as (iii) certain new types of law and their subtypes were designed. On the basis of the application of the psychological typology Weber's four main types are to some extent renamed and additional four subtypes and their corresponding ideal persons or (legal) professionals are thereby developed.

Moreover, it is necessary to emphasize that within a particular period of time, along with a certain type of law, there also existed other types of law that were perhaps not so dominant in that era. Furthermore, until modern times it is not possible to consider any kind of established and consciously developed system of law – at least not in terms of the complexity which is typical of legal systems today.

5.1 The Religious Types of Law

The first general type of law described here is the so-called religious type of law. It consists of two variants: mystic law and theological law. To some extent, both types would correspond to what Weber called the charismatic revelation of law and theocratic law. Contrary to Weber, who in his ideal types referred to different epochs in which these two types appeared, I am analysing the types within one general type of law that is not limited to one special period of time but can be present at any time and in any society. Mystic law and theological law are different from each other and they appeared in different time periods, with the first being applied in more primitive societies and the latter in more developed social systems. What then justifies them being analysed within one joint model?

One of the main reasons for their unified treatment is the fact that both of them are based on intuition as one of the irrational cognitive functions. Still, they differ in that one is based on the auxiliary cognitive function of feeling whereas the other on the auxiliary function of thinking. This difference will be analysed in more detail below with respect to a specific type.

5.1.1 Mystic Law

The first subtype of law refers to the activity of charismatic authority by prophets and mystics possessing supernatural capabilities. The people of that time generally believed in such interpreters of the interventions of divine forces, respected them as such and considered their authority to be legitimate. A type of law that is based on the operation of supernatural forces and their revelation to human beings is designated as the prophets' religious type of law. Such an irrational manner of referring to the divine origin of codes and other laws is particularly typical of the ancient Oriental law and its explicit theocratic orientation.

To a certain extent, it also continued in ancient Greece, despite the important emergence of rationality, and at the early beginnings of Rome. Its importance, however, re-emerged during the Middle Ages, only to be subsequently slowly repressed with the beginnings of the modern era. What then followed was the increasing predominance of modern law being particularly secularized and rationalized. In the continuation we are presenting certain typical examples taken from legal history to demonstrate the existence of typical metaphysical elements in the perception of law.[45]

In view of law creation as a typical example of such religious law we can take the prologue to the Code of Hammurabi from almost two thousand B.C. In this work it is written that Hammurabi composed the mentioned code following a command from the God Marduk who had ordered him to ensure law and justice for his people.[46] A similar divine ordering was found even some 320 years before Hammurabi in the Law Collection of Ur-Nammu, where the God Nana ordered him to adopt certain legal rules.[47] Also, the Decalogue revealed to Moses by God and which constitutes part of Hebrew law falls within this context. Furthermore, an important metaphysical element of the ancient Oriental law is reflected in trials by ordeal. divine judgements made upon the trial by, for example, a river,[48] duel, boiling water, fire, red-hot iron. In general, ordeals were carried out not only within the old Oriental law, but also in the Middle Ages, somewhat until the beginning of the 13th century when the Holy See prohibited priests from taking part in them.[49]

Despite the increase of rationality in Ancient Greece, a certain degree of the metaphysical approach to law remained, especially at the beginning of Greek civilization. For example, Plutarch reported that King Lycurgus did not write down his laws as this was prohibited by one of the *retras*.[50] Furthermore, in his Great State Elegy, King Solon cited the divine laws of Dike (i.e. Lady Justice).[51] Even in the strongly rationalized period of Rome, at least at its beginning du-

45 Examples are given according to the antology by Katja Škrubej, *Pravo v zgodovini, Odlomki virov s komentarji,* Ljubljana, GV Založba, 2010.

46 Viktor Korošec, *Slovenski prevod Hammurabijevega zakonika*, *Zbornik znanstvenih razprav Pravne fakultete,* Ljubljana (1954), 53–55.

47 Martha T. Rot, *Law Collections from Mesopotamia and Asia Minor,* Atlanta, Scholars Press, 1997, 15-18, cit. according to Škrubej 2010 (note 45), 37.

48 A typical example of such follows from the Code of Hammurabi, in which one who accused another of, e.g., sorcery but could not prove such achieved that the accused was dipped in a river, and if the river threw him out so that he survived it was considered that he was innocent, so the one who had accused him was then executed. Korošec 1954 (note 46), ibid.

49 Rene David, Guenther Grasmann, *Einführung in der großen Recthssysteme der Gegenwart,* München, C. H. Beck'sche Verlagsbuchhandlung, 1988, 119.

50 This was an order by gods, which was communicated to people in the form of prophesy. Rajko Bratož, *Grška zgodovina*, Ljubljana, Zveza zgodovinskih društev, 2003, 75.

51 Anton Sovre, *Starogrška lirika,* Ancient Greek Lyric Poetry, Ljubljana, DZS, 1964, 76–79.

ring the period of the Kings of the archaic era prior to the Code of Twelve Tablets, one can find certain metaphysical elements when the Roman society lived upon customary law that still contained strong elements of sacral law. In such a manner they believed that a violation of law in the form of sacrilege or a crime interrupted the peaceful co-existence between people and gods. Also, the mentioned Code of Twelve Tablets still knew the punishment for desecration, which entailed that the perpetrator was given over to the gods and thereby became an outlaw.[52] Subsequently, Roman law was rationalized to an important extent.

The irrational metaphysical elements in law were re-emphasized at the beginning of the Middle Ages when trial by ordeal was still used. Furthermore, a specialty of the early Middle Age law, particularly in Germanic *leges propria* (or *leges barbarorum),* were sworn assistants as persons who swore under oath that, for example, the assertion of one of both parties was correct or the defendant was dangerous and thus probably guilty of committing a criminal offence. Otherwise the swearing under oath is a means of evidence that is in particular of sacral origin. In swearing under oath such assistants, not the witnesses in today's meaning, had to touch a sacred object, in the Christian era either the crucifix or gospel; in the case of Jews, the Decalogue. To some, a judgement sworn under oath was one of the first and the longest preserved forms of divine judgement.[53]

At the time of the early Middle Ages, there still existed charismatic prophets who made judgements in specific procedures among the Germanic tribes in the West. Such prophets included, for example, the *brehon* in Ireland, *druid* among the Gauls, *rachimburgi* among the Franks and *lag saga* with respect to the Nordic tribes.[54]

With this type of law, which is somewhat characteristic of the old Oriental law and also of the law of the early Middle Ages, there certainly co-existed other types of law that are presented in the continuation. In particular these referred to legal customs, their collections, the commands and decrees of various rulers, simple laws, court decisions, etc., which were not necessarily of a metaphysical origin. In addition to important sacral roots of the then societies it was also necessary to regulate completely secular issues. Thus, for example, even from old Mesopotamia, 2112 B.C., the notice on an 'ordinary' civil contract has been preserved.[55]

52 Škrubej 2010 (op. 45), 63.

53 Sergij Vilfan, *Pravna zgodovina Slovencev*, Ljubljana, Slovenska matica, 1961, 1996, 272.

54 Weber 1978 (note 3), 768–769.

55 Russ VerSteeg, *Early Mesopotamian Law,* Carolina AP (2000); cit. according to Škrubej 2010 (note 45), 37.

Which are the most typical examples of the legal sources of general religious law?

If legally valid general legal acts with religious content are concerned, first of all the so-called metaphysical 'constitutions' must be mentioned, including the Bible (particularly the Old Testament) and the Koran. These were not only supreme religious documents but also applicable legal acts. Certain metaphysical legal norms also appeared in certain parts of historical laws or law collections such as the provisions of the Code of Hammurabi on ordeals. Certainly, until the appearance of modern legal codifications, all laws or codes were merely of a casuistic, not a systematic, character. Moreover, certain ritualistic legal customs that found their place in various law collections or were simply part of oral tradition could also have contained metaphysical laws. Otherwise the majority of laws in the past were in the oral form of legal custom until writing became better developed.

What occurred to such types of law in later periods? Thanks to the development of modern law, which is particularly rational, it was slowly pushed to a peripheral position. Already the shift in modern natural law transferred it from a sacral dimension to the dimension of an individual's moral perception of the world. With respect to the Anglo-American and European Continental legal families, today we could still find it but more or less in certain senses of justice or within a quite narrow circle of people who perceive law in relation to its classical (mostly religious) natural-law dimension. However, in the event of traditional and religious legal families it is still more common.

What, then, are the psychological-typological characteristics of prophets' and mystics' law? Which are their prevailing elements?

As we maintain that such law is irrational, one of the so-called irrational cognitive functions, as the functions of perception, must be in the forefront. Considering the fact that such a law depends to a large extent on divine revelation, the most important cognitive function in this respect is certainly introverted intuition. Concerning intuition (lat. *intueri* to look upon, or in) Jung wrote that the content is presenting itself as a whole or entirely giving us little clue to discover or explain where it comes from. It concerns a somewhat instinctive perception of the given *(a priori)*, somewhat internal certainty or conviction. Spinoza and Bergson called the *scientia intuitiva* the highest kind of knowledge. According to Jung, both intuition and sensation are part of infantile and primitive psychology. In its introverted version, intuition also includes the visions and insights of various prophets and mystics who obtain the material for such in particular from the unconsciousness and archetypes.[56]

56 Jung 1990 (note 21).

Weber designated such an ancient type of law as irrational-formal. The 'formal' refers to the careful consideration of rituals which allegedly lead to one performing them to discovering a just judgment, while the 'irrational' certainly relates to the predominance of intuition as a special cognitive function. In such, the formality of a ritual or ritual procedures in discovering the contents of a just decision affords priests the possibility of shelter and security when they are dealing with powerful numinous contents.

Intuition as a perceptive function is irrational. To emphasize a perceptive function as dominant one entails that you consider an evaluative function to be of secondary importance. At least in the context of law and legal professions there is a difference between pre-modern law and modern law: as we will see in the continuation, the dominant cognitive functions in the framework of modern law are rational while in the pre-modern frame these were more irrational.

As already indicated, by adding an auxiliary function to the dominant function of intuition we initially come to the so-called mystic law. Here the auxiliary function, i.e. feeling, is an evaluative function as the one which evaluates the perception received through intuition. What feeling adds to intuition is a somewhat total, harmonic, and value-laden experience of numinous contents as revelation, which by the prophet is then shared with other people. In the context of legal procedures, it is the revelation that is relevant for the outcome of these procedures. Since we cannot deal with any type of legal professions at that time, we could at least point to a person typical of such law, that is a prophet or a mystic.

5.1.2 Theological Law

What I consider as the second type of religious law is the so-called theological law. It is intuitive in origin, being on one hand based on the perception of a metaphysical content but it is, on the other hand, different from mystic law. I call it theological law as, in terms of psychological typology, it can be considered that, after the period of mystical religious revelations from the period of the old Oriental law and the beginning of the Middle Ages, the theocratic authority of the Catholic Church in particular slowly became more dogmatic and thus departing from the so-called 'living' faith.

The religious contents once revealed were subsequently written down, codified and also dogmatized. A system of religious rules, procedures, and institutions was developed. This would entail that the initial, strongly intuitive, perception of the sacred was later evaluated by the auxiliary function of thinking, which is represented by logic, systemization, and formality. The aetiology of theology is Gr. *Theo* – God + *-logia* from *logos* – knowledge, study. Out of original religious revelation a comprehensive rational system of the religious

teaching was developed. Notwithstanding the role of thinking in the development of the system of, e.g., canon law the primacy of intuitive perception must haven been preserved since without a relation with the numinous content there is no religion, nor religious law.

This kind of orientation towards theological law is certainly represented by a typical person or profession, namely a theologian (or sometimes a priest). In the West, numerous theologians and canon lawyers have contributed to the development of a vast corpus of canon law. Likewise, in the Islamic Sunni tradition there have been various schools of law (like the Hanafi school of law), which were composed of theologians and lawyers and which contributed significantly to the subsequent development of Islamic law by interpreting various primary religious texts.

5.2 The Traditional Type of Law

Within the general traditional type of law I analyse two specific types of law that are typical of a traditional society: (1) imperial law and (2) customary law. As we will see in the continuation, both are characterized by the role of the predominant cognitive function of sensation, also as a function of perception being irrational in nature. In the first variant the dominant sensation is supported by the auxiliary (evaluative) function of thinking, while by feeling in the second variant.

This kind of law is traditional by its origin and as such more part of the pre-modern periods of time (i.e. partly in ancient times and the Middle Ages). Some traces of it can also be found today. Legal customs (e.g. constitutional customs in the UK, legal customs in business law) are not so uncommon today even in the most developed countries while imperial laws emerge from time to time in some absolutist political regimes (most frequently associated with some military commands during or after certain coup d'etats).

5.2.1 Imperial Law

In the sense of traditional law, Weber primarily dealt with the creation of imperial law (e.g. through commands by a ruler) regarding secular authority. *Imperium* signifies direction, command, or supreme power. Thereby Weber in general considered the power and commands of military commanders at the time of the Great Migration at the end of the Roman Empire. At that time, many wars and military conflicts occurred when the tribes had to act very quickly, most often merely upon an oral command, which could temporarily repeal and substitute even the traditional customary law of a certain tribe. Such imperial law was subsequently developed in the period of patrimonialisation (lat. *patrimonium* from *pater* father), being a kind of privatization of public authority by

local feudal lords at a micro level, and emperors in the event of the macro level of the kingdom. Such mostly oral laws, supplemented local legal customs and, through social development, led to more rational forms of legislation.

Such patrimonial law was not rational in the sense of logical rationality, since the ruler made his decisions case by case exercising discretion most often without being bound by any prior legal rules. So the result of a certain procedure was to a great extent dependent on the ruler's grace or privilege which he or she vested in someone. If the ruler was simultaneously the highest priest in the kingdom then his power was almost complete.[57] Still his or her discretion was not absolute since he or she had to some extent consider also local customs and religious norms (of natural law).

The patrimonial authority of this kind was patriarchal (Gr. *patriaches* from *patria* generation) or "father-like". In the language of symbols, the father archetype represents the cognitive function of sensing, which primarily refers to "earth law".[58] The legal sources of such imperial law were various, mostly oral commands or directions in the sense of individual legal acts, for example in terms of the number of days that a serf had to spend at a castle performing compulsory work. Added to this could be various gifts of land or land tenures, usually made in writing as statements of will by which feudal lords donated land to their vassals as *alodium* or in return for military service. Furthermore, there are also Capitularies issued by Frankish kings and which contained instructions for the regulation of certain areas in royal ownership. These were, however, more similar to what we call today general legal acts although they were written in a more casuistic fashion.

As already mentioned rulers, emperors, chieftans, and other types of leaders have traditionally been considered as authorities of a father-like character for a particular social group. At the same time they had a role of supreme earthly authority. They had to resolve concrete and very much practical problems usually very fast since their tribe would be in serious jeopardy. There was no time for reflection or rational decision-making with the resulting calculation of pros and cons. Hence the sensing function in the forefront of such decision-making as natural-like reaction to a physical danger. In terms of perception, such authority is directed by concrete, practical, and real issues to be decided upon. Their authority stems from a traditional need for social order and social rules to be obeyed. The sensing cognitive function is supported by the auxiliary function of thinking (when time for reflection is available) such as when the ruler is not directly engaged in a combat. The sensing perception of reality is thus evaluated

57 Weber 1978 (note 3), 844–845.

58 Tom Chetwynd, *Dictionary for Dreamers,* London, Paladin Books, 1982, 38. Father is a symbol of reproduction, possession, ruling, and virtue. Jean Chevalier, Alain Gheerbrant, *Slovar simbolov*, Ljubljana, Mladinska knjiga, 2006, 398.

in a thinking manner: logically in terms of utilizing a certain means to cause a certain effect, impersonally regardless of the consequences for whichever person (in a cold-blooded fashion of an absolutist: "because I want it so since I am God's representative on the earth"), and in a tough way by means of standing firm on a decision reached by wishing it to be implemented quickly and efficiently.

A person typically responsible for such types of law is the ruler or the emperor (of a more absolutist type).

5.2.2 Customary Law

Traditional law is also reflected in numerous legal customs. In addition to metaphysical law these were very much typical of pre-modern law, all the way from the ancient Oriental law, ancient Greece, partially Rome, to the Middle Ages in the framework of which they even represented its 'constitution' due to their importance for the legal sources of that historical period. Legal customs had to be respected even by rulers not only in the old Oriental law but also throughout the Middle Ages,[59] the origins of legislation from the Middle Ages being collections of legal customs (either of the nobility, emerging cities, or agrarian communities).[60] They were, however, marginalised by the great legal codifications of civil law. For example, the Austrian Civil Code *(ABGB)* provided that customs did not legally apply by their mere existence "but only if a certain law explicitly referred to them".[61] In today's predominantly rational law, legal costumes very rarely count as formal legal sources.[62]

Legal is considered to be only that custom, i.e. a certain (incessant) repetition of an activity, which a community recognizes as mandatory and valid. As such, it seems to be connected with the cognitive function of sensing that gives much weight not only to the perception of certain facts but also to the norm or obligation existing therein, and particularly values positively what is unchangeable. Sensing as a perceptive function is irrational in character. With respect to legal custom, this is reflected in somewhat blind trust in traditional legal customs, in their repetition also merely for the sake of themselves, even if it is often not very rational and would be more reasonable for them to be altered.[63] If a person with the predominant intuitive function trusts more in possibilities and is by his or her nature inclined to change, the sensory type is more bound by

59 Paolo Grossi, *Pravna Evropa*, Ljubljana, Založba/*cf., 2010, 29–30.

60 Sergij Vilfan, *Uvod v pravno zgodovino*, Ljubljana, ČZ Uradni list RS, 1991, 84–85.

61 Škrubej 2010 (note 45), 267.

62 They may apply as, e.g., commercial usages or legal standards in civil law. As formal legal sources they also appear in constitutional and international law. In the framework of modern law they tend to be codified.

63 Jung 1990 (note 21).

actuality, values conservativeness positively and respects customs and tradition. In short, such a person accepts the world and values as they are.[64] One of the elements of the function of sensing is also tradition, respecting continuity, social affirmation, which is ensured by established institutions and already known methods. Concerning this, the sensing as a cognitive function is disinclined to changes and unconventional departures from established norms.[65]

Contrary to imperial law, the auxiliary function typical of customary law is feeling. (Legal) customs are social norms which grow organically in society. They are reflections of complex and interconnected relationships between people, values, morality, and interests. As such they are evaluated in the manner of a total experience as being overarching and comprehensive social norms that are valid since time immemorial, unlike today's legal norms which are of a known creator and limited duration. In their creation they are the products of an entire society and its need for social regulation. Furthermore, being based on concrete issues they are much closer to the personal needs of individuals than the abstract and general legal rules of modern legislation.

Typical persons for such a type of law would be elders[66] in a society as the guardians of its customs. This is further supported by the fact that in pre-modern societies it was older people particularly that were asked to describe the substance of (legal) customs for the purpose of demonstrating a valid law for the purpose of resolving a particular (legal) dispute.

Finally, from the view of legal history, we can find another flaw in Weber's theory of the ideal types of law. Here the problem is that, despite his very complex analysis of legal history within the traditional type of law, he does not even mention legal customs although these are considered by legal historians to be among the most important sources of law until the beginning of the creation of modern law.

5.3 The Logical Types of Law

Although in the framework of this type of law I analyse what Weber described as (a) legal honoratories' law and (b) systematic law, and which is sometimes depicted as rational law when Weberian ideal types of law are dealt with, I use a different name. I call such a type logical law. The reason for this is to differentiate it from another type of law which I call harmonious law, which is also a rational type of law. Both logical law and harmonious law are rational since the dominant cognitive functions behind both of them are rational: in the case of logical law thinking and in the event of harmonious law, feeling. Another

64 Briggs Myers, Myers (note 37), 57–58.

65 Quenk 2009 (note 39), 10.

66 In some local communities such persons could also be mayors. In Frankish law *(Lex salica)* there was a *tunginus* as a person who performed the judicial function.

argument for calling this type of law logical is also the fact that both subtypes or specific types of logical law are very much logical: which is characteristic of the casuistic type of law is induction and, for systematic law, deduction, both being logical methods.

To claim that logical law is only a product of the modern law or the modern state, and not at all of other historical periods, would be mistaken from the viewpoint of legal history. It is more than certain that parts of logical law existed in the past, even before the period of ancient Greece which is generally considered as marking the major break of *logos* with *mythos*.[67] Nevertheless, the old Oriental law, if its rationality could be maintained at all, was even in its rationality highly permeated with metaphysical and traditional law. Thus, in the Code of Hammurabi we can trace certain rational parts that are to some extent connected with metaphysical elements (e.g. in the case of ordeals) as well as with traditional elements (e.g. in the event of a certain custom that was incorporated in the Code). Moreover, one of the important differences between modern legal societies and pre-modern legal societies is in that the modern law is predominantly rational given the fact that metaphysical and traditional elements are quite rare in such laws. As already pointed out, contrary to the Western systems of Anglo-American law and the European Continental law, customary law as traditional law and metaphysical law have been preserved much more in the heterogeneous group of the traditional and religious legal systems of non-Western societies (e.g. in Africa, the far East and in Islamic countries).

In this section we differentiate between two subtypes of the general rational type of law. First, the logical-casuistic type of law is presented, and secondly the logical-systematic type of law is dealt with.

5.3.1 Casuistic Law

The logical-casuistic type of law is of an older origin than the logical systematic type, although it is still present in contemporary legal systems. Various statutes adopted already in the ancient Oriental law, ancient Greece and Rome, indeed all until the period of the great legal codifications, were mainly of a casuistic character, since they broadly referred to the factual situations in which legal norms were to apply. In no sense was there a systematization and regulation of substance in the manner it is known today and which was in particular typical of the legal codifications of the 19th century (e.g. *Code civile,* Austrian *ABGB,* German *BGB).* Roman law also belongs to this type of law as it was to a greater extent not codified until Justinian in the 6th century (in the *Corpus iuris civilis).* By its systematisation the *Corpus* can hardly be compared with modern

67 Artur Kaufmann, *Uvod v filozofijo prava,* Ljubljana, Cankarjeva založba, 1994, 51.

codifications, which signifies that that kind of rationality was not yet developed in the human psyche of that time. As already indicated, the logical-casuistic law is to an important extent also found in the contemporary Anglo-American legal family, especially concerning judicial common law, in which the judge has been historically the most important legal figure, although in recent times systemisation has gained importance with the increase of legislation activities.

What is important for the logical-casuistic type of law in terms of psychological typology is the primacy of the cognitive function of thinking as the main function supported by the auxiliary function of sensation. For the thinking function, the operation of logic in the sense of relying on logical analysis, cause and effect, sequential justification, impartiality in decision-making, etc., are typical. The sensation function contributes to the red thread of thinking by directing it into concreteness, reality, practicality, experiment, and tradition.[68] Today this is among other areas of law also mostly typical of judicial practice or case law. In such a manner it is possible to comprehend Weber's rationality-substantive law as its thinking-sensing dimension. Thus, a legal profession typical of this type of law will certainly be a judge, but also an attorney (lawyer) would very easily fall within this specific type.

5.3.2 Systematic Law

The second previously mentioned subtype of logical law can be called the logical-systematic. This is typical of the subsequent development of law that culminated in modern legal codifications and is today mostly characteristic of general legal acts (such as constitutions and statutes, executive regulations, treaties). To Weber it signified the last step in the development of people's rationality. Here the main thinking function is supported by the auxiliary function of intuition, characteristic of which are: abstractness, conceptuality, and theory. Thus abstractness is in the psychological-typological sense focused on concepts and abstract meanings of ideas and their interrelations. Furthermore, conceptuality means focusing on mere concepts and not their application, it also entails complexity. Finally, the emphasizing of the theoretical is typical of searching for models and relations between abstract concepts.[69] In this sense it is possible to understand Weber's rational-formal dimension of law – as the thinking and intuitive dimensions, the latter mostly in the sense of abstractness and conceptuality. Such an approach has traditionally been more typical of the European Continental legal family than of others, and which in the past professors contributed to its development, particularly in faculties of law.

68 Quenk 2009 (note 39), 10–11.

69 Ibid.

The persons or (legal) professionals that would fall under this category are certainly modern legislators, the historical ideals of such being the great codifications of the 19th century. Furthermore, as mentioned above, we should add to this type of law also professors of law, in particular those from the European Continental legal family whose legal science, in the process of the reception of Roman law from the 12th century onwards and in the development of *ius commune,* have contributed immensely to the codifications.

The legal sources that are typical of the logical-casuistic subtype of law are certainly judgments of courts as individual legal acts that have an *erga omnes* effect when being precedents. What are typical of this subtype were also the opinions of classical jurists in Rome, which during Augustus' Principate had been pronounced by the Emperor's authority. In ancient times legislation was also adopted, however, until the time of the modern codification movement such legislation was mostly of the casuistic type rather than systematic. The codifications from the beginning of the 19th century are mostly typical of the logical-systematic type of law, which today includes mostly constitutions, statutes, and executive regulations as general legal acts.

'Contemporary' law, particularly that of the logical character, either concerns the systematic or the casuistic type of law. This signifies that there is much less presence of the traditional and the metaphysical elements in law than it was the case in the past.

5.4 The Harmonious Types of Law

Quite a few legal theorists today write about certain new elements of law that are emerging in order to show that we need to deal with a special type of law that they call sometimes contemporary or postmodern law. Such a kind of new law complements modern law in the same manner that the classical characteristics of modern law (including generality, abstractness, systematisation, logic, formality,[70] under the umbrella of the so-called instrumental rationality *(ratio)*,[71] are being complemented by other elements.

In this context what is recently not only popular, but also increasingly important, is alternative dispute resolution (ADR), which is represented by various procedures of negotiation, conciliation, mediation, arbitration, early neutral evaluation, building a consensus process, etc. Nevertheless ADR has its own history. Thus, as early as 1800 B.C., the Mari Kingdom (in modern Syria) used mediation and arbitration in disputes with other Kingdoms. Between 1200 and 900 B.C. the Phoenicians (in the eastern Mediterranean) practiced negotiations,

70 These elements were at first more comprehensively discussed in Slovenia in Anton Perenič, *Relativna samostojnost prava*, Ljubljana, DDU Univerzum, 1981.

71 This kind of rationality was severly criticised in Max Horkheimer, *Eclipse of Reason,* Oxford, Oxford University Press, 1947.

while in 500 B.C. an arbitration system called *Panchayat* was used in India. Then in 400 B.C. the Greeks used a public arbitrator in city-states so that even one hundred years later Aristotle praised arbitration over courts. Also, in China in 100 B.C. the Western Zhou Dynasty established the post of mediator. Also interesting are the research results of different anthropologists and sociologists studying the role of ADR in traditional societies (e.g. among the Bushmen of Kalahari, Hawaiian Islanders, the Kpelle of Central Liberia, and the Abkhazians of the Caucasus Mountains).[72]

Thus, such harmonious law has had a huge importance in the historical development of, e.g., Chinese law. According to the teachings of Confucianism and the concept of *'li'* there developed a variety of forms of conflict-resolution outside the courts which were performed by family heads, close or distant relatives or simply society elders.[73] The *li* means appropriate behaviour and determines social rules for each situation differently, i.e. involving relations between superior and inferior, between older and younger, nobleman and citizen, between relatives, friends, strangers, father and son, older and younger brothers, or husband and wife. These rules of behaviour allegedly represent the natural order.[74] "This reflects the Confucian doctrine which sees legislation as a necessary evil, only to be invoked where the state must impose a criminal sanction because the cosmic order has been very seriously disturbed, or where the organization of the state administration is in issue."[75] In China, this perspective was very important at least until the second part of the 19th century when it became more Western-oriented, taking its example for legal regulation from various European legal codes. Moreover, a similar situation existed in Japan, at least until the *Meiji* period at the end of the 19th century, where the traditional "natural-law" rules were called '*giri*'.[76]

Furthermore, also in the Continental Europe of the Middle Ages, arbitration was for a certain period of time more important than adjudication. The role of arbitration was not so much in helping someone to exercise his or her right but to maintain peace within a society and calm the conflicting groups. In his First Letter to the Corinthians, Paul recommended love instead of justice and advised believers not to bring their claims to courts but rather submit them to priests and brothers. At that time they considered law as something bad due to its earthliness, being as such at a low level of moral importance.[77]

72 Jerome T. Barrett, Joseph. P. Barrett, *A History of Alternative Dispute Resolution,* San Francisco, Jossey Bass, 2004, 2–19.

73 Konrad Zweigert, Hein Kötz, *Introduction to Comparative Law,* Oxford, Clarendon Press, 1998, 291.

74 Ibid., 288.

75 Ibid., 290.

76 David, Grasmann 1998 (note 72), 440.

77 Ibid., 108.

These were only few landmarks from the past in the development of ADR. It seems that such harmonious laws have always been present around the globe, in some societies and periods of time more than in others. Still it appears that it has never been used to the extent to which it is used today. How this version of law differs from typical modern (logical) law follows in the continuation through the prism of psychological typology.

The thinking rational evaluative cognitive function is typical of the "classical" modern (or logical) law and it is based on logical analysis that is focused on objectivity and impartiality and is close to binary thinking.[78] Pursuant to such, one wins and another loses a lawsuit, one is either guilty or is not guilty for a criminal offense, one is obliged or not to pay alimony since in such cases *tertium non datur* applies. However, ADR most often concerns a different type of evaluation or decision-making. What is more decisive for such is the cognitive function of feeling as an evaluative function that steps out of the framework of logical rationality and formality and corresponds much more to the qualities of sympathy, compassion, harmony, compromise, mutual adaptation etc.[79]

I call such a type of law 'harmonious' since maintaining social harmony, both in terms of individual relations among the people and in the society as a whole, seems one of the most important elements of the feeling function. If the logical type of law resolves disputes in a society in a binary fashion that most often has detrimental effects for further social relations, as already mentioned one of the goals of the harmonious type of law is to keep social relations going on by not ruining them. Concerning the logical type of law, with its dominant function of thinking, there could be some reference, even a connection, to the general (cultural) principle of Logos as its peculiar qualities are "to discriminate, reason, judge, divide, and understand in a particular way". The 'Logos culture' "insists upon giving voice to an idea, designating it, giving a name, making a concept, expressing it". On the contrary, the feeling function can to some extent be linked with the general (cultural) concept of Eros, which is "a principle of relatedness, seeking things together, gathering things together, establishing relations between things [...] leave things *in suspenso;* they have not necessarily to be said."[80] However, Jung warned that the concepts of Logos and Eros are intuitive concepts which entails that they cannot be fully defined, but only referred to some small extent.[81] For this very reason they are neither synonymous with

78 Marko Novak, Legal thinking: a psychological type perspective, *Dignitas* (2011), 49/50, 140–177.

79 Quenk 2009 (note 39), 11.

80 James L. Jarret (ed.), *Jung's Seminar on Nietzsche's Zarathustra*, Princeton, New Jersey Princeton University Press, 1998, 102.

81 Ibid., 104.

thinking and feeling, nor simply attributable to a general difference between men and women.

Concerning this, ADR, with its important emphasis on the feeling function, does not concern fighting binary (black or white) solutions, as in the case of a classical judicial manner of resolving disputes, but rather the peaceful pursuit of compromise solutions by which a dispute can be resolved. It is similar to a therapeutic process in which a mediator (therapist) mediates between two parties (clients or patients), but not in a cold-logical objective and impartial manner which is completely detached from the parties. Instead, he or she is more of a counsel – subjective and partial – but equally with respect to both parties so that he or she leads them together to a solution not apart from each other in the system of winner or losers. The results of such an ADR procedure are not black or white but grey areas, i.e. compromises. Nevertheless, such a kind of decision-making is still rational since feeling is a rational cognitive function of evaluation.

In the U.S., where such a kind of dispute resolution has been widespread in recent decades, ADR methods and approaches not only include the above mentioned types of dispute resolution but also preventive law, therapeutic jurisprudence, case resolving courts, methods of creative dispute resolution, building consensus procedures etc.[82] Lawyers who are engaged in such areas of dispute resolution emphasize the importance of human relations, values, goals, emotions, which is very much typical of the above mentioned cognitive function of feeling, or the so-called ethics of care or empathy.[83] These approaches emphasize in particular altruism, non-materialism, non-competitiveness, and oppose adversary court battles which are typical of modern law. Instead of black-and-white outcomes of court "fights" that only resolve disputes with respect to past facts and conflicts, ADR deals with a holistic approach that also looks to the future.

Following the two-subtypes pattern from the rest of the above discussion with regards to the psychological-type impact on developing the specific ideal types of law, is it possible to develop two specific types of law within the general harmonious type? Perhaps we could make a distinction between those ADR procedures that are closer to classical legal proceedings and those that are more atypical. In the first group we could find arbitration as being closer to traditional or classical legal procedures. To some extent, arbitration follows traditional law-like ways of resolving disputes, does not depart so much from established legal institutions, procedures and norms, and from the past and present situations in which the parties who submitted their dispute to the arbi-

82 Susan Daicoff, *Lawyer, Know Thyself,* Washington, American Psychological Association, 2006, 169–196.

83 Ibid.

tration are. Thus it seems that arbitration and arbitrators as persons or (legal) professionals typical of this kind of dispute resolution are closer to the sensing function, which in this case would be the auxiliary cognitive function supporting the dominant feeling. Contrary to that mediators as persons or professionals which are typical of mediation would fall within the second group of the ADR. Contrary to arbitration, mediation is more distant from classical and traditional legal procedures than arbitration. It is particularly mediation that tries to find the most creative possible solutions for dispute resolution in order to keep established relationships going. Good mediation should be imaginative and value possibilities over tangibles and should also be original by valuing uniqueness and inventiveness. All these facets are characteristic of intuition being the auxiliary cognitive function that is typical for mediation in support of the dominant feeling function.

6 CONCLUSION

Before I present a table with all the ideal general and specific types of law, let me briefly refer to a topic which is otherwise crucial for discussing Jungian psychological types, namely the distinction between extraversion and introversion with respect to specific types. Jung had combined these two types of attitudes with his basic types and came up with eight different types, and by adding the two versions of the auxiliary functions, some of his followers obtained 16 different types. I am aware of the fact that this could also be done with respect to my specific ideal types of law, but with respect to this possibility I could not imagine or anticipate any added value to the types presented.[84] At least there would be no important additional contribution concerning the different substance of these types, but would only lead to their further fragmentation and eventual confusion. However, there might be one interesting comparison between the theoretical and practical aspects of these types, the first associated with introversion and the latter with extraversion. Still this would mostly refer to the modern period of our history and the modern legal profession, certainly not to those of ancient times and the Middle Ages.

Finally, on the basis of the above-presented general and specific ideal types of law and the persons, (legal) professionals, and legal sources associated or even typical of them as well as the historical periods in which these types dominated, it seems that the following table may be created:

84 How such a difference would be relevant for law see Marko Novak, Lawyers' Ideal Psychological Type Preferences, http://works.bepress.com/myaccount.cgis (28 March 2013); and Novak 2011 (note 78), ibid.; where I mostly discussed psychological type differences concerning the modern legal professions.

General types of law	*Specific types of law*	*Ideal persons/ professionals*	*Cognitive functions*		*Typical legal sources*
			dominant	*auxiliary*	
RELIGIOUS LAW	mystic law	mystic, prophet	N	F	revelations of law
	theological law	theologian, priest	N	T	"codified" religious law (canon law, Sharia law)
TRADITIONAL LAW	imperial law	ruler, emperor	S	T	commands, old statutes
	customary law	elders, seniors	S	F	legal customs
LOGICAL LAW	casuistic law	judges, attorneys (lawyers)	T	S	case law, legal opinions
	systematic law	legislators, law professors	T	N	codifications, modern statutes
HARMONIOUS LAW	arbitration law	arbitrators	F	S	arbitration decisions
	mediation law	mediators	F	N	mediation agreements

The abbreviations for the cognitive functions within the Jungian psychological typology are as follows: T – thinking, F – feeling, S – sensation, and N – intuition.

Synopsis

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(Dia)logical Reconstruction of Legal Justification

A Case Analysis

Keywords: legal argumentation, legal justification, dialogical modelling of judicial decisions, reason-based logic, Lodder's DiaLaw, judge

In this paper an attempt is made to apply the dialogical approach to modelling legal justification in a particular legal case and to present a dialogical reconstruction of a controversial judicial decision from the Macedonian legal context. The reconstruction is carried out using a contemporary dialogical model of legal justification: Arno Lodder's DiaLaw. The dialogical approach on which this model is based is shown to be suitable for representing the argumentative dynamics and strategic elements of legal argumentation. However, there are still some open questions related to its use, especially concerning the normative status of dialogical rules and the possibility of modelling the role of the judge or arbiter in legal controversies.

References

Aulis AARNIO, 1987: *The Rational as Reasonable: A Treatise on Legal Justification*. Dordrecht/Boston/Lancaster/Tokyo: D. Reidel Publishing Company (Law and Philosophy Library).

Robert ALEXY, 1989: *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification.* Translated by Ruth Adler and Neil MacCormick. Oxford: Clarendon Press.

Else M. BARTH and Erik C. W. KRABBE, 1982. *From Axiom to Dialogue: A Philosophical Study of Logics and Argumentation*. Berlin/New York: Walter de Gruyter (Grundlagen Der Kommunikation Und Kognition / Foundations of Communication and Cognition).

Ana DIMIŠKOVSKA TRAJANOSKA, 2010: The Logical Structure of Legal Justification: Dialogue or 'Trialogue'?. *Approaches to Legal Rationality.* Eds. Dov M.Gabbay et al. Dordrecht/Heidelberg/London/New York: Springer (Logic, Epistemology and the Unity of Science 20). 265–280.

Ана ДИМИШКОВСКА, 2011: *Логиката на правното расудување: дијалошка перспектива.* Скопје: Аз-Буки/Филозофски факултет. (Ana DIMIŠKOVSKA, 2011: *Logikata na pravnoto rasuduvanje: dijaloška perspektiva*, Skopje: Az-Buki/Filozofski fakultet).

Eveline T. FETERIS, 1999: *Fundamentals of Legal Argumentation: A Survey of Theories on the Justification of Judicial Decisions*. Dordrecht/Boston/London: Kluwer Academic Publishers (Argumentation Library).

——, 2000: A Dialogical Theory of Legal Discussions: Pragma-dialectical Analysis and Evaluation of Legal Argumentation. *Artificial Intelligence and Law* (2000) 8, 115–135.

Thomas F. GORDON, 1995: *The Pleadings Game: An Artificial Intelligence Model of Procedural Justice*. Dordrecht/Boston/London: Kluwer Academic Publishers.

Jaap HAGE, 1993: Monological Reason-Based Logic: A Low-Level Integration of Rule-based Reasoning and Case-based Reasoning. URL: http://egov.ufsc.br/portal/sites/default/files/anexos/3229-3223-1-PB.pdf (13 May 2013.).

——, 1997: A Theory of Legal Reasoning and a Logic to Match. *Logical Models of Legal Argumentation*. Eds. H. Prakken and G. Sartor. Dordrecht: Kluwer Academic Publishers. 43–117.

——, 2005: *Studies in Legal Logic*. Dordrecht: Springer (Law and Philosophy Library).

Jaap HAGE and Bart VERHEIJ, 1994: Reason-Based Logic: A Logic for Reasoning with Rules and Reasons. URL: http://www.ai.rug.nl/~verheij/publications/pdf/lcai94.pdf (13 May 2013.).

Jaap HAGE, H. Bart VERHEIJ and Arno R. LODDER, 1993: Reason-Based Logic: A Logic that Deals with Rules and Reasons. URL: http://www.ai.rug.nl/~verheij/publications/pdf/naic93.pdf (13 May 2013.).

Arno R. LODDER, 1999: *DiaLaw: On Legal Justification and Dialogical Models of Argumentation*. Dordrecht/Boston/London: Kluwer Academic Publishers (Law and Philosophy Library).

——, 2004: Law, Logic, Rhetoric: A Procedural Model of Legal Argumentation. *Logic, Epistemology and the Unity of Science*. Eds. S. Rahman et al. Dordrecht/Boston/London: Kluwer Academic Publishers. 569-588. URL: http://ssrn.com/abstract=1312456 (13 May 2013.).

Arno R. LODDER and Aimée HERCZOG, 1995: DiaLaw: A Dialogical Framework for Modeling Legal Reasoning. URL: http://arno.unimaas.nl/show.cgi?fid=40 (12 May 2013.).

Vesel MEMEDI, 2007: Resolving Deep Disagreement: A Case in Point. *SEEU Review* (2008) 3, no. 2, 7–18. URL: http://www.seeu.edu.mk/files/seeu_review_vol3-nr2.pdf (14 May 2013.).

Aleksander PECZENIK, 1989: *On Law and Reason*. Dordrecht/Boston/London: Kluwer Academic Publishers (Law and Philosophy Library).

Henry PRAKKEN, 1995: From Logic to Dialectic in Legal Argument. URL: http://www.cs.uu.nl/groups/IS/archive/henry/DialICAIL95.pdf (12 May 2013.).

——, 1997: *Logical Tools for Modelling Legal Argument: A Study of Defeasible Reasoning in Law.* Dordrecht/Boston/London: Kluwer Academic Publishers (Law and Philosophy Library).

——, 2008: A Formal Model of Adjudication Dialogues. *Artificial Intelligence and Law (2008)* 16, 305–328.

Henry PRAKKEN and Giovanni SARTOR , 1997: A Dialectical Model of Assessing Conflicting Arguments in Legal Reasoning. *Logical Models of Legal Argumentation*. Eds. H. Prakken and G. Sartor. Dordrecht: Kluwer Academic Publishers. 175–210.

Shahid RAHMAN and Laurent KEIFF, 2005: On How to Be a Dialogician: A Short Overview of Recent Developments on Dialogues and Games. *Logic, Thought and Action.* Ed. Daniel Vanderveken. Dordrecht: Springer (Logic,

Epistemology and the Unity of Science), 359–408.

Harry Bart VERHEIJ, 1996: *Rules, Reasons, Arguments. Formal Studies of Argumentation and Defeat.* Dissertation Universiteit Maastricht. URL: http://www.ai.rug.nl/~verheij/publications/proefschrift/dissertation.pdf (12 May 2013.).

Bart VERHEIJ, Jaap C. HAGE and Jaap H. VAN DEN HERIK, 1998: An Integrated View on Rules and Principles. *Artificial Intelligence and Law* (1998) 6, 3–26.

Douglas N. WALTON, 2002: *Legal Argumentation and Evidence.* University Park, PA: Pennsylvania State University Press.

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Macedonian Court decisions. Constitutional Court (*www.ustavensud.mk*):

—— Решение У. бр. 118/2003 на Уставниот суд на Република Македонија од 16 јули 2003, *Службен весник на РМ*, бр. 64/03 и 74/03. (Rešenie U. br. 118/2003 na Ustavniot sud na Republika Makedonija od 16 juli 2003, *Služben vesnik na RM*, br. 64/03 i 74/03).

Трендафил ИВАНОВСКИ, 2003: Издвоено мислење по решението на Уставниот суд У. бр. 118/2003 од 16 јули 2003. *Службен весник на РМ*, бр. 64/03 (*www.slvesnik.com.mk*). (Trendafil IVANOVSKI, 2003: Izdvoeno mislenje po rešenieto na Ustavniot sud U. br. 118/2003 od 16 juli 2003. *Služben vesnik na RM*, br. 64/03 (*www.slvesnik.com.mk*)).

Мирјана ЛАЗАРОВА ТРАЈКОВСКА, 2003: Издвоено мислење по решението на Уставниот суд У. бр.118/2003 од 16 јули 2003. *Службен весник на РМ*, бр. 64/03 (*www.slvesnik.com.mk*).

(Mirjana LAZAROVA TRAJKOVSKA, 2003: Izdvoeno mislenje po rešenieto na Ustavniot sud U. br. 118/2003 od 16 juli 2003. *Služben vesnik na RM*, br. 64/03 (*www.slvesnik.com.mk*)).

Macedonian legislation (*www.slvesnik.com.mk*):

—— [Law on the State Judicial Council] Закон за Републичкиот судски совет, *Службен весник на РМ*, бр. 80/92. (Zakon za Republičkiot sudski sovet, *Služben vesnik na RM*, br. 80/92).

—— [Law on Amendments to the Law on the State Judicial Council] Закон за изменување и дополнување на Законот за Републичкиот судски совет, *Службен весник на РМ*, бр. 43/03. (Zakon za izmenuvanje i dopolnuvanje na Zakonot za Republičkiot sudski sovet, *Služben vesnik na RM*, br. 43/03).

Synopsis

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Ideal Types of Law from the Perspective of Psychological Typology

Keywords: Weber's ideal types of law, Jung's psychological typology, legal history, four cognitive functions, auxiliary cognitive functions

Summary: 1 Introduction. — 2. Weber's Ideal Types of Law. — 3. Jungian Type Theory. — 4. The Weberian and Jungian Types Compared. — 5. General and Specific Types of Law From the Perspective of Psychological Typology. — *5.1 The Religious Types of Law. — 5.1.1. Mystic Law. — 5.1.2. Theological Law. — 5.2. The Traditional Type of Law. — 5.2.1. Imperial Law. — 5.2.2. Customary Law. — 5.3. The Logical Types of Law. — 5.3.1. Casuistic Law. — 5.3.2. Systematic Law. — 5.4. The Harmonious Types of Law.* — 6. Conclusion.

This article presents ideal types of law in view of the law's evolvement through history, and also concerning its contemporary manifestation. The presented ideal types of law have been developed on the basis of two great typologies: Weber's and Jung's. The starting point of my analysis is Weber's ideal types of law. I tried to understand them in the light of Jung's psychological types, however, this lead me to their modification with regard to their original understanding by Weber. In every individual certain cognitive functions prevail so is the case with every social community. Also with respect to law, both in terms of time and place – we can find proof for that in legal history and legal geography (i.e. comparative law). Concerning the four cognitive functions four general types of law can be developed, and on the basis of the influence of auxiliary functions on the dominant functions these can be further developed to eight specific types of law.

References

Renee BARON, 1998: *What Type Am I?*. London: Penguin Books.

Jerome T. BARRETT, Joseph P. BARRETT, 2004: *A History of Alternative Dispute Resolution*. San Francisco: Jossey Bass.

Rajko BRATOŽ, 2003: *Grška zgodovina*. Ljubljana: Zveza zgodovinskih društev.

Isabel BRIGGS-MYERS, Peter B. MYERS, 1995: *Gifts Differing*. Mountain View, California: Davies-Black Publishing.

Tom CHETWYND, 1982: *Dictionary for Dreamers*. London: Paladin Books.

Jean CHEVALIER, Alain GHEERBRANT, 2006: *Slovar simbolov*. Ljubljana: Mladinska knjiga.

Susan DAICOFF, 2006: *Lawyer, Know Thyself*. Washington: American Psychological Association.

Rene DAVID, Guenther GRASMANN, 1998: *Uvod v velike sodobne pravne sisteme*. Ljubljana: Cankarjeva založba.

Paolo GROSSI, 2010: *Pravna Evropa*. Ljubljana: Založba/*cf.

Max HORKHEIMER, 1947: *Eclipse of Reason*. Oxford: Oxford University Press.

Maggie HYDE, Michael MACGUINNESS, 1999: *Introducing Jung*. Cambridge: Icon Books.

James L. JARRET (ed.), 1998: *Jung's Seminar on Nietzsche's Zarathustra*. Princeton, New Jersey: Princeton University Press.

Carl G. JUNG, 1921: *Psychologische Typen*. Düsseldorf: Patmost Verlag GmbH & Walter Verlag.

——, 1990: From Psychological Types, in: Violet S. de Laszlo (ed.), *The Basic Writings of C. G. Jung,* Princeton, New Jersey, Princeton University Press.

Artur KAUFMANN, 1994: *Uvod v filozofijo prava*. Ljubljana: Cankarjeva Založba.

Viktor KOROŠEC, 1954: Slovenski prevod Hammurabijevega zakonika, *Zbornik znanstvenih razprav Pravne fakultete*.

Marko NOVAK, 2011: Legal thinking: a psychological type perspective, *Dignitas* 49/50.

——, 2013: Lawyers' Ideal Psychological Type Preferences, http://works.bepress.com/myaccount.cgis (March 28th 2013).

Anton PERENIČ, 1981: *Relativna samostojnost prava*. Ljubljana: DDU Univerzum.

Naomi QUENK, 2009: *Essentials of Myers-Briggs Type Indicator Assessment*. Hoboken, New Yersey: John Wiley & Sons, Inc.

Sharyn L. ROACH ANLEU, 2000: *Law and Social Change*. London: SAGE Publications.

Martha T. ROT, 1997: *Law Collections from Mesopotamia and Asia Minor*. Atlanta: Scholars Press.

Anton SOVRE, 1964: *Starogrška lirika*. Ljubljana: DZS.

Katja ŠKRUBEJ, 2010: *Pravo v zgodovini, Odlomki virov s komentarji*. Ljubljana: GV Založba.

Russ VERSTEEG, 2000: *Early Mesopotamian Law.* Carolina AP.

Sergij VILFAN, 1991: *Uvod v pravno zgodovino.* Ljubljana: ČZ Uradni list RS.

——, 1996: *Pravna zgodovina Slovencev.* Ljubljana: Slovenska matica v Ljubljani.

Gavin WALKER, 2102: Sociological theory and Jungian psychology. *History of the Human Sciences* 25 (I).

Max WEBER, 1978: *Economy and Society*. Berkeley: University of California Press.

Konrad ZWEIGERT, Hein KÖTZ, 1998: *Introduction to Comparative Law.* Oxford: Clarendon Press.