NOVA UNIVERZA

DIGNITAS
Revija za človekove pravice
Slovenian journal of human rights
ISSN 1408-9653

Legal Thinking: A Psychological Type Perspective
Marko Novak

Article information:
To cite this document:
Novak, M. (2018). Legal Thinking: A Psychological Type Perspective, Dignitas, št. 49/50, str. 140-177.

Permanent link to this doument:
https://doi.org/ 10.31601/dgnt/49/50-7

Created on: 07. 12. 2018
To copy this document: publishing@nova-uni.si

For Authors:
Please visit http://revije.nova-uni.si/ or contact Editors-in-Chief on publishing@nova-uni.si for more information.

This work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License.

© Nova univerza, 2018

NOVA UNIVERZA
FAKULTETA ZA SLOVENSKE IN MEDNARODNE ŠTUDIJE

NOVA UNIVERZA
EVROPSKA PRAVNA FAKULTETA

NOVA UNIVERZA
FAKULTETA ZA DRŽAVNE IN EVROPSKE ŠTUDIJE

Legal Thinking: A Psychological Type Perspective

Marko Novak

1. Introduction

1.1. In General

»Every judgment of an individual is limited by his or her type, and every manner of consideration is relative.«

C. G. Jung, Reflections, Dreams, Memories

As with every other human activity, law seems to be nothing but a reflection of the operation of the human mind in a certain manner. Such reflection demonstrates how a person's (subject's) state of mind is projected on a certain object or a certain area of activity. Consequently, in order to learn what a certain object is, or how it appears, we must study the psychological characteristics of the persons who deal with such, i.e. who create and apply it. Law and legal norms are part of the social reality in which people create and apply legal norms. In this way they project and thus objectify their internal, and thus subjective, interests, motives, desires, moral standards as their necessarily psychic experiences.

Even if today law, the subject of this study, must formally meet democratic standards and be comprehensible by ordinary people, the reality is different. One cannot overlook the fact that, given the conditions of the complexity of modern human society and the modern division of labour, contemporary law is complex to an extent that it is predominantly created and applied by professionals – lawyers. Thus, by studying some typical traits of people who professionally deal with law, by discovering some of their typical cognitive functions, it seems that we can also learn something about law itself.

07 Marko Novak.indd 140 1.6.2011 18:18:32

Further, by indicating typical characteristics of certain areas of law, it seems that we are able to indicate some preferences that persons who are thus engaged have or should have. Moreover, when some specific characteristics are emphasised as typical, and if as such they have been proven historically as important for the well-functioning of a legal field, then they can be called preferred types. Accordingly, in this article I try to indicate those preferences in a lawyer's psychological types that make them good lawyers generally, and also specifically regarding their special area of interest in law.

Not only in the area of psychology but also in other (especially social) sciences, the results of abstraction and generalisation of certain facts and circumstances are often called types, and the discipline dealing with such is called typology. My interest in this article lies in psychological typology and, within it, in a special theoretical approach to psychological types that was initially taken by Carl G. Jung, who had typified specific common characteristics within a general population, and which was subsequently developed by his followers. From such a general psychological typology I will indicate those type preferences that seem to be preferred for the proper functioning of lawyers and the law itself.

In this endeavour I am not so interested in carrying out a psychometric research and analysis by means of locating and testing individual lawyer types, but more in establishing some basic theoretical preferences for special types of persons who professionally deal with law. Needless to emphasise that such special types of legal professions have traditionally been known in society as distinct legal professionals (such as, for example, a judge, attorney, or law professor). Since these traditional legal occupations and all their characteristics have existed in society for centuries, there is no special risk if we designate typical preferences of such types as type preferences for such professions.

As already mentioned, social development has required a division of work that has created many new professions, institutions, procedures, and their practices have produced ideal criteria for their best operation. Therefore, in order for such practices to continue in the best manner possible the mentioned criteria have to be satisfied. Undoubtedly, as already indicated at the beginning, the general or predominant characteristics of a certain social activity are simply reflections (or projections) produced by those

07 Marko Novak.indd 141 1.6.2011 18:18:32

who are engaged every day in shaping the basics of such activity – either as individuals or members of society. In the same manner as lawyers' psyches are structured according to specific types, so law as a special social discipline is structured in accordance with the corresponding types.

Such criteria of quality performance strongly relate to people's psychological preferences and create possibilities for them to become good professionals, in this aspect well-performing lawyers in terms of the general standards traditionally established in the legal profession, and which still serve the same purpose. This is why I have taken Jungian type theory as a point of departure for indicating ideal type preferences concerning the legal profession.

Before I analyse the existence of various psychological types in law, I now briefly sketch some basics of Jungian psychological-type theory.

1.2. Jungian Type Theory in a Nutshell

One of the greatest theories of psychological types was that elaborated by Carl Gustav Jung in his Psychological Types.[1] Jung's scientific opus is extremely vast and stretches to areas that are mostly irrelevant to law that otherwise emphasises clarity, determinateness, externality, formality, systematic character, and rationality. However, the field of psychological types seems to be an area of Jung's intellectual heritage that may also be interesting for law and lawyers. It deals with healthy, well-balanced personalities, not psychopathology. Thus, Jung's theory of psychological types provides me with a starting point for beginning to understand the role of psychological types in relation to the phenomena of law, lawyers and legal thinking.

I have thereby used Jung's theory of psychological types in order to establish how different type preferences determine various dimensions of law and thinking in law. To this effect, I was interested, for example, in answering the question of how different type preferences determine the fact that certain lawyers are more inclined to deal with legal theory and see legal practice as mostly empty, while other lawyers are much more satisfied when practic-

[1] See C. G. Jung, Psychologische Typen [Psychological Types], Patmost Verlag GmbH & Walter Verlag, Duesseldorf (1921, 1971).

07 Marko Novak.indd 142 1.6.2011 18:18:32

ing law and view legal theory as needless speculation. However, given that some lawyers prefer being legal theorists rather than legal practitioners, I also wished to know, from the typological point of view, why even among legal theorists there is a difference between those who put a greater weight on positive-law theories and those who cherish natural-law (or other non-positivist) legal theories.

Accordingly, in this article I am interested in establishing how different psychological types originally established by Jung have determined the character of law, lawyers and legal thinking. However, before I begin indicating possible connections between the basic psychological types and the main dimensions of law and legal thinking, I should outline some introductory elements of Jung's typological theory.

Initially, I should emphasise perhaps Jung's best 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. Extravert and introvert attitudes are present in everyone to varying degrees. The extraverted attitude is motivated from the outside and is directed by external, objective factors and relationships. In the case of an extravert who gets energy from external elements, psychic energy flows outwards towards the world. Whereas in the case of an 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 extraverting 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.[2] 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 introverting get their energy from their inner world of ideas, impressions and thoughts. They usually like to be alone, enjoy one-on-one, think first and then speak or act, conserve energy, focus inwardly, are quiet, like to

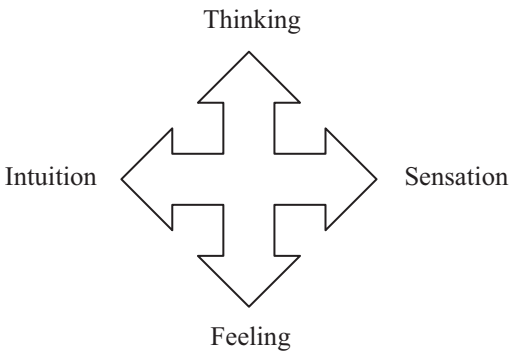
[2] These fundamental concepts of Jung are perhaps more simply explained by some of his contemporary followers. See, e.g., R. Baron, What Type Am I?, Penguine Books, London (1998), pp. 10, 13.

07 Marko Novak.indd 143 1.6.2011 18:18:32

focus on one thing at a time, are reserved, think to themselves, and enjoy reflecting.[3]

In addition to the two attitudes, Jung introduced four functional types or four (cognitive) 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.[4]

Figure 1: Four (cognitive) functions of the psyche according to Jung



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 actual, pay attention to specifics, are practical and realistic, focus on the present, value common sense, and are pragmatic.[5] 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

[3] C. G. Jung, From Psychological Types, in V. S. de Laszlo (ed.), The Basic Writings of C. G. Jung, Princeton University Press (1990), pp. 187-298. R. Baron, op. cit., pp. 10, 13.
[4] Ibid.
[5] Id., pp. 10, 20.

07 Marko Novak.indd 144 1.6.2011 18:18:32

seen as insensitive, are good at critiquing, and usually do not take things personally.[6] Further, 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, sympathise 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.[7] 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 focus on what might be. Intuitives 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.[8]

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 auxiliary functions which serve the superior function.[9]

Further, Jung combined the two attitudes with the four (cognitive) functions and created eight special mixed psychological types: (1) Extravert thinkers 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 (such as Charles Darwin), or economists who create theoretical formulations (such as Karl Marx).[10] (2) Introvert thinkers formulate questions and seek to understand their own being. They usually neglect the world and dwell on their own ideas (e.g. philosophers such as Ludwig Wittgenstein).[11] In addition, there are (3) extravert feelers (e.g. chat show hosts, stars like Frank Sinatra and Madonna)[12] and (4) introvert feelers (e.g. monks, nuns, musicians such as Chopin).[13] We should also add to the list (5) extravert sensators, who tend to focus on external facts, are practi-

[6] Id., pp. 11, 26.
[7] Ibid.
[8] Id., p. 11.
[9] C. G. Jung, From Psychological Types, op. cit., ibid.
[10] See M. Hyde & M. MacGuinness, Introducing Jung, Icon Books, Cambridge (1999), p. 82.
[11] Ibid.
[12] *Id.,* p. 83.
[13] Ibid.

07 Marko Novak.indd 145 1.6.2011 18:18:32

cal, hard-headed, and accept the world as it is, such as builders or speculators. Some of them might even be affable enjoyers of life (such as Casanova).[14] Moreover, there are also (6) introvert sensators (e.g. connoisseurs, aesthetes),[15] (7) introvert intuitivers (e.g. mystics and poets such as William Blake),[16] and (8) extravert intuitivers (such as PR people or adventurers).[17]

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, based on the chosen profession, also the special area that the individual is 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 other mechanisms that are present in the same person, although they might be completely opposite to the dominant one. Therefore, according to Jung, there are no clear types but the notion of ideal types only points to the predominant existence of the said mechanism in a person.[18]

His methodology of creating ideal psychological types proceeded from the insights and observations he obtained while dealing with his patients. Further, these insights were appropriately reflected through the study of some previous attempts in history at creating certain types in different areas of human thought. For that reason, Jung studied the works of Schiller, Nietzsche, James and other great persons.[19] He finally analysed all such previous attempts and tried to comprehend them by developing appropriate categories that resulted in his own theory of psychological types.

Some of Jung's followers have even gone further. In addition to Jung's eight types, Isabel Myers and Katharine C. Briggs invented 16 psychological types and a special indicator (the so-called Myers-Briggs Typology Indicator – hereinafter MBTI), by which it is possible to locate certain types through psychometric measurement. What Myers and Briggs actually added to Jung's scheme of types were two additional cognitive functions, namely "judgment" and "perception", which are allegedly indispensable for better locat-

[14] Ibid.
[15] Id., p. 84.
[16] Ibid.
[17] Ibid.
[18] C. G. Jung, Psychologische Typen, op. cit., p. 9.
[19] Ibid.

07 Marko Novak.indd 146 1.6.2011 18:18:32

ing the types.[20] In their opinion, the two additional preferences of judgment and perception were needed in order to better address the so-called auxiliary cognitive function that was only implicitly discussed in Jung's work. The judgement-perception preference shows the way of a person's life, his or her method of dealing with the outside world. For example, those who prefer perceiving tend to live in a spontaneous, flexible way, while those who prefer judging tend to live in an organised, planned way.[21] Another result of Jung ignoring the auxiliary process is the distorted description of the individual introvert types. For their extraversion introvert types need the auxiliary function, which represents their outer personality, their communication with the world, and their means of taking action. The judgement-perception preference is also allegedly indispensible for ascertaining which process is dominant. Instead of Jung's eight psychological types (introversion/extraversion x sensation/intuition/thinking/feeling), Myers and Briggs established 16 psychological types (introversion/extraversion x sensation/intuition/thinking/feeling + judgment/perception).[22]

Although Jung tested his findings (merely) on his patients in the context of therapy, the MBTI indicator was created on the basis of a psychometric experiment that has been widely used for locating the types. In addition to Jung's general scientific importance, this is one reason it is possible to establish that Jung's psychological type theory has been appropriately tested and approved in practice by empirical research such that it deserves a scientific character. Thus, certain results of such empiric research, which are referred to below, have also served to support the findings in this article on whose basis the importance of different psychological types for the existence of different dimensions of law and legal thinking have been analysed.

[20] I. Briggs Myers, P. B. Myers, Gifts Differing, Davis-Black Publishing (1980, 1995). Also see I. Briggs Myers, M. McCaulley, Manual: A Guide to the Development and Use of the Myers-Briggs Type Indicator, CA: Consulting Psychologists Press, Palo Alto (1985). This was, however, strongly objected to by some "true" followers of Jung who trust his classical thought more. W. C. Jeffries, True to Type, Hampton Roads Publishing Co. (2004), p. 20.
[21] R. Baron, op. cit., p. 11.
[22] I. Briggs Myers, P. B. Myers, op. cit., pp. 17-24.

07 Marko Novak.indd 147 1.6.2011 18:18:32

2. Dimensions of Legal Thinking

2.1. The Central Position of Thinking in Law

Stemming from the fact that law's traditional role has been to provide security and stability concerning social relations, it is not difficult to establish that the main cognitive function to serve that purpose is thinking. Other traditional tenets of law have been rationality, logic, analysis, predictability, impartiality, evaluation etc. All these elements that are associated with law can be ascribed to thinking, which analyses, categorises, decides, evaluates, differentiates, integrates, synthesises etc. The thinking function is not only typical of lawyers but lawyers are people who, when dealing with law, apply it as their superior rational function. It was Weber in particular who defined the law as explicitly rational and systematic. According to him, this was why the interests of the bourgeoisie to have secure and predictable goods traffic, and legal transactions thereof, led to great legal codifications. Weber emphasised that the lawyer is a professional whose activity is predominantly formal and logical.[23]

It is therefore not difficult to conclude that the function of thinking is the psychological function which is superior in persons who professionally deal with law, i.e. lawyers. It is thinking that enables them to approach the situation logically by analysing (concrete) facts in an impersonal manner, and to seek objective truth that is independent of the personality and wishes of the thinker or anyone else, with this imperative especially applying to judges.

Both rational cognitive functions (thinking and feeling) are functions or processes of making an evaluation or judgement. In the framework of the thinking function, basic conclusions are made on the basis of logical analysis with a focus on objectivity and detachment. Quenk indicates the following five facets that characterise thinking: (1) logic (in believing that using logical analysis is the best way to make decisions, and focusing on cause and effect, pros and cons); (2) reasonableness (by using sequential reasoning, fairness, impartiality in decision-making, being confident about objectives and decisions); (3) questioning (in asking questions to understand, clarify, acquire common ground,

[23] M. Weber, Economy and Society, University of California Press, Berkeley (1978), p. 882.

07 Marko Novak.indd 148 1.6.2011 18:18:32

solve problems and find flaws in viewpoints); (4) critique (when using impersonal critiquing of ideas, situations, and procedures to arrive at truth and avoid the consequences of flawed ideas and plans); and (5) toughness (by standing firm on decisions that have been thoroughly considered and critiqued and wishing them to be implemented quickly and efficiently).[24]

If amongst lawyers the thinking function is the most differentiated, their least differentiated function is certainly feeling (which, according to Jung, is also rational). It is the function that evaluates according to personal values, such as, for example, affinity for one person over another because of his or her dress, smell, shoes, clothes, the way they address people or speak to them etc. Concerning the feeling function, the abovementioned five facets that are typical of thinking (i.e. logic, reasonableness, questioning, critique and toughness) can be juxtaposed with empathy, compassion, accommodation, acceptance and tenderness.[25] If by feeling we decide according to our subjective, i.e. personal, values, then on the basis of thinking we decide by following our objective (impersonal) values, such as justice, fairness, and legal certainty. Yet lawyers are human beings and also possess feeling to a certain extent which, however, is not (or should not be) the decisive criterion for their legal decision-making if they want to uphold the values of predictability, neutrality, objectiveness etc.

Based on the above, we can establish that, given that lawyers' superior cognitive function is thinking and feeling is their inferior function, there also remain sensation and intuition as their auxiliary functions. In this connection, a former Slovenian Supreme Court judge interestingly described the atmosphere in his professional environment by explaining that, unlike in the courtroom, in his free time he was also a "human being" with all his emotions and feeling. He thereby meant that the lawyers' profession does not allow for the world of emotions, which much more affect the feeling function than thinking, to prevail in a courtroom as the main standards or criteria for legal decision-making demands "cold" reason and clear thoughts. He confessed that while in the courtroom he had to strongly adhere to the rational landscape of the lawyers' world, but when he came

[24] N. L. Quenk, Essentials of Myers-Briggs Type Indicator Assessment (2nd ed), John Wiley & Sons, Inc. (2009), p. 11.
[25] Ibid.

07 Marko Novak.indd 149 1.6.2011 18:18:32

out he was free and lucky to enjoy the entire life of emotions and feeling.[26]

What is typical of modern law is the fact that its legal proceedings are highly formalised, as reflected in the very detailed and systematically categorised rules of procedure. Moreover, substantive legal rules that are embodied in various codes of law are very abstract and general. A well-functioning legal system also tends to be systematic. All these elements such as formality, abstractness, generality and systematisation which are typical of modern law are characteristic of a very much differentiated thinking function of the human psyche. However, having taken all of this into consideration, one may ask oneself whether there is any place for feeling in the area of law, legal decision-making, and the professional life of lawyers which, as mentioned above, is also a rational function, but very much connected with and dependant on emotions and personal values. Certainly, due to it being a product of people's normative activities, law cannot be absolutely value-neutral, but to some extent at least includes the consideration of certain values such as justice, fairness, legal certainty, predictability, equality etc., by those who are engaged in the processes of creating and applying law. This entails that in law there is also room for passion, fervour and ambition in seeking the fulfilment of these values. However, in a modern legal setting, even in relation to the values that have been accepted in formal legal rules and principles as legal values, the feeling function is mainly a motivating factor behind some of these values, not a decisive criterion for the resolution of disputes concerning them. In such a manner, it is subordinate to the thinking function whose main role is to resolve disputes by rational means, thus preventing usually very emotionally affected parties from resorting to violent self-protection.

Nevertheless, one must not forget the role of the feeling function especially in those more informal settings that are complementary to formal legal proceedings. This particularly applies to alternative dispute resolution procedures (e.g. mediation, settlement etc.). It is especially the informality of such procedures that gives the feeling function its proper role, which is expressed in several dimensions of such a »dispute«, in particular when it comes to mediation. In such an informal setting, which resembles

[26] D. Ogrizek, Sodnikov pogled na jezik (in pravo) [A Judge's View on the Language (and Law)], Podjetje in delo, Vol. XXVIII, Nos. 6–7 (2000), pp. 1078-1085.

07 Marko Novak.indd 150 1.6.2011 18:18:32

more conversation than trial, there is room for the expression of personal values, even outbursts of emotion, which might contribute to a catharsis and in thereby perhaps to the resolution of a dispute, which in some areas of law (like family law) might be a better means for resolving a conflict or dispute than strictly legal means. This especially applies to those areas in which it is preferred that existing social relations continue (i.e. family relations, business relations). Hence the important role of psychologists, social workers and various kinds of therapists in alternative dispute resolution procedures as mediators who are not necessarily lawyers.[27]

Therefore, the role of the feeling function is important for some new developments in law and jurisprudence such as preventive law, ADR, procedural justice, therapeutic jurisprudence, problem-solving courts, restorative justice, collaborative law, holistic law, and creative problem solving.[28] According to Daicoff, such lawyers' concerns are mostly people's relationships, values, goals, needs, emotions and resources, which is more typical of the feeling function or an ethic of care. These traits, such as altruism, non-materialism or non-competitiveness promote values other than wealth maximisation and winning adversarial battles, are certainly atypical of traditional law.[29] They can be important supplements to the traditional role of the thinking function in law, although they cannot simply substitute its importance.

The preceding paragraphs presented the positive role of feeling that, to some extent, is important concerning the phenomenon of law. However, it needs to be emphasised that when feeling is imposed with the task of resolving legal issues, rigid formalism as the manner of decision-making and justification is likely to occur. The feeling function does not possess all the nuances associated with rationality in contrast with the thinking function since thinking is a much more differentiated type of rationality than feeling when it comes to reasoning and argumentation. Since feeling is more deciding according to personal values it is more one-sided, which could also be a trait of formalism, not to mention the problem of objectivity and impartiality in relation to feeling as a mode

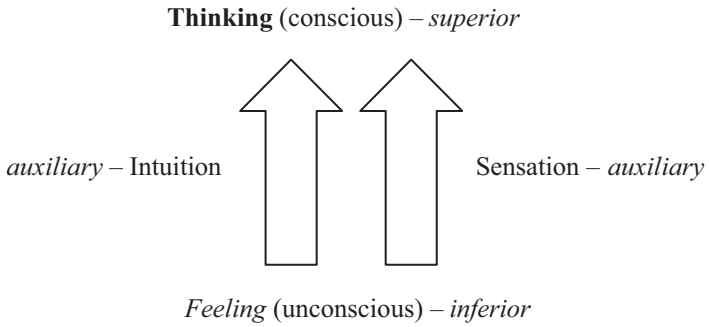
[27] See S. Roach Anleu, Law and Social Change, SAGE Publications, London (2000), pp. 124-29.
[28] See S.S. Daicoff, Lawyer, Know Thyself, American Psychology Association, Washington (2004), pp. 169-186.
[29] Id., pp. 192-93.

07 Marko Novak.indd 151 1.6.2011 18:18:32

of decision-making. Consequently, this leads us to the initial idea of this contribution that thinking is still a more appropriate and prevailing means for resolving legal disputes than feeling.

In accordance with the above, it seemed appropriate to create the following figure as regards the state of the superior, inferior and auxiliary functions of the lawyer's psyche in terms of Jung's psychological type theory.

Figure 2: The »state« of the lawyer's psyche according to Jungian typology



The abovementioned theoretical concepts also find support in empirical research. According to the results of a MBTI test in 1967 on a sample of more than 3,000 law students from seven prominent law schools in the USA, 73.4% of the students saw thinking as their superior function (and only 26.6% feeling).[30] A more recent MBTI test in 1997 among first-year law students demonstrated there were 78% thinkers and 22% feelers. According to the same 1997 study, among US lawyers there was a ratio of 67% thinkers to 33% feelers, and among US judges, a ratio of 68% thinkers to 32% feelers. Further, according to another study from 2004, the vast majority of US lawyers are thinkers (78%).[31]

The predominance of rationality (i.e. thinking) is certainly not only a characteristic of law, but also of other social activities. However, in order to find in the phenomenon of law some special characteristics which differentiate it from other social activi-

[30] See P. V. Miller, The contribution of noncognitive variables to the prediction of student performance in law school, University of Pennsylvania (1967); in: I. Briggs Myers, P. Myers, Gifts Differing, op. cit., p. 49.
[31] See V. Randal, http://academic.udayton.edu/legaled/online/study/mbti00a.htm#N_17_ (5. 1. 2010).

07 Marko Novak.indd 152 1.6.2011 18:18:33

ties that also largely use thinking as their primary function, reference could be made to the classical distinction with regard to human reason between theoretical reason and practical reason as two separate systems of thinking, a distinction which is as old as Aristotle.[32]

It is well known that, on one hand, theoretical reason deals with questions such as reflection on facts seeking the reasons for their existence. It refers to the understanding of the world around us by trying to find the truth, usually by experiment. Such issues are studied predominantly within the natural sciences and social sciences, which conducts research into the reasons and consequences of certain more or less objectively perceived activities (the so-called laws of nature and technical laws). In sociology there are measurements of public opinion, in psychology psychometrics, in economics statistics and other calculations which are similar to the operation of the natural and technical sciences. Theoretical thinking is thus interested in finding the truth or confirming (at least the acceptability of) certain hypotheses.[33]

In contrast, law as a special social activity falls within the so-called normative or practical areas, which deal with imperatives. According to the mentioned classical distinction, such refers to practical rationality which takes normative issues as its starting point. These areas mainly refer to values when they evaluate and weigh reasons for a certain activity.[34] It deals with alternatives to be selected as better (or more just) options. Such thinking can be called normative thinking.

Among the most important social rules there are legal rules which are differentiated from laws of nature and technical laws that reflect the operation of natural forces, their relations and their causes and effects. Social rules also differ from technical rules which determine the use of natural force by human beings in order to achieve certain effects, and thus regulate our relationship with nature. However, social rules regulate human relations within a society and between human beings. They call for certain

[32] In modern times Christian Wolf assigned ethics, economics and politics to practical philosophy, for which "action" is typical, while theoretical philosophy was to comprise ontology, psychology, cosmology, and theology (as "contemplation"). See T. Mautner, The Penguin Dictionary of Philosophy, Penguin Books, London (2000), p. 441.
[33] Stanford Encyclopedia of Philosophy, at: http://plato.stanford.edu/entries/practical-reason/ (17. 6. 2009).
[34] Ibid.

07 Marko Novak.indd 153 1.6.2011 18:18:33

conduct, demand certain respect that depends on the will and consciousness of members of a society. If such required conduct is disrespected, the society needs sanctions to be applied as a certain positive encouragement for people to obey social rules. Laws of nature do not possess such sanctions and also do not need them because of their cause and effect automatism.

However, law as a system of social norms is not the only human activity that deals with practical rationality (or practical thinking). There are also moral norms or morality, which has traditionally been an important activity that falls within the area of practical thinking. In this aspect, one possible distinction between these two activities can be made by using Kant's famous idea that law refers more to external matters of human life, while morality is more an internal issue of people.

In addition to moral norms, other social norms include customs and even other seemingly less important social rules, such as rules of grammar, sports rules, general rules of conduct etc. In comparison with such social rules, it is not difficult to establish that legal rules originate from a very organised social structure supported by various (mainly state) institutions. In the case of law and legal rules, complexity and the level of organisation is much higher than in the case of other social rules. For example, the operation of morality is much more spontaneous than the operation of legal rules and legal institutions. Since global human society today includes a growing number of individuals it is becoming increasingly complex, which is also why we have ever more social and legal rules. Thus, it seems appropriate to agree with MacCormick that law is also a so-called institutional normative order.[35] It is certainly a product of a modern highly organised society that presupposes the existence of numerous institutions and (state) bodies that create and apply legal acts in order to resolve important social disputes. Such institutions are also a product of the historical, civilisational and cultural development of society.

2.2. Judging and Legal Thinking

As mentioned, the judging-perceiving dichotomy was brought to psychological typology by Briggs and Myers. It demonstrates people's attitudes or orientations to the outer world. While con-

[35] See N. MacCormick, Institutions of Law, Oxford University Press (2007).

07 Marko Novak.indd 154 1.6.2011 18:18:33

cerning such, the perceiving function prefers flexibility and spontaneity using one of the perceiving processes (sensation or intuition), the judging function prefers decisiveness and closure using one of the judging processes (thinking or feeling). In this respect, Quenk indicates the following facets that characterise judging: (1) systematisation (in liking orderliness and systematic methods at work, home, and in leisure activities; in valuing efficiency and advance preparation, and disliking surprises; and in enjoying the comfort of closure with making a decision); (2) planning (in liking to make long-range plans for the future, including social events; in feeling that things will not happen as they wish unless planned in advance); (3) early starting (in planning for a deadline by starting early and working steadily to completion; in disliking the stress of having to work at the last minute); (4) schedules (in liking the comfort and security of working with routine, established methods both at work and at home; in liking the predictability this gives their lives); and (5) methods (in organising and developing detailed plans for a current task, listing and sequencing tasks and subtasks to accomplish the goal).[36]

There is also support in empirical research for the above ideal concepts. According to the mentioned 1967 MBTI test, 57% of the tested students turned out to be judgers and 43.0% were perceivers.[37] Further, following the abovementioned 1997 MBTI test among first-year law students there were 67% judgers and 33% perceivers. According to the same study, among US lawyers there were 60% judgers and 40% perceivers (and among US judges 77% judgers and 23% perceivers). In addition according to the 2004 study the majority of US lawyers are judgers (63%).[38]

2.3. The Sensation-Intuition Dichotomy and Legal Thinking

Having established that, according to Jungian typology, the function of the psyche that is predominantly engaged in the daily work of lawyers is thinking, and that their most inferior function is feeling, I now turn to the role of the two auxiliary functions to demonstrate their influence on the superior function. How do the

[36] N. L Quenk, op. cit., p. 13. In relation to the perceiving function, Quenk indicates the following facets: casualty, open-endedness, pressure promptedness, spontaneity and emergency.
[37] P. V. Miller, op. cit., ibid.
[38] V. Randal, op. cit., ibid.

07 Marko Novak.indd 155 1.6.2011 18:18:33

auxiliary functions affect the understanding and shaping of law as a product of practical thinking? At this point, let me just repeat that sensation refers more to information we receive through our five senses and is oriented more to the external world, while intuition, as our »six sense«, transmits to us the messages we receive from our inner self. It focuses mainly on perceiving patterns and interrelationships. However, the fact that thinking is the superior function in the legal profession entails that thinking will dictate the goals, and sensation and intuition will only be allowed to suggest suitable means for reaching them.

Quenk indicates five facets of the sensing-intuition dichotomy. Sensation is characterised by: (1) concreteness (in focusing on concrete, tangible and literal perceptions, communications, learning styles, world view, and values; in trusting what is verifiable by the senses; and in being cautious about going beyond facts); (2) reality (by preferring what is useful, has tangible benefits, and accords with common sense; and by valuing efficiency, cost-effectiveness, comfort, and security); (3) practicality (in being more interested in applying ideas than in the ideas themselves, in liking to work with known materials using practical, familiar methods; and in preferring tangible rewards over risky opportunities for greater gain); (4) experimentalism (in trusting their own interest and others' experience as the criterion for truth and relevance; in learning best from direct experience; and in focusing more on the past and present than the future); (5) tradition (in preferring the continuity, security and social affirmation provided by traditions, established institutions, and familiar methods; and in being uncomfortable with unconventional departures from established norms).[39]

To the contrary, in the event of intuition the decisive criteria for such to be distinguished from sensation are the following: (1) abstractness (in focusing on concepts and abstract meanings of ideas and their interrelations; and in using symbols, metaphors and mental leaps to explain their interests and views); (2) imagination (in valuing possibilities over tangibles and liking ingenuity for its own purpose; and in being resourceful in dealing with new experiences and solving problems); (3) conceptuality (in liking knowledge for its own sake and focusing on the concept, not its

[39] N. L. Quenk, op. cit., p. 10.

07 Marko Novak.indd 156 1.6.2011 18:18:33

application; in enjoying complexity and implied meanings over tangible details; and in liking to take risks for potential gains); (3) theory (by seeing relevance beyond what is tangible and by trusting theory having a reality of its own; and by being future-oriented and seeking patterns and interrelations among abstract concepts); and (5) originality (in valuing uniqueness, inventiveness, and cleverness to put meaning into everyday activities; enjoying demonstrating their own originality; and believing that sameness detracts from meaning).[40]

When it comes to the influence of sensation on thinking, Jung referred to the traditional concept of *ratio* which entails that our thinking receives external information and analyses such in the framework of experimental logic by showing that certain things are causes of certain effects.[41] This is also the way in which science operates and tries to prove its discoveries, and is also the language of analysis and argumentation in law that deals with rules and principles that are written in legal codes. Not only is it the language of contemporary legal rules, but also of rhetoric, reasoning and argumentation in judicial decisions, legal logic, and of commentaries on different legal codes and acts. Accordingly, it is the language of positive law and also, to an important extent, of positive-law legal theories. Today this language as the language of instrumental rationality predominates in legal discussion.

Beside *ratio,* Jung also mentioned what has traditionally been perceived as *intelectus.* In this context he referred to intellectual intuition as a special type of thinking that obtains information from intuition.[42] We can point to the role of intuition in law by emphasising the role of various hunches and insights in the process of legal decision-making.[43] Nevertheless, today this type of language is mostly reserved for more theoretical, even philosophical, reflections on the problem of legal rules such as whether certain legal rules are just or fair in relation to various principles, and as

[40] Ibid.
[41] C. G. Jung, From Symbols of Transformation, in V. S. de Laszlo (ed.), The Basic Writings of C. G. Jung, op. cit., pp. 12-38.
[42] Ibid.
[43] This was particularly emphasised by the American Legal Realists, Frank ("hunches") and Hutcheson ("judgment intuitive"), as well as by Petražycki in his concept of intuitive law. According to him, rules of intuitive law, not being limited by any normative fact, are experienced as resulting from the very nature of things – natural, just, universally valid. See L. Petražycki, Law and Morality, Ballinger Pub. Co., Cambridge, Mass. (1955). Moreover, Petražycki equated his concept of intuitive law with the sense of justice. K. Motyka, Leon Petražycki Challenge to Legal Orthodoxy, 23rd IVR World Congress, Cracow (2007), pp. 28-29.

07 Marko Novak.indd 157 1.6.2011 18:18:33

a tool in reaching legal decisions when various insights, including moral sentiments, help us come to a just decision for example when there is a need to fill a gap in the law. In terms of contemporary law, intellectual intuition is undoubtedly subordinate to the more predictable formal language of law. Such intellectual intuition can also be called "creative intuition".

But this does not mean that in dealing with positive law there is no room for intuition. Quite the contrary, intuition also plays a very important role in more "instrumental" environments. The importance of intuition in law in general stems from the fact that law is mostly a "game" of language, which is composed of words, concepts and symbols. In this respect, the role of intuition is to translate such abstract language into concrete reality in order that it becomes meaningful.[44] Thus, it is indispensable for understanding legal language which is full of concepts, abstractions and generalisations. However, in contradistinction with the previously mentioned creative intuition the intuition that is used in positive-law contexts can be called "instrumental intuition". Its role is to "navigate" or direct the lawyer-thinker through various abstract and general rules and principles of positive-law codes to his or her final legal decision. Such instrumental intuition can to some extent be equated with the concept of (intuitive) recognition, as the one which helps the lawyer *a priori* understand whether certain facts fit a certain legal norm and can thus be subsumed under it (the so-called *Rechtsgefühl)*.

Another special feature of thinking that deals with law is the fact that legal rules are predominately expressed in the form of (mostly written) language. This is why the thinking (by means of logic, analysis, synthesis) that deals with law refers to a special human intelligence for language[45] which to some extent is, for example, different from the so-called mathematical-logical intelligence that deals with numbers.[46] In contradistinction with the logical-mathematical form of intelligence, the world of language is not closely connected with the concrete world as the world of concrete objects[47]. Language is very much linked with abstraction and intuition. Moreover, legal language resulting from (rational) think-

[44] See I. Briggs Myers, P. Myers, op. cit., pp. 57-59.
[45] See, e.g., H. Gardner, Multiple Intelligences, Basic Books, New York (1993).
[46] In my classes there has always been a majority of law students who disliked mathematics.
[47] H. Gardner, op. cit., id.

07 Marko Novak.indd 158 1.6.2011 18:18:33

ing is also quite different from the language of art when literature as its special form is concerned.[48]

Concerning the predominance of the impact of one or other auxiliary function on thinking, I differentiate between the lawyer who is more inclined to positive (i.e. sensatory or empirical) law and the lawyer who is more inclined to non-positive (intuitive) law. The more positive-law-oriented lawyer-thinker is closer to the real world of facts, practical problems and concrete relations. Here the prevailing thinking function receives information predominantly from the empiric world of sensation. In this context, instrumental intuition necessarily plays a subordinate role to the thinking-sensation combination.

Conversely, to an important extent the predominantly intuitively (in the creative way) oriented lawyer-thinker is remote from the concrete world of facts but is closer to his or her internal world of ideas.[49] A lawyer's or judge's creative intuitive function as an auxiliary function that carries hunches from the internal being to (rational) thinking is in particular important for using internal or intuitive dimensions of law such as the sense of morality, the sense of justice, the sense of social-legal issues such as equality etc. In the framework of legal decision-making – especially when it comes to hard cases like when a text is unclear, includes gaps and there are several solutions to the problem – the mentioned dimension of intuitive thinking is very important.

Based on the above, it seems that the sensation-intuition dichotomy concerning law and lawyers is not as important as the previously mentioned thinking-feeling and judging-perceiving dichotomies. This follows from the fact that with law neither intuition nor sensation stand out as an absolute type preference as was the case of thinking. However, both preferences are indispensable for dealing with law as they represent the cognitive functions of perception.

A lawyer learns positive law, including legal rules and legal principles that are incorporated in legal regulations, through their

[48] A typical example of this is poetry in which thinking certainly has some role, although it is often subordinated to feeling.

[49] Maritain asserted that in terms of natural law the matter deals with findings from intuition by means of listening to some internal "melody" of mind. See J. Maritain, Man and the State, The University of Chicago Press (1951), p. 95. Moreover, in his Preface to Metaphysics he claimed that Kant had never understood the proper role of intuition in approaching metaphysical truths. J. Maritain, A Preface to Metaphysics, The New American Library (1962), p. 52. That would undoubtedly be close to what Bergson understood by his concept of intuitive morality.

07 Marko Novak.indd 159 1.6.2011 18:18:33

senses, and such a world of positive law is thus for them part of the world of facts that encompass them. It is the external reality that in the process of legal interpretation and deciding the lawyer must evaluate by means of the evaluative function that is represented in him or her by thinking. Certainly it is impossible to exclude from thinking other parts of the lawyer's personality which might have a certain impact on their evaluative activity. It is particularly positive law, being a starting point for his or her work, which also represents a limitation on his or her evaluation. At this point, it is clear that the less the legal standards the judge must compulsorily consider in their adjudication are envisaged in advance (i.e. more or less precisely determined in legal texts of codes or case law), the more they are free to make decisions, which makes their personality a more important factor in decision-making. Regardless of whether there are gaps in the law, a lawyer's instrumental intuition forms an integral part of his or her functioning in the framework of positive law since, without such, the understanding or recognition of legal concepts when they are faced with the facts of cases would be strongly minimised.

Given the fact that by its form positive law represents a certain objectification of prevailing social interests at a certain time and place, which can only be amended within a certain procedure that is envisaged in advance, this certainly brings security to disputable social relations. Positive law that plays an important role of a mediator between people thus represents a certain compromise or common denominator that is determined in some act or case. Creative intuition, in this respect the "subjective law" of every interpreter or judge that decides on a certain case, is in this sense only a supplement to positive law. In this context, positive law would be a form, while intuitively perceived law somewhat substantive or material supplement to positive law, especially when it comes to various gaps in the law. However, intuitive or theoretical (non-positive) law (e.g. certain senses of justice, morality, legal sense in general, the sense of legal certainty, the sense of other legal and social values) can also play the role of a supervisor over positive law.

The abovementioned positions are supported by the results of empirical research. In relation to the sensation-intuition dichotomy, there is generally a slight advantage in favour of intuition. Intuitive lawyers are more oriented to abstraction, symbols and

07 Marko Novak.indd 160 1.6.2011 18:18:33

theory, while sensatory lawyers are more practical and fact-oriented. According to the previously cited 1967 MBTI test among law students there were 59% intuitives and 41% sensors. In contrast, in the case of a comparable sample of tested members of urban police, almost 80% turned out to be sensors (and only 20% were intuitives). This can be explained by the fact that, although both professions deal with the law, "real" lawyers deal more with words and language, while police officers are more engaged in concrete situations and actions.[50] Moreover, the 1997 MBTI test revealed a ratio of 52% intuitives to 48% sensors. Further, among lawyers the same test showed 59% intuitives and 41% of sensors (however, among judges there were only 41% intuitives and 59% sensors).[51] Furthermore, Daicoff claims that 57% of all lawyers tend to be intuitive.[52]

However, this comparison cannot serve as the basis for a general claim that when it comes to law, in terms of the auxiliary functions, intuition is more important than sensation. While in academic environments the subtleties of intuition, in the form of critical thinking, imagination, new theories etc., are very emphasised, legal practice is more focused on the "tough" way of thinking with its strong emphasis on the thinking-empirical (or sensory) dimension of the finding of facts and their more or less easy subordination to rules. This at least applies to clear cases, which in legal practice certainly predominate.

Finally, the abovementioned findings and ideas are presented below in a table that demonstrates several aspects of the classification of lawyers in various legal professions according to their sensation-intuition dichotomy.

[50] See, I. Briggs Myers, P. Myers, op. cit., p. 50.
[51] V. Randal, op. cit., ibid.
[52] S. Daicoff, op. cit., ibid.

07 Marko Novak.indd 161 1.6.2011 18:18:33

Table 1: Classification of lawyers in various legal professions according to the sensation-intuition dichotomy

	SENSATION	INTUITION
LEGAL PRACTICE	• Attorneys • judges at lower courts • state attorneys, prosecutors	• attorneys (research & writing) • judges at superior courts
LEGAL ACADEMIA	• positive-law theorists • legal historians • professors practicing law	• non-positive law theorists • scholars, writers
LAW STUDENTS	• interested in positive-law courses, legal history, economics and law	• interested in non-positive law courses

2.4. The Extraversion-Introversion Dichotomy and Legal Thinking

One of Jung's most important psychological discoveries was the differentiation between extraversion and introversion. The extravert is more oriented to an external environment, towards the outer world of people and objects, while the introvert is more oriented to an internal environment, towards an inner world of experiences and ideas.[53]

Quenk determines five different criteria that are typical of the extraversion-introversion dichotomy. Extraverts are more (1) initiating, which means they tend to act as social facilitators at social gatherings. They like to introduce people, connect those with similar interests, plan and direct gatherings. They are also very (2) expressive by easily telling others their thoughts and feelings, making their interests known and readily confiding in others, and are seen as easy to get to know. Further, extraverts tend to be (3) gregarious, which means they enjoy being with others and belonging to groups. They also tend to have many acquaintances and friends and do not make a sharp distinction between friends and acquaintances. Another characteristic of extraverts is that they are (4) active in that they like direct involvement in active environ-

[53] C. G. Jung, From Psychological Types, op. cit., ibid.

07 Marko Novak.indd 162 1.6.2011 18:18:33

ments, and learn best by doing, listening, observing and speaking rather than by reading and writing. Finally, they tend to be (5) enthusiastic in that they are talkative and lively, enjoying a dynamic flow of energy in conversations; and in liking being the centre of attention and sharing who they are by telling stories.[54]

In contradistinction with that, introverts are more (1) receiving such that they prefer to be introduced at social gatherings, dislike small talk, prefer in-depth discussions of important issues with one or two people. Further, introverts tend to be (2) contained. They like to share their thoughts and feelings with a small and select few, and are hard to get to know because their reactions are mostly internal. Moreover, they are more (3) intimate by having a limited circle of close, trusted friends, preferring to talk one-on-one to people they know well; making a sharp distinction between intimate friends and casual acquaintances. Introverts also tend to be (4) reflective as they like visual, intellectual and mental engagement, learning best by reading and writing rather than by listening and speaking. They are also more (5) quiet so they seem to be reserved and quiet but often have rich internal responses to what is going on. As they may have difficulty in describing their inner experience in words, they may not prefer speaking about them.[55]

However, when it comes to the extraversion-introversion dilemma it seems that different areas of law and legal professions, also like most other professions, are broad enough to include both attitudes of people in different positions in such. According to Jung, extraverted thinkers generally include scientists (mostly of the natural sciences) and economists (who create theoretical formulae). They direct themselves and others in view of fixed rules and principles based upon reality, order and material facts. In this context, Jung particularly referred to Darwin and Marx.[56] To be honest, a great deal of modern law encompasses so-called positive law which in its sensory and empirical aspect is well described as a product of extraverted thinking. Moreover, in that view the law is considered to be a social activity which is intended for the resolution of practical social disputes. Although in accordance with such criteria law seems be to a product of extravert thinking to an

[54] N. L. Quenk, op. cit., p. 12.
[55] Ibid.
[56] C. G. Jung, From Psychological Types, op. cit., ibid.

07 Marko Novak.indd 163 1.6.2011 18:18:33

important extent, this certainly does not say that law cannot be dealt with introvertedly and that there is no place for introverts in law. In this sense, law is similar to economic and natural sciences.

However, as mentioned, in comparison with other disciplines and sciences within the extraverted-thinking group, what separates law and lawyers from other extraverted thinkers is: (1) their special consideration of language (in its narrow sense as a system of letters, words and sentences) and thus the special importance of intuition, with their language intelligence mostly being focused on logical and analytical perspectives (that has traditionally been called *ratio)* and, to some extent, (2) their special consideration of normativity (especially justice – which has traditionally been considered, in its non-positivistic sense, as a subject-matter of intellect).

Pascal interestingly describes a situation where several types of personalities attended a dinner organised by a lady. Among them there was a talented attorney (a practicing lawyer), who represented the extraverted thinker – with the auxiliary functions of sensation (more developed in him) and intuition (less developed in him). What typified him was his great interest in externity, regulations and facts. Further, it was peculiar to him that he memorised many laws and their rules, which he could quite skilfully use in the framework of thinking when dealing with his clients' problems. His thinking was characterised by combining events and facts, searching for causes and effects, in which he could successfully conceal the existence of certain information. All in all, he was a master of practical thinking.[57]

The other possibility of the thinking function in this aspect is the introverted thinker, who is more typical of philosophers (Jung mentioned Wittgenstein).[58] Philosophers ask questions and try to understand their own existence. They thereby neglect the external world and manage to "live" on their own ideas. Such a type can also be the case as regards law when more theoretical legal areas are at issue, for example: the theory of law, philosophy of law, or sociology of law. Thus, the mentioned dinner was also attended by a distinguished scholar, an introverted thinker, who was discussing Presocratic philosophy as the main force behind Alexander the Great's conquests. In doing so he used his auxiliary functions

[57] E. Pascal, Jung to Live By, Souvenir Press (E&A) Ltd., London (2004), p. 38.
[58] C. G. Jung, From Psychological Types, op. cit., ibid.

07 Marko Novak.indd 164 1.6.2011 18:18:33

of intuition (in developing certain philosophic ideas) and sensation (by describing pure historical events and facts).[59]

Certainly, there can be differences among lawyers as extraverted thinkers, as well as among introverted thinkers. Extraverted legal professions are more typical of legal practice – such as attorneys, prosecutors, judges etc. The most typical extraverted thinker is an attorney. Sometimes the superior function of their psyche can even be sensation, and thinking their first auxiliary function.[60] The most extraverted of such are certainly the so-called litigators as those who represent clients at court trials. They are brilliant in controlling the external situation of a courtroom. More introverted among attorneys are so-called researchers and writers who in their offices in law firms (i.e. in a much more introverted environment than a courtroom) write legal memoranda, in the context of which they study various laws, commentaries and theoretical materials, and write legal papers. Such legal memoranda serve their colleagues – litigators – as the (introverted) basis for (extraverted) litigation.[61]

It seems that a judge is the least extraverted profession in legal practice. In their resolution of disputes they often must be much more "scholarly" oriented than attorneys as they or she also need to study various theoretical treatises in order to learn (and improve the knowledge of) tradition, history, rationale and other "logic" that usually lie behind a certain law that is to be applied. While attorneys in particular listen to their (extraverted) clients' interests, in addition to legal texts judges to a greater extent than attorneys must listen to their internal (or introverted) legal sense and the sense of justice. However, there is also a number of extraverted judges who are more successful in conducting trials than introverted judges. Introverted judges tend to be more scholarly-oriented: they are either perfect legal writers of (theoretical) legal treatises, commentaries on certain laws, or beside their main profession they are also engaged in teaching as law professors. However, in general judges still act in the framework of legal practice so the main framework of their environment is extraverted thinking, which in one way or another mainly deals with positive

[59] E. Pascal, op. cit., p. 39.
[60] See R. Baron, op. cit., pp. 83-84.
[61] Modern, especially North American, law firms have taken this difference into consideration very seriously. Such a distinction between more extraverted and introverted profiles would generally apply to prosecutors as well.

07 Marko Novak.indd 165 1.6.2011 18:18:33

law. Further, the work environment of lower court judges is more extraverted (i.e. public hearings and trials; less time for studying cases in their offices) than the work environment of superior court judges which is more introverted (i.e. deciding in panels; more time for studying cases in their offices).

In legal academia, the general environment is generally theoretical, which means it is introverted. Although in such a milieu the starting point of introverted thinking is usually some existing legal text, a legal theorist often evaluates this in view of certain (internal) ideas, values and concepts such as fairness, justice, equality, legal certainty, consistency, coherence etc. However, also in legal academia there is room for extraversion. Those who are more extraverted are better teachers than introverts as they get along better with an extraverted environment such as a lecture room. Extraverts among legal theorists are also better organisers than introverts, better fund-raising people, and better at keeping contacts with their colleagues than introverts. Conversely, introvert legal professors tend to be better researchers, writers and scholars.

When law students are concerned, more extraverted students would prefer oral exams to written ones, and vice versa. In general the legal academic environment is more theoretical than legal practice so it is a better "natural" environment for introverted intuitive thinkers than legal practice in which extraverted sensatory thinkers can catch up to their introverted counterparts.[62]

In connection with theory, Jung cautioned against the danger of a thinker who is very intuitively-oriented as his theories could be too speculative or somewhat in the air if they are not firmly grounded on facts.[63] However, in the event of a factually (or empirically) oriented scientist, there is a danger that, given all the facts that he or she deals with, there would be too little abstraction, which means that even if we can see in front of us numerous trees (facts) there is still the possibility that we are missing the concept or idea of a forest. Jung thus meant that both aspects of thinking (i.e. facts and theories) must be properly taken into con-

[62] V. Randal, op. cit., ibid.

[63] The same was, however, although in different words, asserted by Kant when explaining that if concepts (or theories) without facts are empty then facts without concepts (or theories) are blind. According to Schneider, the same meaning as experiment has for the natural sciences example has for »spiritual« sciences. E. Schneider, Logik für Juristen [Logic for Lawyers], Die Grundlagen der Denklehre und der Rechtsanwendung, Verlag Franz Valhen, München (1991), p. 39.

07 Marko Novak.indd 166 1.6.2011 18:18:33

sideration, and that theory and practice indeed need each other inseparably.

As indicated, it generally seems that, when seen from its practical aspect, the law is predominantly engaged in resolving disputes that relate to the external sphere of people's lives. Thus, law is in particular a practical activity for which people's extraverted orientation is typical since in the case of social disputes, legal rules and legal procedures, a person's psychic energy flows outward to the external world of facts that the lawyer defines and evaluates on the basis of legal rules, in which his or her main auxiliary psychic function is sensation, as the ability to perceive (external) facts and (external) legal rules. But, as with any thinking, at least to some extent, what also matters for the lawyer is his or her intuition that plays a (subordinate) role in relation to thinking and sensation. Nevertheless, it helps the lawyer find creative (or just) solutions that must again be submitted to a "rational experiment"[64] that is carried out by the thinking and sensation functions. This entails that, even for an intuitively reached decision, the judge must provide (thought out) reasons that are presented in the reasoning of the decision, which are submitted to the (external) public for evaluation.

The general framework of legal practice is, again, extraverted thinking-sensation activity. However, one can also deal with law theoretically in the sense of a theoretical analysis of legal practice, the development of new legal theories, or even when discussing law in terms of legal philosophy. In such a situation, the lawyer who thinks theoretically would think in particular as an introvert, meaning that the current of energy flows into his or her internal world when they evaluate facts and develop new theoretical approaches. In such activity, the more they leave the facts behind the less they are dependent on their sensatory (empirical) function, by using their intuition that enables certain insights which, however, must still be exposed to empirical reality if one is to arrive at a productive idea or concept.

As I have established previously concerning lawyers' attitudes in general, there is also not much difference between introversion

[64] Karl Popper called it "rational reconstruction". See K. Popper, The Logic of Scientific Discovery, Routledge, London and New York (1992), p. 8. The term rational reconstruction was subsequently adopted by the theory of legal argumentation. See E. T. Fetteris, Fundamentals of Legal Argumentation, Kluwer Academic Publishers, Dordrecht (1999), p. 10.

07 Marko Novak.indd 167 1.6.2011 18:18:33

and extraversion. Introverted lawyers, who are more interested in ideas and concepts, are frequently found in legal academia or in research-oriented positions in legal practice (e.g. as corporate lawyers, judges at superior courts), whereas extraverted lawyers, who are better in action, more often appear in legal practice as litigating attorneys or judges of lower courts. This is also supported by empirical research. Accordingly, abovementioned MBTI test of 1967 demonstrated there were 55.2% extraverted law students and 44.8% introverted law students, and the 1997 test showed there were 51% extraverts and 49% introverted law students. In the same study, extraverted lawyers were in the minority as there were 43% extraverts compared to 57% introverts. [65] In addition, Daicoff claimed that US lawyers are slightly more likely to be introverts than extroverts.[66] However, amongst judges there were 56% extraverts and 44% introverts.[67]

In relation to the extraversion-introversion dichotomy concerning lawyers and the law, I complete this article with the following table in which I classify lawyers in various legal professions according to their extraversion-introversion preferences.

Table 2: Classification of lawyers in various legal professions according to the extraversion-introversion dichotomy

	EXTRAVERSION	INTROVERSION
LEGAL PRACTICE	• litigating attorneys • lower court judges (public hearings, trials)	• researching & writing attorneys • lawyers in public administration • superior court judges (deciding in panels)
LEGAL ACADEMIA	• organisers, leaders • teachers	• writers • scholars
LAW STUDENTS	• best performance at oral exams	• best performance at written exams

[65] V. Randal, op. cit. ibid.
[66] S. Daicoff, op. cit. ibid.
[67] V. Randal, op. cit. ibid.

07 Marko Novak.indd 168 1.6.2011 18:18:33

Having seen that in some general or typical, if not ideal, model of the understanding of law and legal thinking different psychological typologies apply, we should pay closer attention to various systems of law in the world. Whether they deviate and, if so, how they deviate from the general pattern will now be considered.

3. Legal Thinking in a Comparative-Law Perspective

3.1. Modification of the General Pattern by Specific Typological Characteristics

From the Jungian psychological types that primarily refer to individuals and those particular elements of such types that apply to individual lawyers as indicated above, it is surely possible to take a step forward from such individuals' characteristics to the characteristics of the social groups to which these individuals belong.[68] We have already established that lawyers as a special professional group are distinguished from other professional groups, e.g., by their extravert thinking.[69] To an important extent this applies to the entire group of contemporary lawyers on the global scale. However, there are deviations from and special aspects of this general pattern when we travel from country to country, from one legal system to another.

Although law in a global sense has some common characteristics, as referred to above, it is so intertwined with the general culture and civilisation in which it originates. We usually assert that it is very hard to arrive at a universal concept of law because it is so strongly subject to the place and time in which it is created and applied. While this is not to deny that the psychological type characteristics that are typical of lawyers are thinking and judging, and of law extravert thinking and judging, it is also necessary to establish that they are strongly influenced by those specific typological characteristics that prevail in different cultures. Some cultures and

[68] E.g. some MBTI measurements in the United States discovered that in 1996 the sensing and judging types (i.e. ESTJ, ESFJ, ISTJ, and ISFJ) predominated in U S males and females. See A. L. Hammer, W. D. Mitchell, The Distribution of MBTI Types in the United States, Journal of Psychological Type, Vol. 37 (1996), pp. 2-15.

[69] We have already indicated this does not mean that lawyers cannot be introverts. By extravert thinking we refer to the general characteristic of the entire group of lawyers as professionals who deal with practical reason in resolving social disputes.

07 Marko Novak.indd 169 1.6.2011 18:18:33

societies are more thinking cultures and more technically-oriented, whereas others are more feeling-oriented and more musical. In some cultures people cherish sensation and are strongly oriented towards the world, while in some cultures they value intuition more and are more mystical. Not only individuals but also ethnic groups and even nations with their collective typology contribute their share to the variety of perspectives and evaluations in the world.[70]

Therefore, the above presented general pattern of psychological typology pertaining to law and lawyers needs to be readjusted by means of considering specific patterns, or at least by taking specific influences on the general pattern into consideration, when we deal with law in terms of comparative-law perspectives. These specific influences seek to either modify the general pattern in one direction or another, influence it insignificantly, or even leave it untouched.

This contributes to the fact that, despite the general common denominator on the globe of the prevailing (extravert) practical rational structure of contemporary law which has been more or less established in various contemporary legal cultures, lawyers, law and legal systems certainly differ in greater or smaller details when we go from one country to another and meet lawyers and law with certain peculiarities. Finally, such partial differences in the law and legal systems of certain territories are undoubtedly reflected in general differences between lawyers from different parts of the world.

3.2. Psychological Typology and World Legal Systems[71]

In comparative-law theory there are three predominant world legal families or groups of legal systems, i.e. (1) the European Continental (also Romano-Germanic) legal system; (2) the Anglo-American (common law) legal system; and (3) religious and traditional legal systems.[72] When it comes to understanding law in the light of either the creation or application of such, it seems that not only do historical and geographical differences between the

[70] E. Pascal, op. cit., pp. 17, 22.
[71] This chapter is partially based on my previous findings in M. Novak, Pravni človek [Homo juridicus], Nova revija, Vol. 27, No. 319-320 (2008), pp. 221-235.
[72] K. Zweigert, H. Kötz, An Introduction to Comparative Law, Oxford University Press, Oxford (1998); R. David, G. Grasmann, Einführung in Die Großen Rechtssysteme Der Gegenwart (1988).

07 Marko Novak.indd 170 1.6.2011 18:18:33

mentioned world legal systems matter, but so too are differences related to various elements in terms of the different psychological typologies of such systems. The partially different legal systems are also reflections of the partially different psychological typologies of the people who create and apply law in such legal systems. Thus, it is interesting to see how the above described general or ideal typological model or pattern concerning law, which is primarily based on the thinking and judging cognitive functions, is importantly supplemented and adjusted in various world legal systems.

In this part of the article I do not base my findings on empirical data concerning psychological typology, although that would clearly be possible through MBTI tests, but instead analyse in an abstract and theoretical manner certain traditional differences between these world legal systems through the prism of psychological typology. I am aware that the differences as regards psychological typology relating to law that I am presenting here are somewhat simplified and relative. They more concern some prevailing or predominant elements of differences between these systems that draw no strict borderlines between them.

What is typical of the traditional European Continental legal system (hereinafter referred to as the "civil law system") is an abstract and systematic way of legal thinking, whereas the traditional Anglo-American legal system ((hereinafter referred as the "common law system") has included more pragmatic and casuistic elements than the civil law system. Below I analyse certain typological elements in these systems according to the already presented criteria of general typological characteristics established by Naomi Quenk.[73] In the next paragraph I repeat some of these general typological characteristics that will be important for the analysis.

According to Quenk, it is the cognitive function of intuition that refers to abstract, conceptual, and theoretical elements. By "abstract" what is meant is its »focus on concepts and abstract meanings of ideas and their interrelationships«. The abstract »uses symbols, metaphors, and mental leaps to explain their interests and views.« By "conceptual" Quenk understands focusing on concepts, not their application, and by "theoretical" seeing relevance beyond what is tangible and trusting theory as having a reality of

[73] See N. Quenk, op. cit., supra.

07 Marko Novak.indd 171 1.6.2011 18:18:33

its own, as well as seeing patterns and interrelationships among abstract concepts. However, following Quenk, when it comes to the cognitive function of sensation, amongst others, the following facets are also typical of it: the concrete, the practical, and the experimental. The "concrete" »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.« The "practical" is »more interested in applying ideas than in the ideas themselves and likes working with known materials using practical, familiar methods«. Moreover, the "experimental" »trusts its own and others' experience as the criterion for truth and relevance and learns best from direct, hands-on experience«.[74]

The predominant legal source in the civil law system has traditionally been statute law with its abstract and general legal rules. Such legal rules are abstract in the way they tend to envisage in advance situations in which they are to apply and thus serve legal predictability, trust in the law, and legal certainty. In statutes as codifications legal rules are general in that they refer to an undefined group of people, thereby ensuring legal equality and impartiality. On the contrary, court judgments as traditionally the main legal sources in the common law legal system are much more specific than statutes as their legal rules (in the form of *rationes decidendi)* are more tailored to (material) facts and thus to the concrete. This points to the fact that, according to the abstract/concrete dichotomy, the traditional civil-law system seems to be more abstract than the common-law system and, in such a manner, it seems that the former has been more influenced by intuition and the latter by sensation.

Moreover, the civil-law system has traditionally been more conceptual with its emphasis on legal concepts and their importance through the predominance of substantive law. However, in this sense the common-law system has been more practical with its greater emphasis on procedure and procedural law, which is not so preoccupied with legal concepts as are applied in the event of substantive law and the civil-law system.

Further, in the civil-law system the most prominent legal professional has been the legal professor, whereas in the common-

[74] Id., p. 10.

07 Marko Novak.indd 172 1.6.2011 18:18:33

law system it is the judge. This addresses the second facet of the sensation/intuition dichotomy, namely experimental v. theoretical. It follows from this that the traditional common law has put at the apex of legal professions a practitioner from the experimental world, while a theorist from the academic world is at the pinnacle of the civil-law system. This also speaks in favour of the sensational element in the event of the common-law system versus the intuitive element in the event of the civil-law world.

In addition, legal education in the civil-law system has traditionally been provided at universities, while in the common-law world young lawyers have primarily been taught at bars and by practicing lawyers. This also confirms the abovementioned difference between the intuitive (also theoretical) and the sensory (also practical) approach when it comes to major variations between the civil-law and common-law systems. However, such a difference only supplements the dominant cognitive pattern in modern law that prevails in both of the abovementioned legal systems, which is primarily focused on the thinking and judging cognitive functions.

The third group of world or great legal systems to be analysed and compared with the previous two, in terms of their typological characteristics, is the group of traditional and religious legal systems, which is by no means a coherent and uniform group of such systems. In fact, it is impossible to assert that in countries in which these traditional and religious legal systems exist these are the only legal systems in these countries. In addition to traditional and religious legal systems, almost all of these countries have developed their national legal systems which are close to either the civil-law system or common-law system depending on historical influences of one system or the other in those countries. Except for certain countries of with a Islamic tradition, in such countries these traditional and religious laws are mostly only applied to limited areas of law (e.g. family law, inheritance law, some other parts of civil, and mostly private, law).[75]

What then are the biggest typological differences between the civil-law system and the common-law system on one hand and the group of traditional and religious legal systems on the other?

[75] K. Zweigert, H. Kötz, op. cit., supra; R. David, G. Grasmann, op. cit., supra.

07 Marko Novak.indd 173 1.6.2011 18:18:33

If civil-law and common-law systems have been strongly modernised[76] by historical development, traditional and religious legal systems have preserved much of their law's premodern content and appearance. What is typical of this third group of legal systems, be they the religious laws of Islam, traditional Hindu law, traditional Chinese and Japanese laws, or traditional legal customs of Africa, is the greater connection of the formal appearance of such law with its inner life (e.g. with natural law, morals and customs). Such law not only follows from codified or simply written legal customs or religious prescriptions but also from some inner perceptions also having legal content by people who interpret and apply such law. Regarding this, one is necessarily reminded of Weber's description of the role of irrationality in premodern law, in either its formal variant (as »lawmaking or lawfinding which cannot be controlled by the intellect, for instance when recourse is had to oracles or substitutes therefor«) or substantive variant (according to which, »decision is influenced by concrete factors of the particular case as evaluated upon an ethical, emotional, or political basis rather than by general norms«).[77]

Thus, in these traditional and religious systems of law legal rules are still very connected with moral rules and very often with still unwritten customs that pass from generation to generation. As mentioned, such a type of law is closer to some kind of archaic law which has generally been surpassed in the process of modern development. Certainly there is a question of the extent to which such archaic legal rules can still be appropriate, on a daily basis, for today's complex and complicated world. However, history has shown that such »intuitive law«, thereby taking the inner laws of morals, religion, ethics, justice etc. into consideration, will always remain an alternative to the vast predominance of contemporary positive law when it deviates too much from the substantive demands of justice, morals and ethics.

Based on the above, there is no difficulty in establishing that these traditional and religious legal environments have retained a

[76] According to Cerar, among the main characteristics of modern law there are rationality, generality, abstractness, formality and systemisation, autonomy. M. Cerar, (I)racionalnost modernega prava [The (Ir)rationality of Modern Law], Bonex založba, Ljubljana (2001). This corresponds strongly to Weber's distinction between modern and premodern law. M. Weber, Economy and Society, University of California Press, Berkeley (1978), pp. 641-900. This also supports the thesis of the predominance of the thinking cognitive function in modern law in contradistinction with premodern ages, when there was a greater emphasis on other cognitive functions.

[77] M. Weber, op. cit., p. 656.

07 Marko Novak.indd 174 1.6.2011 18:18:34

strong connection with the cognitive function of intuition as one of the irrational cognitive functions. However, there is a difference with the role of intuition in the event of its above described role in the traditional development of the civil-law system. When it comes to traditional and religious legal systems, as well as concerning archaic law, intuition seemed to be the dominant and prevailing cognitive function, and thus an independent function, whereas regarding especially the modern civil-law system intuition has been auxiliary to and dependent on the dominant cognitive function of thinking. This strong connection of law with intuition in premodern law follows, for example, from the role of judgment by ordeal as the prevailing type of legal process up to the 13th century, when it was abolished.[78]

Moreover, when trying to differentiate the (modern) civil-law and common-law systems from the (premodern) traditional and religious legal systems, one should not forget the role of the cognitive function of feeling in legal systems that have preserved some elements of archaic law. Let us just remind that among the main facets of feeling Quenk listed empathy, compassion, accommodation and acceptance. Otherwise, she described feeling as the cognitive function which bases conclusions on personal or social values with a focus on understanding and harmony.[79] Concerning this, it is necessary to bear in mind the fact that some recent approaches to dispute resolution that are an alternative to formal judicial proceedings have been taken from certain traditional elements of Chinese and Japanese law, as well as African legal customs. It is from these systems and the role of feeling in such concerning, for example, the settlement of disputes that anthropologists have sought solutions in the development of alternative dispute resolution (ADR).[80] Further, it seems that the feeling cognitive function also finds its place in the recent development of the duty of care approach and therapeutic jurisprudence,[81] ethics in law, and similar movements which try to give some alternatives to the predominance of the thinking function in contemporary law.

Lastly, it should be recognised that the typological differences

[78] O. F. Robinson, T. D. Fergus, W. M. Gordon, European Legal History, Butterworths, London (2000), pp. 10-11, 27-28, 36, 115, 129, 131, 135.
[79] N. Quenk, op. cit., p. 11.
[80] S. Roach Anleu, op. cit.
[81] S. Daicoff, op. cit.

07 Marko Novak.indd 175 1.6.2011 18:18:34

between the legal systems presented above, within the structure of comparative law theory, have been somewhat abstracted and generalised. Today we must consider the fact that contemporary law has been globalised, that the traditional differences between the mentioned systems have been blurred due to the exchange of information and the constant moving of people around the globe. However, it has to be admitted that today some basic tenets have still been preserved but the differences are not as great as they were traditionally.

4. Conclusion

Jung himself asserted that locating a (psychological) type is extremely difficult. There are at least two reasons for this. Firstly, individual types are differentiated between themselves according to some merely predominant, not absolute, criteria. This entails that there are no sharp lines between them, no pure categories, which sometimes causes problems because it is usually much easier when we deal with pure types. Secondly, a person who is locating a type often tries to compensate for his or her one-sidedness, which might question the objectivity of his or her endeavour.[82] However, these potential difficulties should not diminish the benefit that results from understanding these types.

In order to draw some conclusions from the above paragraphs, let me repeat the main thesis of this article which, in terms of psychological typology, emphasises thinking and judging, rather than feeling and perceiving, as the predominant cognitive functions that are (to be) used in the legal world. In this regard, thinking and judging are importantly connected in that, in another aspect, judging (rather than perceiving) only demonstrates that the dominant function in a personality is evaluative and rational, rather than perceptive and irrational. In the context of law this certainly applies to the fact that thinking is the dominant and, as such, the generally preferred cognitive function (and feeling the inferior cognitive function). In terms of the auxiliary and tertiary cognitive functions, extraversion, introversion, sensation and intuition are special preferences to the extent that they are important in different aspects of various legal professions. Their role is to explain

[82] C. G. Jung, From Psychological Types, op. cit., ibid.

07 Marko Novak.indd 176 1.6.2011 18:18:34

how thinking can vary in view of the different contexts of various legal professions

Thus, in relation to legal practice thinking is more extraverted than introverted, with the latter applying more to legal theory, although we find introverts in legal practice as well as extraverts in legal academia. Moreover, an important preoccupation of legal practice is dealing with facts so such law is more practically oriented with the involvement of sensation as its main auxiliary function. However, law is about a language that consists of many concepts that as symbols must appropriately be translated into a meaningful reality. The importance of intuition as the next auxiliary function thus follows. But the closer we are to the real (i.e. practical) world of legal life, the clearer legal concepts or symbols need to be in order to be appropriately applied and so it is sensation as the empirical function which (at least in clear cases) gives the thinking function the necessary material for its decision-making more than intuition which, as a creative and imaginative function, is more important in unclear or difficult cases.

Finally, concerning the typological differences between the main systems in the structure of comparative law, the civil-law and common-law systems are much more modernised than the traditional and religious legal systems. With the former, the thinking function is certainly predominant, although there is some distinction between the civil-law system with its greater emphasis on intuition and the common-law system with its greater emphasis on sensation when the auxiliary functions are concerned. On the contrary, the traditional and religious legal systems have still preserved some elements of premodern law in which intuition and feeling were more important than today.

07 Marko Novak.indd 177 1.6.2011 18:18:34