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COMPARATIVE ANALYSIS OF PROFESSIONAL LEGAL CONSCIOUSNESS
IN THE ROMANO-GERMANIC AND ANGLO-SAXON LEGAL SYSTEMS

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The article is devoted to the study of legal consciousness as a complex process of perception, understanding and reflection of legal information. We study such signs of legal consciousness as its extent in time and space, as well as the tension of legal consciousness. Based on these methodological premises comparative legal studies on the distinguishing features of legal consciousness in the Anglo-Saxon and Romano-Germanic legal systems are conducted.

Introduction. The traditional consideration of legal consciousness comes down to its characterisation in statics. Moreover, most authors, even in modern research, define legal consciousness as a form of reflection of the surrounding reality. For example, legal consciousness is defined as: “reflection of political and legal reality and the way it exists” [1, p. 18-32] or “a type of social practice that reflects and shapes social structures” [8, p. 12].

Moreover, a number of authors add some parameters to the definitions of law that characterise not only its reflective, but also other properties. Some emphasise the temporal features of legal consciousness. They define legal consciousness as “all ideas about the nature, functions and operation of law that are owned by someone in society at a given time” [9, p. 592]; or supplement the concept of legal consciousness with a characteristic of understanding of law, but only by ordinary citizens [8, p. 13]. In literature there exist definitions of legal consciousness as the ways in which people understand and use the law, how people imagine the natural and normal way to do something, understanding the world from the point of view of common sense [10, p. 5]. It must be emphasised that the appeal to common sense and natural, normal ways of mastering the surrounding reality when determining legal consciousness already significantly shifts the emphasis from law (or even the legislation) as an object of understanding to other social regulators – custom, morality, internal regulations.

The definition given by P. Ewick and S. Silbey is the most widely known and recognised in the Anglo-Saxon legal system. These authors believe that legal consciousness is “a process by which people make sense of their experiences by relying on legal categories and concepts” [11, p. 22]. This definition most clearly reflects the complex nature of legal consciousness as a process that does not boil down to simple reflection, but has the stages of analysing previous experience and using theoretical concepts. We believe that an important drawback of this definition is the consideration of only one – rational – system and ignoring the irrational components of legal consciousness.

On the basis of such definitions, legal consciousness as a whole boils down only to the ability of subjects with the same “set” of averaged physiological, psychological and cognitive parameters to reflect the content of legal norms. This, accordingly, should predetermine their constant and equal ability to understand the purpose, content and results of legal regulation, regardless of the conditions in which the legal system operates. This article makes an attempt, based on a broader definition of legal consciousness as an information process, to distinguish it within the framework of the Anglo-Saxon and Romano-Germanic legal systems.

Methods of research. Using the data obtained by synthesising the latest achievements of philosophy, neurobiology, psychophysiology, sociology, it is proved that human consciousness is characterised by complex procedurality, since “we think not only with the brain, but with the whole body” [2, p. 71]. The conscious processes begin in the human body with the activity of the sensory system, then the perceptual system is connected. And only then does the work of the cognitive system begin [3, p. 243] for processing the information received, not excluding various irrational components. Based on these methodological prerequisites, a hypothesis has emerged on the study of legal consciousness as a complex process of perception, reflection and understanding of information [4, p. 319–328], which differs in its content in time and space.

Attention will be drawn to only one section of the legal consciousness – the professional legal consciousness of lawyers, which substantially predetermines the quality of functioning of all components of the legal system. It seems that the process of “ordinary” legal consciousness within the framework of the Anglo-Saxon and Romano-Germanic legal systems should also be studied in detail, but due to its specificity, additional studies are required as part of further work on theoretical and practice-oriented problems of legal consciousness.

Results, their discussion and perspectives. The legal consciousness, as well as the general consciousness, is characterised by processualism. This is due to complex mental, physiological and other processes that occur in the

body of an individual and significantly determine the volume, quality of perception and assimilation of information about the world.

In connection with the processual nature of legal consciousness, we distinguish such properties as its extent in space and time, various tension and temporality.

The tension of legal consciousness is associated with the physical and mental efforts that the subject makes to master the necessary legal information. In some sources, it is analysed as "cognitive tension", as opposed to the phenomenon of "cognitive ease" [2, p. 88].

The extent in time is a property of legal consciousness to have a certain sequence and duration of the stages of perception, reflection and understanding of information – temporality. For each subject, the temporality of legal consciousness, as well as consciousness, has unique individual characteristics due to the physiological characteristics of the organism, the cognitive abilities of the individual, and the social circumstances in which the legal process proceeds. However, in the legal sphere, the temporality of legal consciousness of different entities is unified under the influence of formalised rules. It is tuned to those stages that are predefined by one or another type of legal process. In this case, we can talk about the coherence of legal consciousness of the subjects of this process.

The extent in space lies in the differentiation of the process of legal consciousness, taking into account the ethno-mental features of its content. They are caused by various natural-geographical, demographic, climatic, economic and technical factors, as well as the specifics of the legal system, within the framework of which the process of legal consciousness is formed and proceeds.

Let us try to apply these features in relation to professional legal consciousness, with further identification of its peculiarities in the common and Romano-Germanic legal systems.

The orientation in time of legal consciousness differs very significantly. In the Romano-Germanic legal system, lawyers usually direct their legal consciousness into the future, forming a new regulatory legal act (material norms), which in the future should regulate social relations. In the Anglo-Saxon legal system, lawyers are more oriented towards the past, looking for a precedent (a court decision made earlier) and concentrating mainly on the norms of procedural law rather than substantive law.

Accordingly, the property of maximum tension exists in different processes of legal consciousness. In the Anglo-Saxon system, the greatest tension is directed at creative work to solve a specific case or to find a similar solution. The Anglo-Saxon approach could be called "ad hoc balancing" or ad hoc regulation. However, it should be noted that this approach does not imply a casuistic dispute resolution. In our opinion, the dynamics in this case is manifested in the constant renewal and continuity of the process of legal consciousness, but the lack of complete identity at each subsequent time.

The temporal orientation of Anglo-Saxon law into the past is linear. It is not refuted by codification examples, for example, in the United States of America. The most prominent example of this is the US Code of Laws. Such acts are not focused on the prediction and determination of legal relations that may arise in the future. Firstly, such codifications are made by compilation, that is, they do not imply the processing and harmonisation of codified norms, precedents. Secondly, the main purpose of codification is pragmatic, i.e. it is not aimed at comprehensive regulation, but at the convenience of referring to the sources of law. Third, the Codes are developed and maintained by the Legislative Resource Center of the US House of Representatives [12], but not by the House itself, which has the authority to issue regulations.

Compared with the UK in the USA, the practice of citation of secondary sources of law is much more common [17, p. 10], and the prohibition of citing the works of living authors for American judges has never been so indisputable as for English lawyers. In the United States, in contrast to similar practices in other countries, the list of authors of doctrinal works actively quoted by the courts includes a wide range of people: from the founding fathers of the US Constitution to students of American universities who publish their articles in modern legal periodicals, for example, Harvard Law Review, et al. [5, p. 26].

In the Romano-Germanic legal system, the maximum tension of legal consciousness is associated with creativity in relation to the adoption (publication) of a new regulatory legal act. The adoption of numerous Model Codes, Concepts for the development of legislation, etc., testifies to this approach.

Such an approach is inevitably subject to subsequent concretisation, and sometimes even adjustment, by perceiving how predefined norms are implemented in practice. There is a discontinuity in the spatio-temporal parameters of the processes of professional legal consciousness – from the subject of law-making to the subject of law enforcement, or even to the subject of law, which is the bearer of "ordinary" legal consciousness. In our

opinion, such a temporary divergence of two legal systems could serve as an illustration for the division of law into "law in life" and "law in books" by R. Pound. Since legal consciousness is an information process, it proceeds completely differently in conditions of insufficient information. Moreover, the phenomenon of incompleteness of legal information is now called legal uncertainty.

The emergence of legal uncertainty causes the tension of legal consciousness associated with overcoming or eliminating legal uncertainty. In the Romano-Germanic legal system, such uncertainty is usually removed by the adoption of a new regulatory legal act. In this case, the Heisenberg rule is triggered, adapted in the literature for legal reality. Applying the Heisenberg principle, we get the rule: the more certainty is given to the legal norm externally, in the law (more often – in several regulatory legal acts), the lower the accuracy (clarity) of the elements of its internal, substantial, structure. And vice versa [6, p. 45–48].

In the Anglo-Saxon system, legal uncertainty is resolved by a much wider range of methods. To justify their position, judges, in addition to purely legal arguments, actively use literary and journalistic, historical and legal, comparative legal, international legal arguments. Such subsidiary sources of law are called secondary sources of law. The course of the process of professional legal consciousness to ensure its continuity in conditions of legal uncertainty is supplemented by other acts of legal consciousness, mainly doctrinal or universal – international legal content. Based on this, in the context of the Anglo-Saxon legal system, there is virtually no need to remove, eliminate or compensate legal uncertainty. Legal uncertainty is eliminated, but only if necessary and taking into account the specifics of the spatio-temporal parameters of legal consciousness in each particular case.

American legal scholars F. Snyder and M. Bobinsky in their studies note that when judges turn to certain sources, using them as a legal basis for solving a case, they actually legitimize them [13, p. 454; 14]. In this regard, one can also cite the provisions of L. Petherbridge research, according to which when a judge turns to legal science, citing certain scientific works in court decisions, even if he criticizes them, this means that these sources are part of the decision-making process. So the choice of a judge becomes an integral part of law [15, p. 1354]. R. Pound notes that, although the form of American law is mainly the work of judges, to a large extent, judges simply put a "stamp" of state power on proposals that they found previously developed in the doctrine.

Researchers of the continental legal system as a general principle support a similar point of view that the legal justification of a court decision is a thought process through which a judge harmonises the decision with a previous decision in a similar case, that is, with a precedent [16, p. 46].

Thus, a careful choice of ways to eliminate uncertainty in law is necessary, not so much with the help of new legal regulation (additional formalisation) of social relations, but through various dialogical forms of expression of legal consciousness. They will be able to compensate for the lack of formal attributes of law.

In the common law system, the lack of information necessitates its compensation with emotions [7, p. 278].

Conclusion. The process of professional legal consciousness in the Anglo-Saxon legal system has a linear focus, the maximum tension on the creative work to resolve a specific case or search for a similar solution. The process of legal consciousness is directed to the past. In the presence of legal uncertainty as a result of rapidly changing life circumstances, professional legal consciousness is aimed at eliminating the uncertainty to ensure its continuity and linearity.

Professional legal consciousness in the Romano-Germanic legal system has the maximum tension in law-making, that is, when creating new regulatory legal acts. The legal process is intermittent. It is directed to the future – from legal consciousness in lawmaking to legal consciousness in law enforcement, and then to the past – from legal consciousness in law enforcement to lawmaking and so on. The presence of legal uncertainty is mainly associated with the shortcomings of legal consciousness in lawmaking and requires its elimination by amending an existing one or creating a new regulatory legal act. If necessary, uncertainty can be overcome by law enforcement.

REFERENCES

1. Жуков, В.Н. Правосознание: философский анализ / В.Н. Жуков // Государство и право. – 2019. – № 11. – С. 18-32
2. Канеман, Д. Думай медленно...решай быстро ; пер. с англ. А. Андреева, Ю. Делигиной, Н. Парфеновой // Д. Канеман. – Москва: Издательство АСТ, 2019. – 653 с. – С.71
3. Худ, Б. Эссенциализм / Брюс Худ // Мышление. Ведущие ученые о том, как мы делаем выбор, решаем задачи и прогнозируем будущее ; пер. А. Курышевой, Д. Литвинова. – Москва: Издательство АСТ, 2018. – 480 с.
4. Вершок, И.Л. Информационная природа процесса правового сознания // Актуальные вопросы развития правовой информатизации в условиях формирования информационного общества: сб. науч. ст. / Нац.

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- центр правовой инф. Респ. Беларусь; под ред. Е.И. Коваленко. – Минск: Нац. центр правовой инф. Респ. Беларусь, 2017. – С. 319–328.
5. Хужокова, И. М. О цитировании юристов / И.М. Хужокова // Журнал зарубежного законодательства и сравнительного правоведения. – 2010. – № 6. – С. 18–31
 6. Вершок, И.Л. Теоретико-прикладные вопросы обеспечения формальной определенности правовой нормы / И.Л. Вершок // Современная государственность и право: теоретические и практические проблемы формирования и успешного функционирования : материалы международной научно-практической конференции, посвященной 75-летию со дня рождения заслуж. юриста Респ. Беларусь д-ра юрид. наук, проф. А.М. Абрамовича, Минск, 24-25 мая 2019 года / Белорус. гос. ун-т ; редкол.: С.А. Балашенко (гл. ред.) [и др.]. – Минск : БГУ, 2019. – 233 с. – С. 45–48
 7. Познер, Р. Рубежи теории права / Р. Познер ; пер. с англ. И. Кушнаревой. – Москва: Издательский дом Высшей школы экономики, 2017. – 480 с.
 8. Silbey, S. After Legal consciousness / S. Silbey // Massachusetts Institute of Technology, Cambridge, Annual Review of Law and Social Science Volume 1, 2005 [Electronic resource]. – 2005. – Mode of access: http://web.mit.edu/~ssilbey/www/pdf/after_legal.pdf. Date of access: 06.03.2020.
 9. Trubek, D. Where the action is: critical legal studies and empiricism / D. Trubek // Stanford Law Rev. 26:575. – Stanford: Univ. press, 1984. – pp. 575-622
 10. Merry, S. Getting Justice and Getting Even: Legal Consciousness Among Working Class Americans / S. Merry // Chicago law review. – Chicago: Univ. Chicago Press, 1990. – 227 p.
 11. Ewick, P., Silbey, S. The Common Place of Law: Stories from Everyday Life / P. Ewick, S. Silbey. – Chicago: University of Chicago Press, 1998. – 336 p.
 12. Unites States Code / Office of the Law Revision Counsel [Electronic source]. – 2019. – Mode of access: <https://uscode.house.gov>. Date of access: 10.10.2019.
 13. Bobinski, M. A. Citation Sources and the New York Court of Appeals / M. A. Bobinski // Buffalo Law Review, Vol. 34. – Buffalo: University at Buffalo School of Law, 1985. – p. 965
 14. Snyder, F. The citation practices of the Montana Supreme Court / F. Snyder // Montana Law Review, vol. 57, Montana: University at Montana School of Law. [Electronic resource]. – 1996. – Mode of access: https://scholarship.law.umt.edu/cgi/viewcontent.cgi?article=1005&context=faculty_lawreviews. Date of access: 06.03.2020.
 15. Petherbridge, L., Schwartz, D. L. The Use of Legal Scholarship by the Federal Courts of Appeals: an Empirical Study / L. Petherbridge, D. L. Schwartz // Cornell Law Review, Vol. 96. – Cornell: Cornell Law School, 2011. – pp. 1345–1374
 16. Шумилов, В. М. Правовая система США : учеб. пособие / В.М. Шумилов // Научная библиотека имени Ярослава Мудрого [Электронный ресурс]. – 2013. – Режим доступа: http://library.nlu.edu.ua/POLN_TEXT/UP/SHUMILOV_2006.pdf. Дата доступа: 06.03.2020.
 17. Семенихин, И. В. Вторинні джерела англо-американського права / И.В. Семенихин // Научная библиотека имени Ярослава Мудрого, Теорія і практика правознавства – Вип. 2 (6) / 2014 [Электронный ресурс]. – 2014. – Режим доступа: <https://cyberleninka.ru/article/n/vtorichnye-istochniki-anglo-amerikanskogo-prava>. Дата доступа: 06.03.2020.