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The Type Theory of Law

An Essay in Psychoanalytic Jurisprudence

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Preface and Acknowledgments

I have always been fascinated with the duality of human nature. One such version is the duality that has existed in legal theory or legal philosophy from the very beginning of our civilization, that between natural law and legal positivism. Both perspectives have certainly proven to be persuasive accounts of law, but it needs to be understood how their authors can be so different as to have such distinct approaches concerning the essence of law. In order to obtain an insight into people's true nature, one needs to study psychology and I was very lucky to come into contact with Jung and his depth psychology. From amongst his enormous work in the field of analytical psychology, it was a particular typology that gave me at least a glimpse of understanding as to why people have such divergent views.

This book has been in a state of either gestation or writing for more than 10 years. In order to make a general account of something, one needs to develop an overarching perspective that can only be properly established over a longer period of time.

I have incorporated certain material from the following articles of mine, although with much revision and amplification: "A typological reading of prevailing legal theories", *Ratio Juris*, No. 2, Vol. 27 (2014) (Chaps. 1 and 3); "The argument from psychological typology for a mild separation between the context of discovery and the context of justification", in: Dahlman, C. (ed.), *Legal Argumentation Theory: Cross-Disciplinary Perspectives*, Dordrecht: Springer (2013) (Chap. 4); "Ideal Types of Law from the Perspective of Psychological Typology", *Revus*, No. 19 (2014) (Chap. 3); and "Legal Thinking: A Psychological Type Perspective", *Dignitas*, No. 49/50 (2011) (Chap. 2).

I would firstly like to thank Jože Magdič, who introduced me to Jung's work some 20 years ago and has since greatly encouraged my research and writing concerning Jung's psychological typology. I next need to acknowledge the support of Ivan Padjen, with whom I discussed some parts of my project and who helped in my research and development of the theory to some extent. My colleagues Luka Burazin, Giovanni Tuzet, Jernej Letnar Černič, Matej Avbelj, Vojko Strahovnik, and Hanna Maria Kreutzbauer were more than helpful with many a discussion we

have had about my work, on the occasion of our several LegArg conferences at Nova Gorica, Bled, and Ljubljana. I also need to thank Rafael Manko, who was "on my side" at a conference in Zagreb. I would also like to acknowledge the support of John Mikhail from Georgetown University Law Center, who encouraged me to continue with my research of Jung. Moreover, I need to thank my English editors Dean DeVos, and particularly Aeddan Shaw, who has done the lion's share of the language editing.

Finally, this book would never have come to light were it not for the support of my beloved Romana, Luka Gal, and Vita.

Contents

Introduction

> Every judgment of an individual is limited by his or her type, and every manner of consideration is relative. Carl G. Jung (1962)

Individuals and their communities have always striven for some kind of balance, to harmonize conflicting tensions in themselves and also in their societies. Robert A. Johnson called this perennial search for balance "Balancing Heaven and Earth" (Johnson 1998), in order to emphasize that we balance, in ourselves and our societies, our everyday practical activities based on various rights and obligations against "higher" (metaphysical, moral, etc.) imperatives and aspirations, and vice versa. To address this never fully resolved problem, it seems that at some point people eventually began to make projections from the depths of their souls and thereby created the symbol of a goddess of justice holding in her arms scales, symbolizing the right balance between two opposing views. This craving for balance seems to be the same, regardless of time, place, and culture, and therefore universal. And, luckily, we do find it from time to time, if only for brief moments, to appease our introvertive and extravertive (social) battles of imbalance.

My ambition in this book is to shed light on a small aspect of this balance by focusing on legal ontology or questions such as where one should look for essence in law. I am aware of the fact that I am not going to find this essence since it constitutes a kind of Holy Grail, but I hope to at least point to where and how one might pursue it. In the history of legal philosophy, there seem to be two versions of the "Holy Grail": natural law and legal positivism. However, if the two had really been the "Holy Grail(s)" then the history of legal philosophy would have ended. Obviously this has not happened and so our search has to continue.

In accordance with Arthur Kaufmann, what is typical for the postmodern era is the ontological polarity between being and ought (Kaufmann 1993). Following him, in the framework of such an ontological model, being and ought are not strictly separated but are in a polar relation. This seems to be relieving news as it gives hope for (re)conciliation. In my opinion, this polar relationship might also seem to be a kind of integration or inclusiveness: an integration of quite conflicting views. If

being and ought are able to be reconciled then also the opposing views of strict natural law, such as the ought which stems from the very nature of being, and of strict positive law being the ought adopted on the basis of people's interests, could be integrated to some extent.

In this essay in psychoanalytic jurisprudence, as I apply Jungian psychological typology to the above mentioned area of jurisprudence, I have tried to show how the integral or inclusive approach to understanding the nature of law is not only in tune with our (still postmodern?) time but also relevant for presenting a more persuasive picture of law than the older exclusivist or dualist approaches of strict natural law and rigid legal positivism. It is simply more persuasive as it is more realistic to take into consideration our whole psychological typology, how we act as a personality, and does not only point to our only one dimension as the one representing our true self. Once we truly understand this holistic perspective of multidimensionality, one-dimensionalism necessarily becomes reductionist.

In taking this multidimensional approach to law why then are Jung and his psychological type theory important for describing the nature of law? To try to answer this quite complex question I must, firstly, explain why psychoanalysis or psychology in general is important for legal theory or legal philosophy; secondly, why one should rely particularly on psychological typology as a special field of this very broad scientific discipline; and, thirdly, why one should opt for Jungian typology.

As to the first issue, after the modern discovery of psychology in the nineteen century, as a relatively young science in the overall history of (modern) sciences, although there had already been quite a few psychological attempts to describe a human being in the antiquity, it seems that there was no way back in trying to describe individual or social phenomena. Or, at least, the psychological approach in science has established itself to be a very important one. In legal theory or legal philosophy, we have had the very fruitful tradition of American Legal Realists, and particularly Jerome Frank (Frank 1930) as one of their important protagonists, who considered psychology or, more specifically, psychoanalysis as a very important area to give a glimpse of what goes on in respect of law and lawyers, judges, or other legal professionals when they deal with law. Moreover, their heirs, proponents of the Critical Legal Studies movement, used psychoanalysis, particularly Freudian, in order to criticize mainstream (liberal) law. Thus, when we try to describe law from a realist perspective, which is also my ambition here, it seems that psychology, or its upshot psychoanalysis, seems to be a logical choice to make.

Concerning the second tenet of the above-posed question, it seems that typology with its whole array of different categories that are very structured logically and linguistically in order to fully define a certain phenomenon. Let us remember Weber's famous typological interpretation of general legal history (Weber 1978) and how persuasive it was also from the position of the sociology of law, too. It was a superb description of law from the historical and sociological perspective, and this is also the reason why psychological typology was a choice to be made once I decided to rely on psychoanalysis. Law is a social discipline whereas psychology and psychoanalysis are humanist. Normally I take that into consideration as I

analyze, firstly, the meaning of typology for the individual as *homo juridicus* (Supiot 2007). However, since law is needless for an individual and only makes sense in a society, secondly, I had to make a typological shift from individual to society when linking psychological typology with law and jurisprudence.

That collective (or social) understanding of psychological typology was not alien to Jung, whose psychological typology I have taken as my starting point in this research. Jung discussed his types very much substantively, almost archetypally – in short, philosophically. I am also taking as a similar approach here when I try to understand law and lawyers from the typological perspective. Jung understood such as metaphysical principles or ideas which really form the fundamental bases of everything we are and do. Through such types, I argue that we can much better understand ourselves, our role, and position in society.

After this introductory chapter, since this writing is mainly about jurisprudence, the book opens with Chap. 1 entitled "Integral Theories of Law." It is about those legal theories, nowadays quite frequent in this "postmodern" time, which search for the nature or essence of law beyond the classical positions of natural law and legal positivism. They came to the world arena of legal theory, particularly after World War II. Another name has recently begun to be used, namely inclusive theories of law, in order to distinguish them from the so-named exclusive theories of law which include strict natural law and strict legal positivism. From amongst these integral or inclusive legal theories I was most attracted by the three-dimensional theory of law, which I would like to explain here by virtue of its psychological typology and then extend in order for it to become a four-dimensional type theory of law. Moreover, since for the jurisprudential re-interpretation of this theory of law, I have resorted to Jungian psychological typology, as one of the greatest psychoanalysts of our time, this essay, to find it a legal theory context, should fall within works from the province of psychoanalytic jurisprudence.

Chapter 2 entitled "Understanding Law and Legal Practice through Jungian Type Theory," first, outlines the fundamentals of Jungian psychological types, initially how and to what extent they were developed by Jung, and, second, how they were continued by his followers, the position of which I try to assess critically returning, for the purpose of this book, to the original Jung and his position with respect to the types. Third, by analyzing the two attitudes (introversion and extraversion) as well as the four cognitive functions (thinking, feeling, sensation, and intuition) in the context of different legal professions I try to understand their specific role, particularities, advantages, and disadvantages in legal business. Fourth, I apply Jungian psychological typology (Jung 1921) to what I call (world) legal geography or comparative law, where I try to demonstrate how different (collective) psychological typologies have contributed to different legal systems and their peculiarities.

In Chap. 3, in a similar manner to the case of comparative law, I discuss the role of psychological typology in terms of legal history in the course of which different type models of law have been established depending on a particular psychological typology that was predominant at a certain time. These historical types express how the cognitive functions of individuals have contributed to law creation and law