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Some Competence Gaps of a Novice Lawyer

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In this paper, the main gaps in professional legal competence of law school students and novice lawyers are identified, their possible causes are indicated, an approach to the corresponding problem is suggested.

Keywords: higher legal education, professional legal training, professional legal activity, method of professional legal activity, professional legal competence.

Introduction

Despite the vagueness of educational results, which should be conditioned by a required competence level of a law school graduate – either a holder of Bachelor, Specialist or Master of Laws degrees, it can be stated that to a certain extent he has to be prepared to engage in legal practice. In order to practice law, he has to be competent, i.e. he has to be able to solve corresponding legal problems. In particular, a law school graduate should possess an ability to conduct legal classification (legal characterization, legal categorization). The following discussion examines the competence which is required for this skill.

Judging by my experience that I have gained while teaching courses which are aimed to train students and novice advocates to perform the professional legal activity, it can be noted that students of different years and young lawyers demonstrate serious gaps in the analyzing competence. Therefore, they are not able to practice law and solve corresponding professional problems proficiently. Moreover, students of different years and practicing lawyers encounter the same difficulties, and this causes concern. I contend the fact that the method of professional legal activity has not been learnt yet is the root of these difficulties, whereas Rudolf von Jhering maintained that a lawyer should know the method better than anything else, because the method fosters a lawyer. This makes the matters of effectiveness of contemporary higher legal education and its organization even more pressing.

The main competence gaps displayed by students solving problems in the field of legal classification are considered further.

Competence gaps

A student is confronted with a task to solve a professional legal problem. And the problem is given to him in the same way as it appears before a lawyer in his professional legal

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activity. For example, a student has to address the following questions: whether client's rights have been violated and whether it is possible to protect them; whether the prosecution authorities conduct supervision in a case analyzed by a student, and if there are any grounds for public prosecutor's actions; whether a standard size sheet of paper presented to a student on which a word 'contract' is written could be considered as a contract; whether from a legal point of view it is correct to assert that this contract has been concluded; if there are any grounds to take a suspect into custody, whether all circumstances as determined by Art. 73 of the Russian Code of Criminal Procedure are ascertained to recognize a committed act as a theft. How can a student find the answers to these and similar questions and which means for that purpose should be used? In most cases a student (like the majority of professional lawyers) does not have to devise a method for the search of an answer. An instrument for solving problems which are raised in formulated questions is already set in professional culture. It is contained in the law. This instrument is the structured content of legal norms. It is that content by which a lawyer solves a professional problem. A hypothesis as a structural element of a norm's content, determining in this sense a pattern of the factual circumstances, is designed to solve a question whether the norm is related to a case analyzed by a lawyer. A disposition and a sanction of the norm give a lawyer an answer to the point (whether a person has a right or not, whether a contract is concluded or not, which kind and amount of punishment could or should be imposed etc.).

However, in his practice, a lawyer deals not with norms and their content. Most of all, he deals with a large amount of statutes, which, as R. Jhering (1905) pointed out, are not the law. To be more specific, a lawyer observes the titles of legal acts, titles and numbers of articles, letters, punctuation marks, numerals etc., i.e. a set of signs and symbols, which are contained in articles and ultimately in legal acts. A lawyer observes the symbols, which cannot be used for immediate obtaining a solution to a professional juridical problem, because these symbols require deciphering, which in lawyers' language is called interpretation. Thus, at this point, a lawyer does not observe the law. Consequently, he does not possess a method for solving a problem. Therefore, while solving a principal professional legal problem, a lawyer is faced with the need to solve several other problems nonlinearly and non-sequentially, namely, basing his reasoning on the factual side of a case (the paper does not explore the competence in the sphere of working with the information for the determination of the facts and the corresponding professional legal techniques), a lawyer should assume which articles of a statute provide the norms applicable to the factual side of a case, interpret text of the articles, determining the content of the norms as a result, find out the relationship between the norms and the factual side of a case, and if the norm is applicable to the factual circumstances, a lawyer should, in the context of solving a professional legal problem, answer the question by interpreting a disposition (and a sanction, if the norm includes it) of the norm.

I believe this represents the cultural method of professional legal activity, i.e. the method conditioned by the structure of Russian law. And in the paradigm of training for the professional legal activity, when the skills required for the solution of the problems mentioned above are formulated by a professor as expected educational results, a student begins to comprehend laws, articles and norms not as something which should be learned and repeated. They serve as means which allow lawyers to solve a professional legal problem. And this affects the process of their comprehension

and understanding. And such students always provide a legal basis for a taken decision, which makes the latter well-grounded.

But what are the students who did not master this method doing? They proceed in a different direction, trying to solve a problem otherwise. That is to say, strange though, the majority of second to last year students whom we are working with propose solutions, basing their reasoning not on legal norms, but on conjectures. In most cases, when a student begins to argue, his rationale is based on layman's appreciation of the law, and that in its method is very similar to the reasoning of Kifa Mokievitch, who was depicted by classical dramatist and novelist N.V. Gogol in a novel 'Dead Souls'. In the words of Gogol's Kifa Mokievitch: 'Now, for instance, the animal is born naked. … Why is it that he is naked? Why is not he born like a bird, why is not he hatched out of an egg? … Well, if an elephant were hatched out of an egg I expect the shell would be pretty thick, you would not break it with a cannon ball, they would have to invent some new explosive.' An example which is closer to the professional legal activity could be given. I have often heard from students that a loan agreement for the sum of 100,000 rubles shall be certified by the notary. Students have supported their position with the argument that the amount of sum transferred under the loan agreement is large. It is important to note that in most cases students have tried to work out an answer on their own, without direct referring to a norm. Clearly, this solution method is unacceptable. It is that competence gap which is natural for the early years students, but the one which the system of higher legal education cannot ignore.

What kind of difficulties students are faced with, while they are trying to solve a professional legal problem by legal norms?

One of the difficulties appears right away when students, while solving a certain problem, equate factual circumstances with legal conclusions drawn from a legal norm. For instance, during the specially organized class students receive case materials including a standard size sheet of paper on which, among other things, a phrase 'the loan agreement' and signatures of two persons are written. The students are confronted with the task to determine factual circumstances and to formulate factual side of the case. From year to year, while solving this problem, the students argue nearly straight away that the conclusion of a loan agreement has to be considered as an established fact. Faced with a question why they are so confident about that, at first, the students look at a professor in bewilderment, and then, pointing to the sheet of paper, say something like this: 'Well, it is written here that this is the loan agreement, it is sealed, and therefore, it is concluded.' At this moment the students do not even suppose that in fact not every sheet of paper with a written word 'agreement' is an agreement, moreover, a loan agreement, which is, above all, is concluded. They do not know that at this stage they just have to start to carry out the search for the answers to the following questions: if there is an agreement, whether it is a loan agreement, whether it can considered as concluded, whether its form is observed etc. They do not know that the answers lie not in the sheet of paper, but in the dispositions of the corresponding norms. And the found answer would be a legal conclusion, but not a factual circumstance. If all this is not known to students, and frequently would never be known, then I would suggest that within the limits of the present article there is another significant competence gap, which is awaiting its elimination.

The similar situation, incidentally, is typical for the students majoring in criminal law and criminal procedure. Several professors of the Siberian Federal University Law School

and advocates of the Krasnoyarsk Krai Bar Association provide training aimed to prepare students for advocate practice. The training sessions constantly reveal that while solving an analogous task in the sphere of legal categorization, the students determine a theft as a factual circumstance, and do not draw a corresponding conclusion from a criminal law provision. It has far-reaching consequences. Such a lawyer almost always observes a theft, even if it is not and cannot be a theft case. For not all cases when a man takes a certain thing constitute a theft. And the structure of criminal and criminal procedural norms shows that this task should be solved differently.

The following gaps exist to a greater extent in the ability to interpret. It is important to note that one should construct legal norms not only to find and provide an answer but also to interpret them in connection with the solving of a professional juridical problem, when interpretation results serve as an instrument for a solution of corresponding tasks, not as an end in themselves, namely:

- Students cannot select norms from the system of legislation regulating relations involved in the situation, within which the professional legal problem is being solved. In other words, students try to solve the problem using an article of a statute, or, in worst cases, an article title. But at the same time they do not feel the need to decipher and realize legal norms. A professor does not stress that need, while they could not understand it. And, if so, they do not realize the norms. There are no contemplation and discussion of the process solving too.
- It takes students a long time to determine the structural content of a norm. It often seems to me that even the majority of senior years students solve this kind of a problem for the first time. They can frequently give no more than the definition of structural elements of a norm.
- It also takes students a long time to answer, at the minimum, two questions: 1. Is a norm applicable to the situation analyzed by a lawyer? 2. Which legal conclusions should be drawn from a disposition and a sanction, and which functional place do they have in legal arguments on a case? The situation is complicated by the fact that these are not the only questions a lawyer is faced with, and they need to be dealt in connection with the solving of a principal professional juridical problem, i.e. when the intermediate conclusions do not present the final results.

Causes of competence gaps

Due to the fact that such competence gaps are widespread among senior students and young lawyers, who have obtained their law degrees, and bearing in mind that corresponding skills form the basis for effective and qualified legal activity, it is worth considering the causes for these competence gaps. My analysis revealed four major factors, which lie within the structure of higher legal education.

1. Instead of teaching the law and professional legal activity, professors tell students about the law and professional legal activity. But this is not the same. A separate issue is that professors try to teach, but not to create conditions under which students will learn, discover, master and act independently.

2. It is school-learned knowledge for students that if a teacher comes into a lecture room and starts asking questions, a student should close each book and paper and answer what has been memorized. Looking something up in a textbook or a statute is often considered as a ‘grave crime’, resulting in low grades. Clearly, the same rules are

prevalent in the system of higher legal education. How then can it be explained that professors are still frequently unwilling to let students use statutes and other materials during the workshops, tests and examinations? That is why the use of any text for the search of an answer is completely eliminated from the student's experience. Hence, while solving a professional juridical problem, a student often looks for a black cat in an empty dark room rather than turn to the law and find an answer there. Thus, he knows neither the answers, nor how to solve a problem.

3. During the seminars and practical training students often deal with cases contained in workbooks, which consist of a given factual background to a case and a question, whereas there are no and cannot be any factual backgrounds to cases of a like character in the legal profession. Furthermore, questions contained in workbooks are rarely presented in the legal profession.

Working with a factual background to a case leads to the following difficulty. After graduation a student is confident that a factual background to any case is always set up by someone from the outside. However, there are no factual backgrounds to cases in the legal profession. Instead, the latter deals with what is called a factual side of a case. And it is not set up by someone from the outside. It is formulated by a lawyer on the basis of his analysis of the data presented, for instance, in the client's papers. Working with a factual background to a case causes a problem: a student adopts a work method which is not determined by the professional legal activity.

With regard to the questions, it can be said that a common question in the sphere of legal characterization, 'Did the court make a right decision?' sets up a task for students which is similar to one presented before a court, for instance, a court of cassation, when it has to establish whether an applicable norm was applied in a case. Obviously, this is not the only problem which a lawyer should be able to solve, and, what is more, to solve it separately from the other problems.

While working on workbook cases, a student has to give a right answer. It allows a student to move to the next case. The more cases are solved the better. If all cases are solved, then so much the better. A quotation from the resolutions of the Supreme Court of the Russian Federation and/or the Supreme Commercial Court of the Russian Federation with the direct reference to the particular section of the judgment is often an example of perfect substantiation of a suggested solution. A formal reference to the decisions of the Constitutional Court of the Russian Federation or the European Court of Human Rights makes an A-student. But the bases and the method of solution fall out of sight; they are not traced, discussed and contemplated by a professor. While it is needed not to solve a case during education, but to solve by cases. In other words, cases and various moots should be used not as an aim, when the more is solved the better, but as an instrument, when one case might be enough for solving a training task. Since it is of particular importance how and for what aim the process of solving is organized, and what has happened as a result, but not the quantity of solved workbook cases.

4. That is why a student is getting used to working not within and with the methods of solving a professional juridical problem, but with right answers. And it represents adverse conditions under which the reasoning and the ability to think as a lawyer would never become a part of the student's competence structure. And it is combined with the fact that the correctness of an answer is often and without sufficient grounds determined not by reasons' culture and the logic of reaching a conclusion, but by a professor.

As a result, we have a graduate who usually knows what is written in statutes and books, the

information which frequently loses its significance, but who is not able to solve professional legal problems. Employers are repeatedly telling me about that. Faced with juridical problems, a graduate solves them by intuition, emotionally, but in no way rationally. Because in his life he is used to acting in this very way. He has not learned anything else in law school. And in that sense he has not acquired legal reasoning.

Solution to the problem

In this connection, the following approach to the problem is suggested. I contend it is critical to give up teaching within the paradigm of right answers, when students are only expected to learn the right answer and right grounds for it, and then render that all orally or in writing from memory. Professors of positive legal subjects, while considering expected training results (Sonsteng et al., 2007), have to focus on the method of professional legal activity, and create conditions under which a student discovers and adopts this method, and, as a consequence, is able to solve the basic professional juridical problems. How could it be done? It is crucial to create training situations and conditions in which a student solves professional juridical problems and contemplates the methods and grounds for the solution, thus mastering the professional legal activity and becoming a competent lawyer.

References

1. *Sonsteng J. O., Ward D., Bruce C., Petersen M. A.* Legal Education Renaissance: A Practical Approach for the Twenty-First Century. William Mitchell Law review. 2007 Vol. 34. URL: http://www.wmitchell.edu/lawreview/Volume34/34_I.html (date of appeal: 25.10.2012).

Некоторые пробелы в компетентности начинающего юриста

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Фиксируются основные пробелы в профессиональной юридической компетентности студентов юридических вузов и начинающих юристов, указываются возможные причины этих пробелов, предлагается вариант решения соответствующей проблемы.

Ключевые слова: высшее юридическое образование, профессиональная юридическая подготовка, профессиональная юридическая деятельность, способ профессиональной юридической деятельности, профессиональная юридическая компетентность.