

## *Leon Petrazycki's Legal Theory and Contemporary Problems of Law*

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Several years ago, Russia, Hungary and other Eastern European countries lived the end of the Soviet regime. The collapse of the administrative and economic systems was matched by the crash of the ideological paradigm. This fact posed numerous problems in different fields of life, and also dramatically touched the sciences, especially those called social. In law the impact of this crash was experienced not only through the collapse of the legal systems, but also through the critical renouncement of the previous MARXIST theoretical constructions upon which the Soviet law had been constructed and construed. Along with various social debacles, these life issues forced the renewal of critical theoretical queries into the very roots of law.

In this situation certain East-European legal scientists decided to look back into the history of their national science to find tools to explain the phenomenon of law. In Hungary it was particularly CSABA VARGA who challenged the post-soviet Hungarian legal science by questioning it from the point of view of legal pluralism and of sociological approach.<sup>1</sup> He pertinently summed up the results of the development of Hungarian legal philosophy: "We have found long abandoned patterns again. We have discovered realisations of common recognition in those potentialities and directions in law which we believed to have been conceptually marked off once and for all".<sup>2</sup> In Russia this line of thinking led the researchers in the same direction, to questioning the history of legal thought, to the pluralist vision of law in the context of its social/communicative importance. In both countries an attempt was made to base the legal theoretical researches upon the ideas of the two legal thinkers who, apart from each other but almost in the same time, managed to formulate the outlines of legal pluralism. We are referring to GEORGE LUKÁCS in Hungary<sup>3</sup> and LEON PETRAZYCKI in Russia<sup>4</sup>—what the first meant by "mediation"<sup>5</sup> and the second by "imperative-attributive emotion" is basically the inter-subjective

<sup>1</sup> Cf. Csaba Varga 'Philosophising on Law in the Turmoil of Communist Take-over in Hungary (Two Portraits, Interwar and Post-war)' in *The 2005 ALPSA Annual Publication* of the Australian Legal Philosophy Students Association, ed. Max Leszkiewicz (Brisbane 2005), pp. 82–94.

<sup>2</sup> Csaba Varga *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999), p. 20.

<sup>3</sup> Cf. Csaba Varga *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985).

<sup>4</sup> Cf. Csaba Varga *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985).

<sup>5</sup> See on mediation in Lukács' legal conception in Csaba Varga 'Towards a Sociological Concept of Law: An

communication that is the foundation of the legal conceptions of LUKÁCS and PETRAZYCKI. In this respect, apart from the two famous Hungarian philosophers of law, BARNA HORVÁTH and GEORG LUKÁCS, one can also think about similar points in the legal ideas of PETRAZYCKI and of such Hungarian thinkers as JULIUS MOÓR with his conception of legal policy<sup>6</sup> or ISTVÁN LOSONCZY with his multi-level pluralist legal conception.<sup>7</sup>

In this paper we don't intend to assert the identity of the legal ideas by PETRAZYCKI with those by the contemporary authors. If we could use here the theological term of consubstantiality, we should say that the ideas of this Russo-Polish thinker are consubstantial to the antistatist analyses that today are developed by such eminent theorists as CSABA VARGA. This does not imply any direct credits that these conceptions had to LEON PETRAZYCKI's legal philosophy: the same inspiration must not always indicate to the same sources (though we might have been inclined even to trace here certain indirect links through concepts of GEORGES GURVITCH or of PITIRIM SOROKIN). Another common point between PETRAZYCKI's theory and contemporary legal thought is that during the rapid and crucial reforms in the East-European legal systems, we might have felt the reality of cardinal underlying shifts in law as it might have been felt by the Russo-Polish philosopher during the social cataclysms in imperial Russia. It is our conviction that the interest for legal pluralism owes greatly to life issues of the theorists who become much more inclined to this way of thinking after experiencing cardinal changes in law: it was the case of both VARGA and PETRAZYCKI.

Another goal of the present paper is to sustain the idea that the legal pluralism traditions were not completely interrupted by the communist experiments and that there is a direct inheritance of some trends in the contemporary Russian legal science from the theories formulated as early as the debut of the 20th century. This is to say that the Saint-Petersburg legal philosophy school, which dates back from LEON PETRAZYCKI, continues to exist until now. The problems posed and still being discussed in the scope of PETRAZYCKI's intellectual heritage in Russia are topical from the standpoint of the problems of modern legal science.

Not less importance had the ideas of LEON PETRAZYCKI for the development of the legal thought in Russia. A thinker with a new theoretical background, he explained the independence of Law in the face of State authority. His ideas are opposed to the normative and statist theories of Law even more radically than the natural law conceptions.<sup>8</sup> PETRAZYCKI's doctrine counterweighted the legal concept of HANS KELSEN that was being created in that epoch. The Russo-Polish thinker originated the non-classical theory of Law, the ideas of legal pluralism, of legal policy and of social importance of Law; thereby he formulated one of the deepest non-classical theory of law.<sup>9</sup> His critical arguments

Analysis of Lukács' Ontology' *International Journal of the Sociology of Law* 9 (1981) 2, pp. 157-176 in *Marxian Legal Theory* ed. Csaba Varga (New York: New York University Press 1993), pp. 361-378.

<sup>6</sup> Cf. Varga 'Philosophising on Law...', pp. 82-83.

<sup>7</sup> *Ibid.*, pp. 90-93. Cf. also Varga *Lectures...*

<sup>8</sup> PETRAZYCKI anticipated many critiques that are presently developed by contemporary authors. Cf. Csaba Varga 'What is to come after Legal Positivism is over?' in *Theorie des Rechts und der Gesellschaft Festschrift für Werner Krawietz zum 70 Geburtstag*, hrsg. Manuel Atienza et al. (Berlin: Duncker & Humblot 2003), pp. 657-676.

<sup>9</sup> REZA BANAKAR sustained the idea that EUGEN EHRLICH was under PETRAZYCKI's influence and was absolutely aware of the legal conception of the Russo-Polish thinker. Reza Banakar & Michael Travers *An Introduc-*

against dogmatism in law have been essential until now. Along with the idea of legal politics, he was also author of a large number of other theoretical ideas of the first importance.

The intellectual heritage of PETRAZYCKI is polyvalent. During his Russian years this Russo-Polish thinker created the St.-Petersburg Legal Philosophy School. Along with PETRAZYCKI one can mention another great Russian legal thinker who contributed to the development of the psychological aspect of law – the Saint-Petersburg professor NIKOLAI KORKUNOV (1853–1904). It is quite possible to draw a net connection between these two theorists: NIKOLAI S. TIMASHEFF was right in saying that “PETRAZYCKI was in particular influenced by KORKUNOV who combined the sociological heritage of COMTE and SPENCER with the teaching of R. IHERING”.<sup>10</sup> It is characteristic for the St.-Petersburg School to see in Law a pluralist, functional and existential phenomenon. In the opinion of ANDRZEJ WALICKI, the St.-Petersburg School was divided into two groups. The first developed the ideas of PETRAZYCKI on Intuitive Law (LASERSON), the second fashioned the Sociology of Law (GURVITCH, SOROKIN, and TIMASHEFF).<sup>11</sup> We think that this second group managed to select the best of the legal conception of PETRAZYCKI. The most important is the theory of GURVITCH who originally interpreted such key-conceptions by PETRAZYCKI as “normative fact” and “intuitive law”.<sup>12</sup> This latter is understood as “intuitive positive law” and the former is close to the phenomenological conception of *Lebenswelt* (as developed by HABERMAS). It is in GURVITCH’s legal theory that the ideas of PETRAZYCKI were liberated from psychological subjectivism and gained synthetic and integral character. And it is here that one can find the point where the conceptions of GURVITCH, HABERMAS and PETRAZYCKI converge.<sup>13</sup>

Already before the Bolshevik Revolution the conceptions of PETRAZYCKI had been appreciated by MARXIST-oriented scientists such as MIKHAIL REISNER who did not participate formally in PETRAZYCKI’s School. Afterwards, PETRAZYCKI’s theory was banned for ideological reasons. Under the Bolshevik rule nobody could openly profess sympathy for PETRAZYCKI’s psychological theory of law. Nevertheless, under the Soviet regime some legal thinkers at Leningrad University continued to use this theory implicitly. We can state PETRAZYCKI’s influence in the books of JAKOB MAGASINER who was a very

*tion to Law and Social Theory* (Oxford: Hart Publishing 2000), pp. 42–43. Referring to J. LIČKI, A. PODGÓRECKI also has stated this circumstance. Adam Podgorecki ‘Unrecognized Father of Sociology of Law: Leon Petrazycki; Reflections based on Jan Gorecki’s Sociology and Jurisprudence of Leon Petrazycki’ *Law and Society Review* 15 (1980–1981), p. 191. Cf. Andrzej Walicki *Legal Philosophies of Russian Liberalism* [1987] (Notre Dame: University of Notre Dame Press 1992), p. 290. Cf. also: M.B. Антонов [Mikhail Antonov] ‘Интеграция знания о праве и обществе в творчестве Ойгена Эрлиха’ [Integration of Knowledge on Law and Society in the Work of Eugen Ehrlich] in *Государство и право* [State and Law] 2011 (1), pp. 79–87.

<sup>10</sup> Cf. Reza Banakar ‘Sociological Jurisprudence’ in *Encyclopedia of Law and Society American and Global Perspectives*, ed. David S. Clark (Los Angeles: Sage Publications 2007), p. 37.

<sup>11</sup> Walicki *Legal Philosophies...*, pp. 283–290.

<sup>12</sup> See especially two works of GEORGES GURVITCH—*L'idée du droit social* (Paris: Librairie de Recueil Sirey 1932) and *L'expérience juridique et la philosophie pluraliste du droit* (Paris: Pedone 1935)—where he apparently adheres to the ideas of PETRAZYCKI. Cf. on the connection between GURVITCH and PETRAZYCKI: Michael Antonov ‘Les influences russes sur la formation intellectuelle de Georges Gurvitch: l'exemple de ses premiers ouvrages’ in *Anamnèse* 2005 (1).

<sup>13</sup> Reza Banakar ‘Integrating Reciprocal Perspectives: On Gurvitch’s Theory of Immediate Jural Experience’ *Canadian Journal of Law and Society* 16 (2001), p. 73.

important figure in the Legal Science of USSR in the 1920s and 1930s. In his book on the General theory of law on the basis of Soviet legislation<sup>14</sup> he forwarded some ideas of PETRAZYCKI though without revealing the source of these ideas. Certain aspects are common between PETRAZYCKI's theory and the conception of the great legal thinker of the 1970s and 1980s, LEON JAVITCH.<sup>15</sup>

The particularity of PETRAZYCKI's legal doctrine is that he combined the principles of the classical scientific paradigm with those of the non-classical one.<sup>16</sup> First of all, the influence of the classical scientific rationality appeared in his attempt to build the theory of law on a monist basis, taking into consideration only the individual psychology and studying it only through introspection and formal logics. But trying to restrict his studies by a limit of monist approach, PETRAZYCKI seriously simplified his vision of social and legal realities. He relied on the traditional scheme of simplification and ignored the exceptional cases by reducing them to the paradigmatic *Weltanschauung*. In this tradition one of the elements in the object becomes dominant thanks to the reduction and moves the other elements into the shadow.<sup>17</sup> It is in this way that the unilateral theories that study the different social objects, such as law, are created. We see these theories (normative, sociological, jusnatural, etc.) explain the different sides of law, each of them having its *raison d'être* but without grasping the totality of the object studied.<sup>18</sup>

PETRAZYCKI's theory was not exempt of this rule. The genial legal thinker managed to find in law what had been neglected before – the internal, emotional, binding aspect of law that motivates the subjects in their conduct. Of course, there were other legal theorists who before PETRAZYCKI had developed the psychological approach to law,<sup>19</sup> but his singularity was to work out the entire psychological methodology based on the emotion theory and extrapolated onto the law studies. He discovered the emotional side of law, though always staying bound by the narrow limits of his scientific paradigm. To be consistent, PETRAZYCKI had to affirm that law embraces also subjective fantasies which are produced only via individual imagination moved by imperative-attributive emotions. It was a weak point of his theory, especially in the light of the contemporary legal theories that search to escape a unilateral vision of law.

What is the basic innovation that PETRAZYCKI brought into the contemporary theory of Law? We think to find it in the idea to consider law as a system of communication.

<sup>14</sup> This book was first published only in 1997 in the Russian review *Pravovedenie* (also cf. his Oeuvres: Я.М. Магазинер [Jakob Magaziner] Избранные труды по общей теории права [The Selected Oeuvres on Theory of Law] (Санкт-Петербург [Saint-Petersburg]: Юридический Центр Пресс [Law Center Press] 2006), 352 p.

<sup>15</sup> Lev S. Javitch *On The Essence of Law* [in Russian: Л.С. Явич, О сущности права. Л., 1985 ] (Leningrad 1985), pp. 108–109. A similar conception he developed in his book on Socialism: [in Russian – Л.С. Явич [Lev Javitch] Право и социальный прогресс [Law and Social Progress] Москва [Moscow] 1990), pp. 25–27.

<sup>16</sup> By non-classical legal theories we mean those which do not accept reduction of law to any of its foundations (like reason, norm, relation, and psyche). The non-classical legal theories consider law as a phenomenon inevitably bound with the social agent and with the limits of intellectual activity of this subject.

<sup>17</sup> N. K. Denzin 'Interaction, Law, and Morality: The Contributions of Leon Petrazycki' in *Sociology and Jurisprudence of Leon Petrazycki* ed. Jan Gorecki (Urbana: University of Illinois Press 1975), p. 73.

<sup>18</sup> GEORGE LUKÁCS has demonstrated that one cannot escape studying law as totality, even if this totality presumed to be partial. Cf. Csaba Varga 'Law as a Social Issue' in *Szkice z teorii prawa i szczegółowych nauk prawnych* Professorowi Zygmuntowi Ziembinskiemu, ed. Sławomira Wronkowska & Maciej Zieliński (Poznań: Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza w Poznaniu 1990), pp. 246–255.

<sup>19</sup> Cf. Walicki *Legal Philosophies of Russian Liberalism*, p. 238.

Law appears through communication as its immanent characteristic. This idea challenges the classical paradigms of jusnaturalism, statism and normativism that claim that law is something given, formed, "prêt-à-porter", and that the task of a legal thinker is only to pick up from the social reality the corresponding facts (either the norms established by public authority, or natural rights, or normative structures of formal logics) without taking into account the subjective apperception of these facts. PETRAZYCKI was of another opinion. He starts the legal analysis with a study of the very subject, with this subject's apperception of reality through the imperative-attributive emotions. In other terms, law for PETRAZYCKI exists in all the spheres where there is a specific way of apperception and of reacting to the external drives by the specific emotions and representations. From this point of view, law is not dependent upon State, upon any abstractions, upon natural laws.

In this regard we see two crucial points in PETRAZYCKI's legal theory. Firstly, its division between normative fact (text of law) and law itself. Secondly, its unity of rights and duties that is the basic element of legal communication. Naturally, the term of communication has a broad sense and may seriously differ in scientific conceptions. In the theories of N. LUHMANN and of J. HABERMAS we have the most popular conceptions of communication. For HABERMAS communication is consensus-oriented.<sup>20</sup> But before any consensus we need to establish the rational argumentation about validity of the ways people consent or just presume that these or those ways of consenting are valid a priori. In social relations we always deal with actions bound to meet a reciprocal response. If there is no reciprocal reaction, it means that the communication is failed. It has often been stressed that the idea of communication means much more than a simple transfer of information. Communication is a primary social process of co-creating, maintaining and transforming social realities. We cannot exist if we do not communicate given that it is a status of human condition, a human *modus vivendi*, in which we produce and reproduce our world.

From this point of view we can partly accept the critiques formulated by LUHMANN. But we cannot agree with the too narrow understanding of communication that LUHMANN proposes in excluding from communication even subjects and their rational behaviour.<sup>21</sup> He thinks that the notion of communication covers only the selection of information, of message and of understanding/misunderstanding.<sup>22</sup> Can we accept this theory of communication? It seems that this theory can be efficient only in what concerns the descriptive information (*Sein*), but not for the prescriptive information (*Sollen*). Let's presume that *A* prescribes to *B* to fulfil something. In this case, *A* implicitly or explicitly refers to the mutually recognized (by both *A* and *B*) groundwork of communication. Thence, the communication cannot be limited only by apperception, by understanding of information. We inevitably must add behaviour to understanding because they are in-

<sup>20</sup> Jürgen Habermas *Theorie des kommunikativen Handelns*. Bd. 1. Handlungsrationalität und gesellschaftliche Rationalisierung (Frankfurt am Main: Suhrkamp 1981), pp. 367–452.

<sup>21</sup> Niklas Luhmann 'Was ist Kommunikation?' in *Soziologische Aufklärung 6: Die Soziologie und der Mensch*, hrsg. Niklas Luhmann (Opladen: Westdeutscher Verlag 1995), pp. 113–124.

<sup>22</sup> It is characteristic that LUHMANN writes that "Die Operationsweise, die das Gesellschaftssystem produziert und reproduziert, ist die sinnhafte Kommunikation [...]. Das erlaubt es zu sagen, dass das Rechtssystem insofern ein Teilsystem der Gesellschaft ist, als es die Operationsweise der Kommunikation benutzt, also nichts anderes tun kann, als im Medium von Sinn mittels Kommunikation Formen (Sätze) zu bilden". Niklas Luhmann *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp 1993), p. 35.

dissolubly interlaced. That is why we cannot exclude human conduct from the concept of communication – conduct/action is inherent to knowledge and to understanding. In this sense, the ideas of HUMBERTO MATURANA and FRANCISCO VARELA seem to be more pertinent for sociological analysis, and we agree with them that every communication presupposes a text.<sup>23</sup> Law is a specific form of communication because its subjects assert their mutual rights and duties and construct their interaction on this base. Any action contradicting the asserted rights and duties shall be deemed as violation of law. It means violation of legal communication. So, communication constitutes an irreversible unity of its elements. Law is a kind of social communication (along with moral, economic, politic, cultural communications). This approach makes us accept the idea of legal pluralism and of collective (inter-subjective) psychological reality and values.<sup>24</sup>

PETRAZYCKI's problem was, in our opinion, not to have combined these two principal points of communication (legal text and correlative rights), though it is in communication that legal texts (source of law, normative fact) and the subjective experience of rights and duties are united. The Russo-Polish theorist radically opposed law and the textual forms of legal argumentation (sources of law). He treated as source of law (preferring to avoid this term and to employ the term of source of legal knowledge) every phenomenon of the external world that initiates in us an imperative-attributive emotion. This phenomenon belongs to another reality than the law itself (solely psychological phenomenon). In this respect we see PETRAZYCKI adhere to the non-classical paradigm of jurisprudence.<sup>25</sup>

For PETRAZYCKI, law is not a kind of external reality, but is produced by the psychological processes. Even positive law is resulting from the intellectual and emotional interpretation of the objective signs, of the normative facts that produce law in the mind. Law in PETRAZYCKI's theory is far from being understood as material phenomena outside of the psyche. These material phenomena are able only to promote the law already psychologically structured.

We cannot but agree with PETRAZYCKI in this aspect: there is no law without subjects. Nevertheless, one may not limit law by the subjective consciousness because this would entail the simplification of legal reality. As the example of GURVITCH, SOROKIN and TIMASHEFF teaches us, it is quite possible to extrapolate the key ideas of PETRAZYCKI to the totality of social/cultural reality and to largely understand law as the coordination of social interaction/communication. It is via communication that the legal text and the psychological apperception of law are united. PETRAZYCKI sees law in imperative-attributive emotions that are born either intuitively or through perception of normative facts, provided that these emotions are possible only when one is aware of the real ex-

<sup>23</sup> Humberto R. Maturana & Francisco J. Varela *The Tree of Knowledge A New Look at the Biological Roots of Human Understanding* (Boston: New Science Library 1987).

<sup>24</sup> Cf. А. В. Поляков [Andrey V. Polyakov] *Общая теория права. Феноменолого-коммуникативный подход (Курс лекций)* [General theory of law: The problems of interpretation in the context of communicative approach (Cycle of lectures)] (Санкт-Петербург [Saint-Petersburg]: Издательский Дом Санкт-Петербургского государственного университета 2004) 864 pp.

<sup>25</sup> Cf. А. В. Поляков & Е. В. Тимошина [Andrey V. Polyakov & Elena V. Timoshina] *Общая теория права Учебник* [General Theory of Law] (Санкт-Петербург [Saint-Petersburg]: Издательский Дом Санкт-Петербургского государственного университета [Publishing House of Saint-Petersburg State University] 2005) 472 pp. Cf. also Mikhail Antonov 'Unser schwerer Weg zum Recht' in *Rechtstheorie* 2007 (1), pp. 157-168.

istence of another person. What is important here is only the reality of the connection between this subject and this person, irrespectively of the possibility to perform any real acts. Imperative emotion is a feeling of obligation that is ascribed to or perceived by a subject. Inversely, attributive emotion means feeling of authority (= right) to demand someone to execute such or such act. From this supposition naturally follows that law emerges from concordance of the obligations of *A* with the rights of *B*. This concordance, in PETRAZYCKI's opinion, is totally subjective, i.e., is defined only by the psychology of the subject that experiences imperative-attributive emotion. That is why PETRAZYCKI insists that law is purely subjective – in his conception there is no legal reality except the psychological reality.

Though similar to phenomenological constructions,<sup>26</sup> PETRAZYCKI's conception does not reach the level of a real phenomenological apperception. In the psychological conception of the Russo-Polish thinker law is excluded from real social communication, from interaction of agents and is therefore devoid of any power. Evidently that such image of law is completely different from what we understand as law—a system of coordinated behaviour that cannot be reduced only to subjective fantasies.

PETRAZYCKI's position was that the attributive drive is responsible for the coordination of the social actions and thereby for the legal communication. The reason is that attribution always means an appeal to another person, considered to be the addressee of the appeal. In its turn, legal subjectivity suggests that the person is responsible and is able to respond to appeals, as long as the appeals are really executable through the acts of this appealed person. We can ascribe such appeals to our counteragents in the social relations only under condition that we recognize that these counteragents exist *in re* and that their appeals are real. That's why in the famous example by PETRAZYCKI we can ascribe any rights to the devil only if we believe in his existence; the same is true about the rights that the primitive peoples ascribe to the dead. PETRAZYCKI's position is that our imagination is a sufficient basis for establishing law, but he falls into contradiction because any attributive-imperative emotion can only arise when we feel the reality of others. Otherwise, if we deal only with subjective imagination, then there is no attribution from the other side—the imagined subjects, like witches or devils, cannot respond to our appeals. Understanding this theoretical obstacle, PETRAZYCKI nevertheless wants to be coherent and claims that our belief is enough for us to logically construct the legal relation with the imagined subjects. But he does not continue and ignores the question about the foundations of this belief. PETRAZYCKI's follower, GEORGES GURVITCH, saw this foundation in the phenomenological coordination between the emotions of one person *A* and the real conduct of the other person *B* whose actions respond to the emotions of *A*. The paradox was that PETRAZYCKI couldn't escape recognizing this factual coordination and its social character – we see it in his ideas about the social adaptation of legal habits, about the progress of legal institutions, about the ulterior value of law (love). *De facto* he founds his conclusion on combined psycho-social coordination of emotions and counteractions, but *de jure* PETRAZYCKI refuses to accept sociological elements into his monist paradigm so

<sup>26</sup> On similarities between the ideas of PETRAZYCKI and the phenomenological analysis, see particularly Gurvitch *L'expérience juridique...*, pp. 349 et seq.

as not to break its coherence (the theorist saw in such coherence the necessary attribute of science).<sup>27</sup>

PETRAZYCKI introduced in his conception two different models of Law. We say “different”, and not “multi-level”. In the scope of the first model law is constituted through individual, imperative-attributive emotions and intellectual representations. We can call it “virtual model of Law” (or “intuitive law” in terms of PETRAZYCKI). Another model means a system of coordinated actions that is based on a unique understanding of legal texts—“actual model of law” (or “positive law”). PETRAZYCKI (like NIKLAS LUHMANN) insisted that law could not be reduced to symbols because these symbols must initiate imperative-attributive emotions: make an individual connect in his representations his rights and duties with those of another subject.

Which of PETRAZYCKI’s models is better from the point of view of legal sense? One can suggest that it is the second model. PETRAZYCKI proposed to treat as law everything that implies individual imperative-attributive emotion. But he did not pay attention to the fact that this emotion, from a legal point of view, is the same thing as the “imagined *thalers*” that must be differentiated from the “real *thalers*” (to use I. KANT’s hyperbole). The legal consciousness as possibility to have, to experience, to evaluate legal emotions should be considered as *conditio sine qua non* for the genesis of law. But this consciousness cannot be identified with law in its “focal meaning” (JOHN FINNIS). An individual imperative-attributive emotion can implement the real legal significance only under condition that it is seconded by the correlative imperative-attributive emotion of other subjects. In other terms, it becomes possible only when we have a unique understanding of the sense of our mutual rights and obligations and when this understanding is seconded by coordination of actions. To have rights and duties signifies to behave in an established manner towards the other subjects.

Law is not equal to the paper sheets on which the legal prescriptions are written. “These documents are but the witnesses of the previous facts, of the acts effectuated by kings or by other legislators.”<sup>28</sup> The symbols used for the fixation of these documents are designed to initiate imperative-attributive emotions, i.e. to connect (in the consciousness) the rights of the subject with the obligations of the third parties. But, as we could see, PETRAZYCKI met another problem here: he had to see that one cannot reduce positive law exclusively to the individual imperative-attributive emotions because in the very normative fact we already have the common understanding of the logos of the rights and

<sup>27</sup> Another follower of PETRAZYCKI, PITIRIM SOROKIN, explained this paradox in his master’s theory: “If one takes some of the statements of PETRAZYCKI at their face value, and if one explores whether PETRAZYCKI gave a well-developed »sociology of law and morality«, the critics are seemingly right. PETRAZYCKI indeed repeatedly states that the reality of law and moral phenomena is psychological, that law and moral phenomena are real only in the described, specific mental experience of individuals, that without this psychological reality, law and moral phenomena do not exist as an empirical reality [...]. Even more, when law and moral phenomena appear as trans-subjective, social forms of reality, it is only a phantasm, or projection of this psychological reality into the trans-subjective world of space and time. On the basis of this, the critics seem to have been right in accusing PETRAZYCKI of a sort of a psychological solipsism and of being blind toward the objective, trans-subjective, and social forms of reality of law and moral phenomena”. Pitirim A. Sorokin ‘Law and Morality. By Leon Petrazycki’ *Harvard Law Review* 69 (1956), pp. 1153–1154.

<sup>28</sup> Л.И. Петражицкий [Leon Petrazycki] Теория права и государства в связи с теорией нравственности [Theory of Law and of State in their Connection with Theory of Morality] (Saint-Petersburg 2000), p. 265.



obligations in question, as well as of the corresponding emotions.<sup>29</sup> If the legal emotions fail to coincide, we run the danger of awful legal and social disasters—"such mismatching of legal emotions can produce a real explosion of destruction, of vengeance and of hatred that would mean killing of millions who mutually disagree as to the scope of their rights and duties".<sup>30</sup>

Here law must be cardinally distinct from morality and must imply a kind of unification, i.e. of a common understanding of legal facts that are the unique source of knowing about legal norms, and that therefore produce a coordinated interaction on legal base.<sup>31</sup> The evolution of law can lead to a progressive adaptation of similar emotions that produce more and more similar legal acts, or in the words of PETRAZYCKI: "produce a stable coordinated system of legally significant social behaviour, produce a stable and defined order that is to be taken into consideration by the individuals and can be a support in their activity".<sup>32</sup> In other terms, evolution of law leads to "exact predestination" of rights and duties, to exact description of their scope and objects, to an objective recognition of other facts that are relevant to law. This process invests materiality into law; CSABA VARGA justly points out that law is always "characterized by externality and reification".<sup>33</sup> This distinguishes law from morality, the latter being incapable to coordinate behaviour. We can extend the way that PETRAZYCKI treats this aspect of law and say that this adaptation means also more effective legal communication that minimizes legal conflicts. Such an adaptation or, as CSABA VARGA says, legitimacy of law<sup>34</sup> is an indispensable element of every law.

PETRAZYCKI describes law as a dynamic auto-constructing system that is formed through a network of interlaced communications. For the Russo-Polish thinker, law is a process of "psychosocial adaptation" to imperatives of "socially reasonable action". The central role is played here by "inter-human talks", which means psychological communication between members of social groups. Human communication is, according to PETRAZYCKI, a kind of psychological contamination, in both intellectual and emotional aspects – an idea that was simultaneously pronounced at that epoch by G. TARDE in France. This vision of Society seems to be closer to the autopoietic theory developed by LUHMANN than to the communicative action theory of HABERMAS. Here we could also draw parallels with the ideas of H. L. A. HART on the third position in legal studies which permits

<sup>29</sup> That is why G. GURVITCH insisted that PETRAZYCKI's idea of the bilateral (imperative-attributive) emotions implied the social basis of positive law, and that the idea of normative facts could be combined with ÉMILE DURKHEIM's conception of social facts. Cf.: Michael Antonov 'Le raisonnement dialectique de Georges Gurvitch et la philosophie russe' in *Études sur la pensée russe: la raison*, Lesourd F. (ed.) Lyon 2009, pp. 337-360.

<sup>30</sup> Petrazycki *On Theory of Law...*, p. 148.

<sup>31</sup> We can better understand the topicality of these ideas by PETRAZYCKI if we put "communication" instead of "unification"—this way of studying law is not far from the recent legal conceptions of LUHMANN or of HABERMAS. This idea also reminds the theory of CSABA VARGA who defines the judicial process as "purposeful and responsive human thinking undertaking definite values and justificatory paths through given referential channels". Csaba Varga *The Philosophy of Teaching Legal Philosophy in Hungary* [manuscript for IVR XXIIIrd World Congress in August, 2007], p. 17. Cf. Csaba Varga *Theory of the Judicial Process The Establishment of Facts* (Budapest: Akadémiai Kiadó 1995).

<sup>32</sup> Petrazycki *On Theory of Law...*, p. 157–158.

<sup>33</sup> Csaba Varga 'From Legal Customs to Legal Folkways' *Tidskrift for Rättsociologi* [Lund] 2 (1985), p. 45.

<sup>34</sup> Understanding under such a legitimacy "the minimum consensus in the law as the main agent of social ordering issuing in law and order", according to Csaba Varga 'From Legal Customs...', p. 46.

to take into account the subjective psychology without falling into psychologism in the jurisprudence.

This vision of law correlates with the conception of norms by PETRAZYCKI. Denying that legal norm exists objectively, the thinker understands norm as representations that are intellectual signs of imperative and attributive emotions. If any text initiates an imperative-attributive emotion of possession of rights or of duties, then this text is a normative fact (= source of law). From this point of view, legal norm is psychological projection of experienced rights and duties. But in spite of the monism of PETRAZYCKI's legal theory, we must claim that this vision cannot be limited by psychology solely – legal norm is a communicative link, a condition of legal communication. Legal norm indicates us that psychologically experienced rights and duties are shared by other subjects of law and therefore there is a real (not imagined, as PETRAZYCKI suggested) attribution. This real attribution first becomes possible when we assert that law is something more than legal emotions and that it has a common base recognized at least by several subjects of law. Let us imagine a situation when a subject *A* cannot find any generally recognized base for his pretensions (normative fact, legal text)—then we have no law and his pretensions remain only in the imagination of *A*. Should *A* experience his pretensions as legal, he must be aware that the other subjects experience his pretensions in the same way. It means that there must be a common textual base for the pretensions in question. This can be any written or oral text mutually recognized by subjects.

We can express this idea otherwise: law is a communicative order that legitimates rights and duties through legitimating legal texts. Law doesn't exist outside legal texts, outside legal norms. If we try to define law irrespectively of this normative communication, then we deal only with the psychological projections of legal emotions. PETRAZYCKI applied the term "intuitive law" to this legal-psychological imagination, but this term fails to express the real nature of this phenomenon that is far from what we call "law" in our everyday life. At the same time, we must not be hostages of the term "text"—it is not equal to the term "norm" that implies any acts to be imperatively accomplished.<sup>35</sup> The dialectics of norms and of texts is that the legal norm always arises as a result of experiencing of the legal text.<sup>36</sup> This experiencing takes place through acts of legal behaviour (acts of realization of rights and duties).

PETRAZYCKI managed to establish the relations between law and the inner world of human psyche but he failed to relate law to the social reality. This goal can be achieved only after having renounced the vision of law as a phenomenon of human psychology

<sup>35</sup> The same thought we find in the conception of ENRICO PATTARO: "Directives are Language. Norms are Behavior. A directive is a linguistic expression by which somebody is told to do something, and it is a directive whether it is effective or not. A norm is a pattern of behavior, which is performed, because it is conceived (felt, lived) as obligatory, and it is performed independently of any directive. This, of course, does not mean that there are no relevant factual connections between directives and norms. These connections need to be properly spelled out". Enrico Pattaro 'Language and Behavior. An Introduction to the Normative Dimension' in *The Reasonable as Rational? On Legal Argumentation and Justification*, ed. Werner Krawietz (Berlin: Duncker & Humblot 2000), p. 267.

<sup>36</sup> One shall not understand text only as language practice, for the text largely exceeds the limits of linguistics. Language and law constitutes a unique process of social reproduction. Cf. Varga 'Law as a Social Issue', pp. 239–255. Even legal facts, such as judicial facts, emerge via linguistic practices that first permit the facts to be institutionalized. Varga *Theory of the Judicial Process*.

solely. We shall promote a multifaceted vision of law where inter-subjective and textual realities will be combined.<sup>37</sup> In this respect we can refer to PETRAZYCKI's legal ideas that prove to be efficient under condition of being developed further, towards a combined study of psychological emotions and their social background. Especially one can appreciate the terminology created by the Russo-Polish thinker—normative fact, intuitive law, imperative-attributive structure of law and other terms that are keeping their topicality until now. PETRAZYCKI's conception proved to be too narrow because of its subjectivity, because of being oriented only toward individual experiences. This conception fails when compared with the reality where we have common legal emotions and representations, the common background (normative facts) for experiencing them uniformly. This makes us suppose that legal norms and law in general have an inter-subjective character. Such inter-subjectivity of law means that law has its rationale and significance that are uniformly and therefore objectively experienced. Inter-subjectivity and objectivity of legal norm coincide in this phenomenological understanding of legal communication. These norms exist irrespectively of our personal will, of our personal experience because norm gains its social significance as long as it is rooted in the collective consciousness.

We can compare the efficiency of law with the projection of movies. Sources of law (normative facts) appear on the screen of social life like frames of movies which, in their continuity engender law that we watch as a lasting picture. The norms of law can be compared here with different scenes played throughout the picture and that have their sense only when incorporated in the whole of the movie. This signifies that the legal norm is an axiological, psychological and intellectual apperception/experiencing of the real rights and duties arising from the legal text and being fixed through the legal behaviour. Thence, the legal norms cannot be separated from the legal texts. So, in law we have unity of different aspects: norm implies rights and duties which, in their turn, always are normative; both norms and rights/duties are introduced by legal texts. Our conviction is that we can continue developing PETRAZYCKI's legal theory in using his important findings in law, as well as his deep scientific terminology. At the same time, we shall overcome the unilateralism/monism of PETRAZYCKI's theory and promote a pluralist vision of law as communicative phenomenon that incorporates the legal texts, their realization through the normative behaviour of the subjects that exercise thereby their rights and duties.<sup>38</sup>

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<sup>37</sup> The similar ideas were expressed by CSABA VARGA in the polemics around internal and external aspects of law. According to him, "la formation et le fonctionnement du droit se situent précisément au point d'intersection des domaines externe et interne du droit". Csaba Varga 'Domaine «externe» et domaine «interne» du droit' *Revue interdisciplinaire d'études juridiques* 14 (1985), p. 32. He claims elsewhere that "What we have discovered about law is that it has always been inside of us [...]. We bear it and shape it". Varga *Lectures...*, p. 219.

<sup>38</sup> Cf. Polyakov [General theory of law].