

CHAPTER 1

LEGAL REASONING

IN THE THEORY OF PETRAZYCKI

INTRODUCTION

The theory of a Russian scholar of Polish descent, Leon Petrazycki, contains interesting ideas, which can help us to clarify the intrinsic connection between legal reasoning and the conscience of judges. This connection is left unnoticed in many contemporary writings about judicial decision-making,¹ which makes it necessary to consider a theory which paid attention to the relationship between legal reasoning and conscience, even though this theory is almost a hundred years old and is not well known in the Western legal thought.

One reason why the theory of Petrazycki has been left unknown was the First World War and the October Revolution in Russia which interrupted his academic life. After the revolution Petrazycki was forced to emigrate leaving much of his materials in Russia. His life tragically ended after futile attempts to find a new homeland abroad. Apart from a few articles,² no solid academic work on his theory has been yet carried out. Almost all the books of Petrazycki (his heritage amounts to 35 volumes) are still inaccessible to an English speaking reader. There is only one shortened translation of his two volume work *Theory of Law and State*, published by the Harvard University Press and entitled *Law and Morality*.³

Despite his obscurity, Petrazycki offered insights in the nature of law and legal process which can be of great interest for a researcher of judicial decision-making. Three basic ideas in the theory of Petrazycki give the key to his whole theory of legal reasoning.

¹ Some of them will be considered in chapter 4 of the book.

² *Sociology and Jurisprudence of Leon Petrazycki*. - Ed. by Jan Gorecki. - Chicago: University of Illinois Press, 1975; Rudzinski A. W. 'Petrazycki's Significance for Contemporary Legal and Moral Theory.' in: 21. *American Journal of Jurisprudence*. (1976). pp. 107-130; Sadurska R. 'Jurisprudence of Leon Petrazycki.' in: 32. *American Journal of Jurisprudence*. (1987). pp. 63-98.

³ Petrazycki L. *Law and Morality*. - Transl. by H. Babb - Harvard University Press. 1955.

1. The law is not what is fixed in numerous statutes, precedents, customs. The law is what is experienced by the human consciousness as an imperative or impulsion to discharge a certain duty in order to satisfy a certain right. Every participant in the legal process has already got pre-given expectations about what the law requires in the given situation.

2. The origin of such imperatives and expectations cannot lie exclusively in the formal sources of law like statutes, precedents or customs dominant in a particular society. It is necessary to go further to the phenomena of conscience and intuition.

3. In order to explore the life of law in such a way as it exists on the level of the ordinary participants in legal processes it is not enough to make a logical analysis of the legal rules. Because the reality of law has to be discovered in the imperatives and expectations of the individual consciousness, it is psychology and, in particular, moral psychology, which should provide efficient methods to explore this level of legal reality.

In this chapter, these three basic ideas of Petrazycki will be examined in their relationship to judicial reasoning. The implication of his theory is that judicial reasoning is determined not so much by the abstract content of the legal rules applied as by the psychological experiences of the judges. There are many similarities between the theory of Petrazycki and the later expositions of the Legal Realists. This comparison will be made, and the need for further development of the ideas of Petrazycki and Legal Realists on conscience, love, and natural law will be posited.

PETRAZYCKI'S THEORY OF INTUITIVE LAW

For Petrazycki, conscience appears as a moral intuition, that is a direct and spontaneous perception of an obligation to act in a certain way or abstain from certain behaviour. Petrazycki's thesis that conscience is the source of intuitive law is fundamental for exploring the moral aspects of judicial decision-making. Having given a theoretical exposition of the problem of conscience as intuitive law, Petrazycki did not move further to the implications of his theory concerning judicial decision-making, particularly the moral experience of judges. Nevertheless, his theory of intuitive law may be of significance in revealing the influence of conscience on the results of judicial process.

Petrazycki developed his theory of intuitive law on the basis of psychology of moral impulsion. He identified the intuitive law with the commands of conscience although the concept of conscience itself was not his primary concern.⁴ The particular feature of his theory was a distinction between the intuitive law of conscience and the positive (state-established) law. The distinction was based on the different sources of the intuitive and positive law. The rights and duties of the positive law, according to Petrazycki, are set by the normative facts, that is a

⁴ Petrazycki L. *Teoria Prava i Gosudarstva*. - St. Petersburg: Merkushev, 1910. - P. 486-487, 573..

legislative directive, a legal custom, a judicial precedent.⁵ The intuitive law cannot be reduced to such facts.

The separation of the intuitive law and positive law is not identical to the separation of law and morals drawn by Petrazycki. Although both law and morals are seen within the realm of ethics they are different on the basis of how the ethical obligation is conceived by the human consciousness: "Obligations conceived of as free with reference to others - obligations as to which nothing appertains or is due from obligors - we will term moral obligations. Obligations which are felt as compulsory with reference to others - as made secure in their behalf - we shall term legal obligations."⁶ The legal obligations are expressed in, as he called it, attributive imperatives, and the moral obligations are expressed in non-attributive imperatives, because such imperatives are not accompanied by a right of the other person involved to the action caused by the imperative. It is important to notice that the commands of conscience have a legal nature as far as they ascribe to other person any right. Like the positive law, intuitive law contains imperative-attributive imperatives. But unlike the positive law they are formed by the individual conscience freely without reference to the normative facts. The latter include statutory provisions, decisions of the courts, customs and all that which the consciousness of the individual perceive as the source of the imperative-attributive imperatives. The intuitive law has a different source of the imperatives, which lies in the convictions and beliefs held by conscience.

The intuitive law and the positive law comprise what Petrazycki calls 'the official law'.⁷ They have equally binding force on its subjects. Thus, the intuitive law is identified with the official law: "Insofar as they concern objects within the cognisance of official law, the axioms of intuitive law are acknowledged also by state courts and other organs of state authority. In general the corresponding intuitive law is a constituent part of official law and a fundamental and essential element thereof."⁸

Petrazycki perceives the positive law as a product and manifestation of the intuitive law of those who establish it. At the same time, he stresses that not all positive law is derived from the intuitive law (conscience). "Legislative enactments may be based on considerations of interests and the like, which contradict the intuitive law conscience of the legislators themselves - or of the masses - and nevertheless bring to life the corresponding positive law."⁹ Apart from this, there are many parts of the positive law which are irrelevant and neutral with respect to the intuitive law: questions of formalities, technical arrangements, and so forth. Yet Petrazycki maintains that conflict between positive law and intuitive law is inevitable, and that it is in the court room where this conflict has to be settled. Not only may the intuitive law of one of the parties collide with the positive law, but so

⁵ *ibid.*, - p.477.

⁶ *ibid.*, p.49-50.

⁷ Petrazycki L. *Law and Morality*. - Transl. by H. Babb - Harvard University Press. 1955. - P. 292.

⁸ *ibid.*, p. 293.

⁹ *ibid.*, p. 235.

may the intuitive law of the judges, and Petrazycki talks even about collision with the intuitive law of the public.¹⁰

However, the relation between the positive law and the intuitive law may be one of relative harmony. Petrazycki affirms that the greater the accord between the intuitive law of the public and the positive law, the more correctly the law functions in general in a given nation, and the more uniformly it is observed. So one of the primary tasks of judges is to achieve this harmony. The intuitive law of the judges plays an important part in the application of positive law. "It exerts pressure upon the interpretation and application of positive law in the direction of securing decisions in accord with (or as little as possible divergent from) the directives of the intuitive law conscience."¹¹

According to Petrazycki, the positive law gives only a general pattern within which the intuitive law (conscience) of the judges operates. The adaptation of general rules to concrete circumstances, the choice of the degree of punishment, or of the sum of an award, the evaluation of facts, - all these are governed by the intuitive law of the judges.¹² He writes: "In the official criminal law of civilised nations, the positive standardisation of punishments ordinarily indicates only the minimum and maximum limits of punishments, and definition of the specific punishments within these limits is left to the conscience of judges - that is to say, to their intuitive law. Even the decision as to whether or not the prisoner deserves punishment and should be recognised guilty (of an act which has been proved) depends on the conscience of judges and the jurors. Civil codes likewise entrust the decision of various questions requiring individualisation to the discretion of the judges, enjoin the interpretation and fulfilment of contracts and the decision of other questions, 'according to good conscience.'¹³ Thus, Petrazycki's theory of conscience as intuitive law gives great importance to the judges. Judgements of conscience appear as a necessary element of judicial decision-making, and these judgements have a legal authority.

LAW AND LOVE

As we have already observed, the distinctive characteristic of Petrazycki's theory is that he tried to explore law from the point of view of subjective consciousness. Petrazycki understood law as a social-psychological phenomenon.¹⁴ The main function of law is to facilitate conflictless and benevolent co-existence between members of society. The main stream of legal impulses of the individual is characterised by, firstly, a desire to secure one's own position in society; and secondly, a desire not to harm as far as possible the position of other individuals. If

¹⁰ *ibid.*, p. 234.

¹¹ *ibid.*

¹² *ibid.*, p. 293.

¹³ *ibid.*

¹⁴ Petrazycki L. *Teoria Prava i Gosudarstva*. - St. Petersburg: Merkushev, 1910. - P. 3.

the desire is based on a claim of mutual reciprocity it is a legal (attributive) impulsion, if not it is mere a moral (non-attributive) impulsion.

A cultivated impulsion to meet the needs of other people in order to secure the interests of all the members of society forms the core of the Petrazycki's concept of rational and active love.¹⁵ This concept is central in one of his earliest works: *Introduction to the Science of Legal Policy* (1896) in which love is presented as the ultimate goal of law. The concept of rational and active love was not developed in his latter and the most influential works. However, the idea of ethical love is implicit even there, although it is not clearly articulated. Moreover, the latter works of Petrazycki can serve as the key to a better understanding and full reconstruction of his idea of love as the ultimate goal of law.

The meaning of the idea of active and rational love can be adequately understood if, and only if, the whole psychological approach of Petrazycki has been taken into an account. It is important to stress that love as the ultimate goal of law is derived from psychological experience, or rather it is a rationalisation of legal experience. The latter becomes more evident when the connection between love on the one hand and the motivational and educative effects of legal impulsions on the other is established.

The essential significance in human life of legal impulsions is that they "(a) operate as motives of conduct and stimulate the accomplishment of some actions and to abstention from others (the motivational effect) and (b) produce certain changes in the mind of individuals and masses, developing and intensifying some habits and propensities and weakening and eradicating others (the pedagogical and educational effect)."¹⁶ Both effects, usually but not necessarily, aim to promote the common good. "They act in general in favour of conduct socially desirable and against conduct socially harmful, and educate in the direction of developing and intensifying socially desirable habits and propensities."¹⁷ At this point love can be perceived as a characteristic of legal motivation to act for the common good and for the good of one's neighbour. Love is not the only characteristic of legal motivation, but it is the most important one. Only in this context can we understand why Petrazycki set love as the goal of legal policy. Love is a certain condition of the human mind which makes a person act in a socially desirable way and abstain from what is socially harmful. Therefore, legal policy which carries out the pedagogical and educational effects should do everything possible in order to stimulate legal impulsions based on love.

It is necessary to point out two implicit ideas in Petrazycki's theory: firstly, the meaning of ethical love lies in the deep psychological experience of a duty to act in the interests of society, its members and the bearer of the duty himself. Secondly, ethical love in legal impulsions is different from the ethical love in moral impulsions. The duty born by legal impulsions is conceived as obligatory because the individual consciousness recognises the right of the other person to claim the

¹⁵ Sorokin P. *The Ways and Power of Love*. – Boston: Beacon Press, 1967. – pp. 66-67.

¹⁶ Petrazycki L. *Law and Morality*. – Transl. by H. Babb - Harvard University Press. 1955. - P. 93.

¹⁷ *ibid.*, p. 94.



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Shytov, A.N.

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