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Book Review. Law and Morality by Leon Petrazycki

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and a selective bibliography of articles devoted to some aspects of these organizations.

The survey of actual operation and practices of European organizations as offered by this Yearbook is an invaluable source of otherwise hardly available information. For anyone interested in regional organizations the Yearbook is indispensable. The Yearbook makes an outstanding contribution to the promotion of "a closer unity between all like-minded countries of Europe." It serves this worthy cause by directing attention to the work of European organizations and their potentialities, by gaining popular support for them, and by providing a very useful forum for discussion of the pertinent problems of European cooperation.

*Gehard Bebr**

New Haven, Connecticut

Law and Morality. By LEON PETRAZYCKI. Cambridge: Harvard University Press. 1955. Pp. xlvi, 335. Translated by Hugh W. Babb, with an introduction by Nicholas S. Timasheff. \$7.50.

Here is a most stimulating and interesting book. Professor Babb, who has very smoothly translated Petrazycki's treatise, and Professor Timasheff, who has written an excellent introduction, merit the highest praise for rendering accessible to American legal circles an outstanding work of one of the greatest Slavic philosophers of law of all times.

Petrazycki was one of those rare geniuses who, aware of the shortcomings of the recognized theories in his field of science, discarded all the traditional doctrines and approached the subject in his own way, building up a new coherent theory capable of explaining all the phenomena under examination. He contributed new ideas to methodology, psychology, sociology, philosophy in general, and law.

In *Law and Morality*, Petrazycki analyzes the traditional concepts of law and finds that they fail to explain adequately what legal phenomena are. He is especially critical of those who regard laws as unilateral commands of the government which must be abided by under threats of sanctions, and strongly condemns the late nineteenth century German school of thought with Thering as its outstanding representative. Compulsion is not an ingredient of what we term law; the State may use it to enforce its legal order, yet it is a misconception, Petrazycki says, to explain legal phenomena in terms of purely external constraints and prohibitions. The application of force may be the result of a violation of a legal duty, but it does not go to the essence of the law itself. Says Petrazycki:

In order to save his life the traveler who has fallen into the hands of a band of robbers can fulfill the commands of the more powerful and hand over his purse, but probably even the robbers would not assert the presence of an obligation as such.

*Neither law nor morality has anything in common with commands and prohibitions as such.*¹ (Emphasis added.)

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¹ P. 158.

In the last sentence, Petrazycki's conviction that law and morality are closely connected is reflected and emphasized. Legal and moral experiences are considered by him as two branches of ethics.

The novelty lies, chiefly, in this unorthodox classification; still, it extends to all the underlying observations. From the outside world, Petrazycki brought legal phenomena to the inward experiences of every individual. Just as the moral ones, they happen in the consciousness of human beings, except in those underdeveloped in this respect and incapable, wholly or partially, of perceiving any sense of obligation. For example, there are individuals for whom larceny is not a legal experience. The essence of morality as well as that of the law lies in the conviction, in the minds of men, that they have some duties to fulfill towards other men, or that the others have some obligation towards them. Processes occurring deep in the minds of individuals must be carefully analyzed. Once the existence of duty is recognized, an "ethical impulsion" takes place.²

But then, what is the difference between law and morality? Moral obligations are free; there are no corresponding claims helping the one to whom they are owed; moral norms are unilateral.³ In other words, ethical phenomena which are purely imperative belong to the sphere of morality. On the other hand, those which involve an obligation with a corresponding claim (right) are termed legal. Law is nothing else than "imperative-attributive ethical phenomena."⁴ Needless to add, moral and legal experiences often overlap.⁵

It follows that the field of law is much broader than is usually recognized. Besides phenomena which are traditionally considered legal, there are scores of situations in which law appears, although no jurist of the traditional school of thinking would admit it. Law exists even where there are no "normative facts" like statutes, customs or case-law. But, in a large majority of situations, people are not familiar with codes and statutes; still, they realize the existence of rights and duties. Under this broad conception of law, the rules of games or of *savoir vivre* are legal;⁶ so are some mental processes of a child.⁷ Another field of legal experiences is the legal order of criminal organizations; as in other cases of legal phenomena, its essence lies in the consciousness of the members of criminal gangs. Their respective rights and duties are a reality in their minds. The analysis of criminal groups, with an organization which could be assimilated to a government endowed with all three powers—executive, legislative, and judicial—is most interesting.⁸

An interplay of legal experiences rooted deeply in the minds of the members of a certain community, with the rules of law which are officially in force, can take place in some primitive tribal or religious societies. The barbaric laws of the inhabitants of a colony may be outlawed by the colonial power. They continue, however, to exist as long as they "operate in the minds of certain strata of the population."⁹ Such minds often hold tenaciously to certain inveterate legal rules, like the right of blood-vengeance and the right of heads

² P. 35.

³ P. 45.

⁴ Pp. 62, 90.

⁵ P. 61.

⁶ Pp. 64-65.

⁷ P. 69.

⁸ P. 72.

⁹ P. 74.

of families to subject their wives and children to the punishment of death. The result is that sometimes a dual system of law may continue to exist, even though one of them imposes severe punishments "upon persons acting in accordance with the directions of their legal conscience in effectuating rights sacred in their opinion or in fulfilling a sacred legal duty."¹⁰

Petrażycki also recognizes legal experiences in the relations of human beings and animals. He says:

If we are dealing with animals—with dogs, for example, requiring of them certain actions or abstentions and punishing them for disobedience—we not infrequently experience imperative-attributive processes with regard to them wherein they figure as subjects of obligations.¹¹

Here are some examples:

In those types of hunting where it is the accepted practice to reward dogs that have contributed to the success—with certain parts of the slain game, for example—hunters consider to which of the dogs the reward is due, and disputes of a legal character arise: that is to say, a legal mentality is at their basis. If the owner of an old horse, that has served him faithfully and truly when it was younger, nonchalantly let it starve, people with a more subtle ethical (and particularly a more subtle legal) conscience would disapprove and even be indignant over the injustice.¹²

As other unorthodox examples of legal experiences, Petrażycki discusses obligations owed dead persons, such as preservation of their graves,¹³ and duties in respect to deities in primitive societies, such as furnishing them with food and drink.¹⁴

Naturally, the author realizes that from the point of view of contemporary legal science, his approach is "a completely inadmissible scientific heresy: a strange and incoherent fallacy."¹⁵ As pointed out, law is for him a much broader field than for any jurist of the traditional schools. Legal experiences as described by him, if containing "no references to outside authorities and . . . dependent thereof," constitute the "intuitive law" as contrasted with the positive law of a given society.¹⁶ The two may either conform to each other or conflict, not only in primitive groups, but also in modern societies. Since legal phenomena occur in the consciousness of individual people, intuitive law remains individual, and "there may be said to be as many intuitive laws as there are individuals." However, many "problems of intuitive law find a similar solution in the intuitive law of large circles or of broad categories of people."¹⁷ Even if positive and intuitive law concur, the foundation of legal principles is to be found in psychological processes; property rights, for instance, are based on the considerations "in the minds of the owners and of the others who ascribe rights of property to someone."¹⁸

Of course, the more that positive law concurs with intuitive law the better. If

¹⁰ P. 74.

¹¹ P. 79.

¹² Pp. 80-81.

¹³ P. 83.

¹⁴ P. 85.

¹⁵ P. 81.

¹⁶ Pp. 57, 224.

¹⁷ P. 226.

¹⁸ P. 126.

a collision occurs, statutory law may become a complete fiasco and fail to be observed. Again, statutes which were perfectly operative may lose their authority with the evolution of the intuitive law. Numerous are the instances of "cruel punitive statutes ceasing to function because of the influence of a more gentle and humane intuitive law, which has changed."¹⁹ Here, intuitive law was more progressive than the positive one. And a similar situation existed and exists today in hundreds of instances. Intuitive law either abrogates positive law, or precedes it, with the change of social and ethical ideas; and Petrazycki heartily believes that the human race is improving, in the course of ages. He develops one of the examples I have cited:

In the earlier savage and crudely barbaric time, people were not inclined to ascribe and to respect the rights (most elementary from our point of view) of the vast majority of other people—slaves, persons of another race or tribe, and so forth—to say nothing of animals. However, the cultural process gradually but undeviatingly changes the human mind substantially for the better. And . . . it may be hoped that certain moral and legal obligations with reference to animals will become the common ethical property of all mankind, as is suggested by the abundant and animated literature in defense of animals.²⁰

In extreme cases of discordance between the intuitive and the positive law, the conflict may culminate in bloody revolutions and violent *coups d'état*.

Sometimes, however, positive law goes in advance of the intuitive law. When serfdom was abolished, in Russia, under Alexander II, the new officially declared relationship between squires and peasants did not gain immediate recognition from a large number of either class. After some time elapsed, however, intuitive law followed the positive law.

Special attention is given by Petrazycki to the idea of justice. At all times, justice was considered as "the loftiest guiding light," and attempts were made to establish its relation to law. Justice is nothing else, says the author, than "intuitive law in our sense." When we say "justice demands" or "according to justice he is bound," we do not refer to positive law, and do not care whether it is agreeable to our conclusions; we know that, in our consciousness, imperative-attributive experiences are evoked.²¹

Recognizing the fact that law and morality are interrelated and that law should not be contrary to morality but rather based on moral considerations, we may disagree with Petrazycki's classifications and his broad definition of legal experiments, many of which we would not connect with law. However, one merit of the great scholar cannot be denied: he dealt a blow to the simplistic identification of the law with organized power to command, supplied with force, and drew attention to the psychological processes which either are a part of what we call law, or even constitute the law themselves. The democratization of law follows. It is not created by the king or a few legislators; it is a reality existing in the minds of all individuals.

It is impossible to do justice either to this challenging treatise or to Timasheff's excellent introduction in a short review. In order to keep abreast of the

¹⁹ P. 251.

²⁰ P. 82.

²¹ Pp. 241 ff.

development of the thought of Petrazycki, one must read carefully one sentence after another; and a review of the book not only fails to answer hundreds of questions arising in the mind of its reader, but also may be misleading by its brevity. If these few observations seem to deal with an interesting work, the book should be read in full. But it will not be very easy reading. Petrazycki uses his own vocabulary, and if one misses his explanation as to the meaning of the terms, further passages of the book may be impossible to be understood. The author does not abide by the usual legal and philosophical parlance for two main reasons: first, he created his own concepts, previously unknown, or invested the old ones with new life and significance; second, while some of his Roman law studies were written in German, and while his contributions to codification of the law were written in his native Polish tongue, *Law and Morality* and most of his works in jurisprudence were written in Russian, a language which he was never able to master perfectly. Most of the terms of Latin origin found in his book are used by Petrazycki in their Polish sense and are misleading in a Russian text.²² This fact, of course, greatly increased the difficulties met by Professor Babb in translating the study.

As in writing, Petrazycki's use of the Russian language in oral utterances had many deficiencies; his accent was definitely Polish.²³ According to an anecdote about the great scholar, one of Petrazycki's disciples expressed his enthusiasm about the new approach to the law by his professor, and added that the only unfortunate thing was that such a great man and the most famous jurist of the University of St. Petersburg²⁴ spoke poor Russian and used many foreign words. "And who are you, my friend?" asked the master. Astonished, the student answered: "A student of the Faculty of Law of the University of St. Petersburg." "Why," said Petrazycki, "did you use a single purely Russian word in answering my question?" In fact, all words were of foreign origin, the name of the big town included. This conversation spread among the students, and he never heard observations of this kind again.

In spite of his difficulties with the language and his young age when he assumed his duties as a member of the faculty, the contents of his lectures (the lecture method was and is used in European law schools) must have been fascinating since hundreds of listeners, students of law and of other schools, often including faculty members, gathered in the largest classroom in order to hear Petrazycki. Those who wanted to find a seat, had to come far in advance. Some were standing, and the last arrivals were unable to enter the overcrowded room.

The entire life of Petrazycki was unusual, from the beginning to the end, just, as he was an unusual man: from the beginning—because although he came from a well-to-do family of squires, he inherited little or nothing because the estates of his family were confiscated by the Tsar as punishment for his family's participation in the unsuccessful uprising of the Poles against Russia in 1863-1864; to the end—because he ended his life by suicide in his residence near Warsaw in 1931. This tragic occurrence might bring up the question whether Petrazycki's personality was well reflected

²² See examples given in the Translator's Notes.

²³ Introduction, p. xxi.

²⁴ Petrazycki taught at the University of St. Petersburg from 1898 to the revolution.

in his writings, in which he appears a perfectly well-balanced philosopher, taking life stoically as it comes, and believing in the progress of humanity, as we have already observed. Even Timasheff suggests in his introduction²⁵ that the suicide was caused by Petrazycki's pessimism over political matters. In the light of information which I have from a reliable source (Mr. Andrzej Plesniewicz, a close cousin of Petrazycki who loved him as his own son), the explanation is quite different, and fits much better with the picture of Petrazycki the philosopher. At the close of his extraordinary career, he realized that his mind was no longer as brilliant as previously and that he could not write with the logic, ease and clarity of the past. He decided to leave this world still at the summit of his glory, and to remain in the minds of those who knew him as a man matched by few if any. Since his faith was not deep, religious scruples were slight. A notebook found after his death revealed that Petrazycki prepared himself for his end over a period of three months, resolving to complete during this time a few tasks which he had already undertaken. The plan was carried out in every detail. On the date set, he invited some members of his family and friends for lunch. Before they came, he shot himself, and upon their arrival, he was dead. They found excellent food prepared—a real “stypa,” a delicious meal taken at burials by those surviving, in accordance with a centuries-old custom of ancient Poland.

The popularity that the teachings of Petrazycki gained in pre-revolutionary Russia were an indication that the psychological school of law which he founded would spread and gain world-wide attention. But political and military developments which upset Europe and the whole world in 1914-18 prevented this from happening. *Silent leges inter arma*. The universe had more pressing problems to solve during the general upheaval and period of reconstruction after the disaster of the war. Even Petrazycki who intended to polish and further develop his theories did not carry out this plan. After Poland recovered its independence in 1918, he became Professor in the University of Warsaw and devoted most of his time in reborn Poland to the urgent questions of codification of law for the country.

In Russia itself, after the revolution of Kerensky, recognition of the work of Petrazycki was expressed in his appointment to the Supreme Court. However, he refused to attend its sessions.²⁶ A few months later, when the Communists grabbed power, a misconceived application of his theories resulted in the enactment of a decree which abolished all laws of the Tsarist régime and instructed the judges to administer justice in accordance with the intuitive law of the working class—a system which could not and did not work properly, and was abrogated a few years later. Then, owing to another misconception, Petrazycki was branded as an “idealist” and his doctrine was banned in the Soviet Union.²⁷

A portion of the theories of Petrazycki are now being presented, nearly half of a century late, to the American public. Let us hope that they will find the attention they merit.

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²⁵ Introduction, p. xxxi.

²⁶ Introduction, p. xxxi.

²⁷ Introduction, p. xxxii.

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