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SOME REMARKS ON THE NATURALIZATION OF LAW

Introduction

In 1908, in *Introduction to the Science of Law and Morality* Leon Petrażycki noted:

> The fact that till today no one has succeeded in defining law, even though a lot of effort was put into it and there had been developed innumerable, more or less fundamental and interesting attempts at describing the essence of law, has even led to doubts as to whether the question may be answered at all, or to the acceptance of definitions which are clearly unacceptable.[1]

Since 1908, such convictions have been repeated on many occasions.[2] For some (Petrażycki included) the reason for this is that jurisprudence has never been a proper science. They claim that the only way to give a satisfactory explanation of law is to develop a naturalistic conception thereof. In recent years, due to the astonishing advancements in biology (especially, neuroscience), the project of naturalizing law has become again a subject of heated debate.

The problem is very complex and thus, in this short essay, I will confine myself to some preliminary remarks. I will devote considerable attention to two cases studies: Petrażycki's own reductionist project and a recent proposal by Wojciech Załuski. I will try to evaluate them from two perspectives. First, I will look at how they answer the ontological question ('what is law'), and second, I will consider their answers to the normativity question ('how do legal norms become reasons for action'). The choice of those questions is quite straightforward. The ontological problem is one with which jurisprudence has struggled from its beginnings. The normativity question, in turn, points toward the most intriguing aspects of law: its normative force. I take the liberty of adopting a working definition of normativity (a rule of behavior is normative if it constitutes a reason for action). This is a commonly accepted definition, and – anyway – it suffices for my purposes.

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[1] L. Petrażycki, *Wstęp do nauki o prawie i moralności* (*Introduction to the Science of Law and Morality*), PWN, Warszawa 1959, p. 25.

[2] E.g. H. Hart, *The Concept of Law*, Clarendon Press, Oxford 1961, in the Introduction.

Case study: Petrażycki's legal theory

Petrażycki is considered one of the most eminent – if not the most eminent – Polish legal theorist. His answer to the question 'what is law?' is very original indeed. It does not mean, however, that his conception is flawless. Petrażycki set out to lay new foundations for jurisprudence and claimed that this task requires, first and foremost, an answer to the question, *what is law*. He observed that without such a definition any legal-philosophical and legal-theoretic considerations are carried out in a vacuum:

> This is a principal and prejudicial issue, one which conditions the very possibility of the science of law.[3]

The answer to the question 'what is law' demands, according to Petrażycki, to apply an adequate method. The problem is, however, that the methodological tools Petrażycki uses are out-dated if not anachronistic – even from the perspective of the 19th-century philosophy of science.[4] Petrażycki claims that the goal of jurisprudence – understood as 'a science in the correct sense of the word'[5] – is to look for the *essence of law*.[6] In effect one should try to construct a classical definition of law, i.e. a definition *per genus et differentiam*:

> In order to divide the law scientifically into kinds and determine the differences between them, one should know the *genus* of law (...). It is thus necessary to recognize to which higher, more general category of phenomena law belongs.[7]

Here, in a nutshell, one can find all the ingredients of the Aristotelian view of science. It assumes, first, that in the world there exist *essences*; the aim of science is, thus, to capture those essences in definitions which serve to build a table of essential definitions (Porphyry's tree), one that classifies all entities univocally. Petrażycki's method presupposes, then, a very strong metaphysical view. It also encapsulates a static conception of science. Both those features are inconsistent with the practice of contemporary science.

Furthermore, one has to note that some of Petrażycki's claims open the door to a revision of the Aristotelian orthodoxy. He says, e.g.:

> The foundation of scientific legal policy should be the examination of the causal features and the causal mechanisms of law in general, and of its different kinds and elements in particular.[8]

The quoted passage indicates that jurisprudence should confine itself to the considerations of causal connections, while in the Aristotelian tradition the teleological connections play an eminent role. Moreover, Petrażycki notes also:

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[3] L. Petrażycki, *Wstęp*..., p. 41.
[4] Cf. the views of French conventionalists.
[5] L. Petrażycki, *Wstęp*..., p. 13.
[6] *Ibidem*, p. 39.
[7] *Ibidem*, pp. 31, 35.
[8] *Ibidem*, p. 14.

> Especially in science, where each and every theory needs to overcome attempts at rejection and modification in order to be considered acceptable (...), where one has to do with a 'struggle for life' and only the fittest doctrines survive, one should expect that with the passage of time there should survive objectively sound theories.[9]

Such a declaration fits well with the conceptions of Popper or Lakatos. This is evidence that Petrażycki had many original insights connected to the question of what is science. Unfortunately, he combined them with the anachronistic ideas of Aristotle. This led, in turn, to the development of an incoherent methodology. It wouldn't be devastating if the elements of the essentialist ideology remained at the verbal level only but Petrażycki applied those methodological rules meticulously, what makes his theory of law, one conceived in original sin, an unacceptable one.

For Petrażycki – and that is also Aristotelian – jurisprudence, as well as other humanistic and social disciplines, needs a foundation, which is to be found in a more basic science: psychology. Petrażycki was unhappy with the psychology of his time, in particular, disagreeing with the Kantian heritage it accepted. Kant divided mental phenomena into three categories: knowing, feeling and willing. Petrażycki considered this division incomplete, claiming that one should add to it another, fourth category:

> One should distinguish not three, but four basic forms of inner experiences and four classes of mental elements: (1) emotions, i.e. impulsions (two-sided mental experiences), (2) and (3) sensations and feelings (passive one-sided experiences), (4) processes of the will (one-sided active experiences).[10]

Emotions (impulsions), a category which is essential for the task of defining law, are two-sided, active-passive, while all the other experiences are one-sided. Among the emotions Petrażycki includes hunger and love.[11]

Further, Petrażycki provides us with a classification of emotions. From our perspective, the most interesting are the ethical emotions (emotions of duty), which "are experienced as an inner limitation of freedom."[12] Ethical emotions could be further divided into moral and legal; the former are exclusively imperative (i.e., the actor feels obliged to do something), while the latter are imperative-attributive (the actor feels obliged to do something, but accepts also that someone else has the right to require her to do it). This distinction leads Petrażycki to the famous definition:

> Law, as a separate class of real phenomena should be understood as such mental experiences whose emotions are of the attributive character (...). All the other ethical experiences, i.e. experiences of exclusively imperative emotions, should be deemed moral phenomena.[13]

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[9] *Ibidem*, pp. 205–206.

[10] L. Petrażycki, *O pobudkach postępowania i o istocie moralności i prawa* (*On the Motives for Action and on the Essence of Morality and Law*), Oficyna Naukowa, Warszawa 2002, p. 14.

[11] Cf. *ibidem*, p. 10.

[12] *Ibidem*, p. 27.

[13] L. Petrażycki, *Teoria państwa i prawa* (*Theory of State and Law*), PWN, Warszawa 1960, vol. I, pp. 72, 73, 123.

One should be mistaken, however, if she insisted that Petrażycki identifies legal norms with certain emotions or complex mental experiences. In order to clarify this issue, one should distinguish between such notions as emotion, representation, norm and duty.

Emotion, as noted above, is one of the four basic, irreducible mental experiences. People, according to Petrażycki, have also the power to imagine certain situations or behaviour. Such an imagined representation – together with the emotion it causes – constitutes *a motive* for action. In *On the Motives for Action and on the Essence of Morality and Law* Petrażycki says:

> We are interested, especially, in one particular type of motivation, the one in which there is a connection of representations of various acts with very peculiar emotions, which we deem ethical emotions or emotions of duty.[14]

For instance: if I imagined taking part in a fraud, "I would experience a mental state similar to that which I experience while considering eating a piece of rotten meat, touching a spider or a snake; in normal circumstances I would experience repulsive emotions."[15]

Furthermore, one should distinguish between emotions, representations and motives on the one hand, and legal and moral norms and duties on the other. Petrażycki defines legal (moral) norms as the *contents* of the ethical (moral or legal) convictions.[16] Thus, norms are not emotions, motives etc but they are of an intellectual character. They may be described as specific representations or propositions, which can be grasped (contemplated). It is worth noting that those representations (propositions) serve as primitive terms in Petrażycki's psychology, similar to the notion of *idea* in Hobbes, Descartes or Locke, or the notion of *concept* in Kant.

The notion of duty is defined in a similar way. Petrażycki says:

> Duties are ideal projections, which originate in our minds. Such projections are connected to the described emotions and representations, and not to some things or phenomena in the outer world.[17]

It seems, therefore, that duties should also be called representations or propositions, which are graspable by the human mind. One can find the confirmation of those conceptual distinctions in the following passages:

> The explained difference of *genus* between one-sided imperative (moral) and two-sided duty-imposing (legal) norms and duties is based on the adequate *genus* differences among the emotional-intellectual complex phenomena which are, as we demonstrated, the real base for ethical duties and norms.[18]

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[14] L. Petrażycki, *O pobudkach...*, p. 25.
[15] *Ibidem*, p. 21.
[16] *Ibidem*, p. 33.
[17] *Ibidem*, p. 34.
[18] *Ibidem*, p. 49.

> The basic motivation, which consists in connecting representations of actions with the above characterized repulsive or apulsive emotions, we should deem ethical motivation and the corresponding principles of behaviour – ethical principles or norms.[19]

Therefore, law and morality exist in the minds of people. Law cannot be identified with norms. It would be a mistake, however, to identify it with certain ethical emotions. When Petrażycki says that "law, as a separate class of real phenomena should be understood as such mental experiences whose emotions are of the attributive character," he claims that law is a *complex* mental phenomenon, one that consists of the adequate emotions, norms and duties.

Still, one more problem should be addressed: what is the relationship between the law (in Petrażycki's sense) and the provisions of legal acts. Petrażycki's reply is the following:

> The representations of legal provisions or biblical commandments shall be deemed the representations of "normative facts." Ethical convictions, to which such representations belong, shall be called positive ethical convictions, and their contents – positive norms. Ethical convictions, which lack such representations of normative facts, are intuitive ethical convictions, and the corresponding norms – intuitive norms.[20]

The general mental mechanism proposed by Petrażycki looks as follows: people have the capacity to imagine certain situations, patterns of behaviour etc. There are a plethora of sources of such imagined representations: legal acts, Bible, or any other "normative fact," as well as one's own intuition. Those representations cause the corresponding legal or moral emotions. Together, they serve as motives for action.

In light of the above, one may say that Petrażycki presents us with a peculiar ontology of law. He believes that norms are certain representations or propositions. He claims, moreover, that law cannot be identified with the set of legal norms. Law consists of complex mental states, which include representations (propositions), and emotions, generating together motives for action.

It is interesting that Petrażycki does not address the problem of law's normativity. He does not consider legal (or moral) norms as objective reasons for action. He seems to concentrate on a different question: how does a legal or moral norm motivate people's actions. The key role in this process is played by the relationship between representations of certain states of affairs and the ethical emotions they generate. Does this mean that the reductionist strategy deployed by Petrażycki leads to the elimination of the concept of law's normativity? Does Petrażycki show that the notions of a legal norm which is an objective reason for action is meaningless? The answer is a plain 'no.' The notion of normativity is needed as soon as Petrażycki moves from describing law to the problems of legal policy.

The entire theoretical enterprise described above, which aims at uncovering the psychological mechanisms of how legal and moral norms influence human behaviour, has an additional, *practical goal*. Petrażycki says:

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[19] *Ibidem*, p. 28.

[20] *Ibidem*, p. 33.

> The essence of the legal policy problems boils down to scientifically justified prediction of the effects of enacting legal provisions. Legal policy aims at developing such principles, which – introduced into the legal system or in some other way – would yield the required effects.[21]

Moreover, Petrażycki devotes much attention to describe those "required effects." The legislator, he claims, has a certain goal to realize.[22] The goal is to be reached in a purely instrumental way, with the utilization of the knowledge concerning the mental motivational mechanisms. In such a setting the legislator becomes a "super-human." While "ordinary" people are led by emotions, the legislator applies the rules of pure instrumental rationality. It is necessary, of course, to explain the normativity of those rules. Furthermore, the surprising fact that a certain kind of rules – the rules of rationality – are of totally different character than legal and moral rules is also in need of explanation. Thus, the reduction proposed by Petrażycki is only partial and it suffers from a serious 'schizophrenia.'

In conclusion: Petrażycki offers an intriguing conception of law. Contrary to usual presentations, he does not identify legal norms with emotions. He claims that law is a complex mental phenomenon. Unfortunately, along the way he commits some grave errors. The anachronistic method he applies – Aristotle's essentialism – carries with itself a serious metaphysical baggage. Accepting it, Petrażycki is forced to look for the *essence* of law, an ephemerid nowhere to be found. Moreover, misled by Aristotelianism, Petrażycki looks for a foundational answer to the question 'what is law.' This foundationalism has two faces: first, it requires us to look for a science that is more basic than jurisprudence; second, it launches a search for some basic phenomena, which taken together 'produce' law.

All those deficiencies would be avoidable if Petrażycki recognized the role philosophy should play in any attempt at defining law. Instead, he tried to construct the definition of law directly at the level of the "more fundamental" science of psychology (I disregard the fact that Petrażycki's psychology has little to do with the contemporary psychology, as my remarks are methodological in character). The disregard for the philosophical dimension of his project leads Petrażycki to a premature dismissal of the phenomenon of normativity. It turns out that the normativity problem – reduced to the psychological problem of the motivating force of law – reappears at a different level. When considering the goals of legal policy, Petrażycki explicitly states that a legislator should act according to rules of instrumental rationality, ones that clearly possess some normative force.

Case study: Załuski on the evolutionary philosophy of law

Wojciech Załuski in his *Evolutionary Theory and Legal Philosophy*[23] sets out to illuminate several problems of legal philosophy from the point of view of evo-

[21] L. Petrażycki, *Wstęp*..., pp. 13–14.

[22] Cf. K. Motyka, *Leon Petrażycki's Challenge to Legal Orthodoxy*, Towarzystwo Naukowe KUL, Lublin 2007, pp. 48–49.

[23] Cf. W. Załuski, *Evolutionary Theory and Legal Philosophy*, Edward Elgar, Cheltenham 2009.

lutionary theory, or – more precisely – evolutionary psychology. He attempts to answer several questions, among which are the ontological question and the normativity question. Załuski applies a cautious strategy, one that safeguards him from such methodological mistakes as violating the 'Is – Ought' distinction. He begins by reconstructing the evolutionary view of human nature. This concept, in turn, is compared with the anthropological theses presupposed by different conceptions of law. If the presupposed view of the human nature is incompatible with the evolutionary view, a given legal-theoretic conception may be deemed incompatible with the findings of evolutionary theory.

Załuski identifies two aspects of 'human nature:' the dominant motive for action and the dominant mode of action.[24] He claims that evolutionary theory implies a view according to which humans are narrowly altruistic and imperfectly rational. It must be noted, that the evolutionary view of human nature is of statistical character: it consists of the theses that *most* people are narrowly altruistic and imperfectly rational. Moreover, it is best to consider this concept a *technical device*: it serves as a short term standing for a longer description that, in addition to the two theses (concerning human narrow altruism and imperfect rationality), includes some assumptions of the evolutionary psychology.

Replying to the ontological question, Załuski begins by analyzing several conceptions of the origins of law.[25] According to the Hobbesian model, people are generally egoistic, the state of nature is a state of chaos and law is established by the way of social contract. The Hayekian model, on the other hand, assumes that the state of nature is orderly, people have collectivist preferences and the modern law aims at minimizing those collectivist attitudes which stand in the way of the development of bigger societies. Finally, the Darwinian model assumes that people are narrowly altruistic, that the state of nature is a state of order, which – by strengthening of the cooperative dispositions people have – developed into the modern society. Within such a setting both the Hobbesian and Hayekian conceptions prove to be incompatible with the findings of the evolutionary psychology.

More important – but quite insufficient – is Załuski's answer to the question what *is* law. Załuski begins by recalling Herbert Hart's distinction between the external and the internal points of view and claims that what he calls the primitive law boils down to the regularities in the cooperative behaviour of the members of a society coupled with the acceptance of those regularities as patterns of obligatory behaviour. Załuski claims further, that such regularities and their acceptance can be explained in an evolutionary perspective. The fact that human beings are narrowly altruistic and imperfectly rational constitutes a base for human cooperative dispositions. These in turn, explain why human behaviour is regular and why those regularities are taken by people as patterns of obligatory behaviour.

Załuski develops his theory by utilizing the concepts of emergence and supervenience. He claims that legal norms are emergent entities which supervene on the regularities of social behaviour and the acceptance of those regularities as the patterns of obligatory behaviour. He observes that this thesis is not formu-

[24] Cf. *ibidem*, chapter I.
[25] Cf. *ibidem*, chapter II.

lated on the basis of the evolutionary theory. He justifies it by pointing out that (1) law does not boil down to sole regularities of behaviour; (2) nor it is the sole acceptance of certain patterns of behavior as obligatory; (3) nor it is a simple sum of the two. As an emergent entity, legal norms: (1) are based on some lower-level entities (regular social behaviour, specific mental states) but are not reducible to them; (2) display downward-causation (law can influence the lower-level entities); and (3) are ontologically different from the lower-level entities.

The ontological conception proposed by Załuski is undoubtedly very interesting – especially when compared to Petrażycki's. First, it explains the emergence of law on the basis of the evolutionary theory, the best theory we have concerning the origin of man and human society. Second, the ontological view favoured by Załuski, one according to which law is an emergent entity supervening on the regularities of social behaviour and some mental states – is consistent with the conclusions of the evolutionary theory. Third, Załuski stresses that the contemporary law is not artificial or purely conventional, a phenomenon incompatible with 'human nature.'

However, there are several pieces missing in Załuski's jigsaw. First and foremost, he does not explain in a satisfactory way, *why* law is to be considered a supervenient entity. In other words, the ontology he offers appears *deus ex machina*. From this, there follow several troublesome consequences. Załuski's reformulation of Hart's conception with the use of the concepts of emergence and supervenience suggests that Załuski's conception is concerned only with the ontology of *legal norms*. Such a conception lacks, so to speak, the required ontological horizon. Even if we accept that legal norms are emergent entities, we would also like to know what are moral norms, the rules of rationality, the rules of language etc.

Why this is important becomes clearly visible when one considers Załuski's answer to the normativity question.[26] Załuski distinguishes between two aspects of the normatively question: the motivational aspect and the normative aspect. The former is connected to the problem of how legal norms become motives for action and the latter with how legal norms can serve as reasons for action. Załuski's treatment of the first problem is very persuasive. He claims that there are several evolutionary adaptations that explain the motivational force of legal norms. Among them, he mentions the tendency to obey authority, the rudimentary sense of justice and the so-called normative module.

Unfortunately, Załuski's answer to the question of how legal norms can serve as reasons for action is less satisfactory. He claims – in a surprisingly arbitrary way – that the question can be answered only in two ways: the normativity of law may have its source in a *moral* norm, one that obliges us to obey the law; or alternatively, legal norms may have normative power because they are *at the same time* moral norms. In such a setting, law's normativity is always reducible to the normativity of moral norms. One may ask why Załuski does not consider other options: that law's normativity is *sui generis*, or that it is reducible to the normativity of the rules of rationality (as in the case of Petrażycki's conception).

[26] Cf. *ibidem*, chapter IV.

In accord with his reducibility thesis, Załuski considers the sources of the normativity of moral norms. His answer is, again, unsatisfactory. He says that one can analyze this problem once the evolutionary view of human nature is reconstructed and contrasted with various philosophical-political conceptions. It is hard to understand how it works. Imagine I accept some form of libertarianism or I accept Rawls' theory. Both conceptions imply some moral norms. Now, Załuski claims that such conceptions presuppose a certain conception of human nature. He even goes to claim that the libertarian view of human nature is incompatible with the evolutionary view, while the Rawlsian anthropological theses are consistent with the findings of the evolutionary psychology.[27] This is a very bold statement. Assume, however, that it is true. So what? Does it explain the normativity of moral norms in any way? Surely, it is not the compliance with the findings of natural sciences (i.e. the compatibility of the anthropological theses) that gives the Rawlsian rules their normative strength. The mystery of normativity remains a mystery; it escapes explanation.

While – and for obvious reasons – Załuski's proposal is superior to that of Petrażycki, it is not devoid of troublesome aspects itself. Załuski uses better science than Petrażycki does. Moreover, Załuski is methodologically cautious. He does not believe the findings of evolutionary theory to be directly relevant for the construction of legal ontology. He recognizes the intermediary role of philosophy, which leads him to utilize the concept of the evolutionary view of human nature. Such methodology carries no serious ontological baggage. Moreover, Załuski's conception is not foundational. He does not search for a more basic science, one that jurisprudence can be firmly placed on. He does not see law as composed of some basic elements (consider his thesis connected to the downward causation). However, Załuski's ontology of legal rules hangs in a vacuum. He does not develop a satisfactory conception of emergent legal rules, he just proclaims it. Still, he does not consider legal rules in opposition to other kinds of rules (language rules, rationality rules etc.). Finally, he accepts – again, without a solid justification – that the normativity of law is reducible to the normativity of morality, which, ultimately, escapes explanation.

Concluding remarks: how to naturalize law?

The above presented analyses can serve as a solid basis for developing several methodological directives for constructing a naturalized conception of law.

(Directive 1) **Ontological baggage**. One should avoid unrecognized ontological baggage. The method one uses and the tacit assumptions one accepts may introduce serious ontological restrictions, as in the case of Petrażycki. This is a serious mistake, as it predetermines the answer one is looking for. It is not to say that I believe it possible to construct a conception of law without assuming any ontological theses. However, those ontological commitments should be clearly stated and, if necessary, revised or abandoned.

[27] *Ibidem*, p. 136.

(Directive 2) **Antifoundationism**. One should avoid looking for the ultimate foundation of legal phenomena. The option that law cannot be reduced to some simpler entities, but e.g. supervenes on them, while influencing them, should at least be kept open.

(Directive 3) **Jurisprudence is philosophy**. One should not search for a science that would be foundational for jurisprudence. Jurisprudence is, ultimately, a branch of philosophy. As such, it cannot be reduced to psychology, physics etc. It does not mean, however, that it cannot utilize the findings of those sciences. However, it is never the case that the findings of natural sciences are directly applicable in jurisprudence. These are always some interpretations of the scientific theories – i.e. some *philosophical conceptions* – that are at play, when one tries to assess some legal-philosophical problems from a naturalistic perspective.

(Directive 4) **Ontological horizon**. One should not confine oneself to the construction of a conception of law, without considering the 'surroundings.' For instance, a conception of legal rule which is in no way connected to some conception of moral norms, rules of rationality etc., is of little value.

Whether these directives can serve to develop a coherent naturalistic conception of law is an open question and I leave it for another essay.