Leon Petraycki and contemporary socio-legal studies

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LEON PETRAŻYCKI AND CONTEMPORARY SOCIO-LEGAL STUDIES

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ABSTRACT

The work of the Polish-Russian scholar Leon Petrażycki from the early decades of the twentieth century holds a strikingly paradoxical position in the literature of juristic and socio-legal scholarship: on the one hand, lauded as a supremely valuable contribution to knowledge about the nature of law and, on the other, widely neglected and little known. This article asks how far Petrażycki's theories, expressed in writings by and about him available to an international readership, can provide insight for contemporary socio-legal studies – not as historical background but as living ideas. How far can his work speak to current issues and inform current debates? What obstacles stand in the way of this? Why have few international scholars engaged with his theories despite their rigour and originality? The article starts from this last issue before addressing the others. It argues that Petrażycki's radical legal theory offers strikingly distinctive resources for rethinking issues about the role of law in multicultural societies, the nature of developing transnational law, and the significance of law as an aspect or expression of culture.

INTRODUCTION

The work of the Polish-Russian scholar Leon Petrażycki from the early decades of the twentieth century holds a strikingly paradoxical position in the literature of juristic and socio-legal scholarship. Indeed, the polarisation between available indicators of its status – on the one hand, lauded as a supremely valuable contribution to knowledge about the nature of law and, on the other, widely neglected and little known – may be the most extreme in modern legal theory.

It is true that 'past and ever new generations of scholars have been drawn to his heritage' (Kojder, 2006, p. 333). Almost all who have devoted serious study to his writings, – and there have been very many throughout the century since they were produced – hold them in high respect. He was called 'possibly the greatest scholar of law in the twentieth century' by one of his leading followers at that century's mid-point (Sorokin, 1950, p. 322), his work 'unexcelled, even hardly rivalled, by any other theory of law and ethics' in that era (Sorokin, 1956, p. 1150). Reading Petrażycki's available writings carefully today, it is hard not to be dazzled by the ambition, imagination and perceptiveness of his thinking and its rigour over an unusually vast intellectual terrain.

He offers not only a systematic and intricate legal theory, utterly different from those that now dominate juristic thought, but also an original system of psychology to underpin it.[1] In addition he provides a blueprint for a new policy science to direct legislation far beyond its usual pragmatic objectives. In doing this he also looks back to identify long-term, scientifically-explicable, historical tendencies of legal development and he looks forward with a morally rich vision of what a truly civilised society of the future might be. He provides many subtle, psychologically-informed insights into the relations of law and morality. And he clearly foreshadows contemporary concerns with legal pluralism, developing one of the most elaborate discussions of this phenomenon in the literature of legal thought. Finally, his distinctive ideas on the nature of social science, developed mainly in unpublished manuscripts and in his teaching, have been publicised by his followers.

Yet this vast intellectual project has not attracted the scale of international interest one might expect. Petrażycki's contribution to the study of law and society has justifiably been called 'unrecognised' (Gella, 1977; Podgórecki, 1980-1) and in international debates in socio-legal studies (systematic, empirically-oriented studies of law as a social phenomenon) his name is hardly mentioned. His theories are entirely unknown to most jurists and socio-legal scholars in the English-speaking world.[2] He surely belongs to the intellectual cultures of the main countries where he pursued his career – Russia (in St Petersburg between 1898 and 1918) and subsequently Poland (in Warsaw until his death in 1931). But he does not yet belong to the intellectual cultures of the Anglophone countries where socio-legal inquiries have notably flourished in the past half century.

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[1] Edoardo Fittipaldi (2012, p. 14) sees Petrażycki as adopting 'a typical 19th-century psychology that is hardly compatible with the research that has been done' since his time. But he considers that this in no way prevents productive use of Petrażycki's ideas about law and his book is an elaborate attempt at developing them. On one view (Walicki, 1967/1992, p. 236), since Petrażycki's method has 'very little in common with the methods of empirical psychology… it would be more proper to emphasise its closeness to phenomenology'.

[2] On the Western reception of Petrażycki's ideas see Kojder (2006, pp. 346-9). For rare recent discussions see Treviño (2013), Deflem (2008, pp. 78-89), Banakar (2002). Fittipaldi (2012) is an elaborate study of legal ontology developed from Petrażycki's ideas.

It has been suggested that 'literature about Petrażycki is scarce' (Peczenik, 1975, p. 86) but this is a strange comment. It is true that much of his writing is available only in Russian or Polish, so scholars not having access to these languages cannot hope to evaluate his work in any comprehensive way. But they can hardly be excused for remaining ignorant of his main ideas.[3] Even though the only work by Petrażycki easily available in English is Hugh Babb's translation (Petrażycki, 1955), published in 1955, of approximately one fifth of his two primary Russian works (Sorokin, 1956, p. 1150), Russian and Polish scholars have written extensively in English and other languages explaining Petrazycki' s ideas. Nevertheless, the literature of commentary is very scattered. Often it devotes much space to re-iterating the central elements of Petrażycki's thought. This ceaseless repetition seems necessary because, even after much effort over many decades up to the present day, the ideas are still not internationally established.

This article asks how far Petrażycki's theories, as expressed in writings by and about him available to an international readership, might provide insight for contemporary socio-legal studies – not as historical background but as living ideas. What aspects of his work can speak to major current issues and inform current debates? What obstacles stand in the way of this? In trying to answer these questions it is also necessary to ask why most international scholars have been deterred from engaging with his theoretical legacy. The article starts from this last issue before addressing the others.

PETRAŻYCKI IN THE WORLD OF JURISTS

Since the centre of Petrażycki's work is a theory of law it might be assumed that its best prospects of exerting influence would be in the juristic world – the world of lawyers' speculations on and rationalisations of their professional field. But some brief comments on his legal theory may show why its socio-legal rather than juristic significance seems ultimately most important to explore at the present time (though these two kinds of significance should not be seen as mutually exclusive).

Petrażycki was determined to produce a scientifically adequate theory of law. An adequate theory, in his view, is one that holds true for all phenomena in the class of phenomena to which it is said to apply, but not to others outside the class (Kotarbiński, 1975). Such a theory requires that law be rigorously conceptualised to indicate such a class. Arguing that all juristic conceptualisations of law (e.g. as the will of the state, or the law applied by courts or other official agencies) fail in this respect, Petrażycki conceptualises law in a radically different way, as something that exists only in the mind.

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[3] Translation of more of Petrażycki's work into English would certainly be valuable, especially if the selections from it were made with a socio-legal (rather than specifically legal philosophical) readership in mind; the main foci of Anglophone legal philosophy are surely now far removed from his concerns.

It is a particular kind of *mental experience* or impulsion, a bilateral (active-passive) experience that is distinctively *imperative-attributive*. That is to say, every individual experience of law combines an active (attributive) element of right or entitlement and a passive (imperative) element of obligation or duty (Petrażycki, 1955, p. 47). Law is distinguished from morality in that in the latter only the imperative element of duty and not the attributive element of right is present.

Law as a purely mental experience has no objective observable reality; it remains the subjective experience of each individual. But by a psychological process of *projection* this experience is often 'externalised' so that it is understood by individuals as a norm somehow standing apart from them and acting on them, as if from outside. Strictly speaking, then, all normative expressions of law (such as statutes, judicial decisions and other legal phenomena studied by jurists) are just mental experiences 'projected outwards and viewed as objective reality' (Rudzinski, 1976, p. 111). They are 'phantasms'. However, where for various reasons these projections tend to become uniform (so that they are *widely shared* by many individuals) they begin to appear as a social reality, not just a subjective experience of each individual. The projections themselves are then often thought of as law, in the form of norms.

Often, but certainly not always, the mental experience of law refers to 'some authority or reason outside that experience itself' (Northrop, 1959, p. 87) which Petrażycki calls a *normative fact*. Such facts can include any sources of authority that the individual recognises. These give content to psychological experiences of law, fixing the sense of right and duty. Law derived from the individual's acceptance of normative facts, Petrażycki calls *positive law*, but it is important to recognise that this is not what lawyers typically understand as positive law. For one thing, normative facts can encompass much more than juristically recognised sources of law (legislation, judicial decisions, etc.); they may not have any 'official' character or any acceptance by the state as legally significant. For another, normative facts have legal significance only as elements in the individual's mental experience of law.

So – in a claim that must have bewildered many of his lawyer readers – he notes that normative facts can be *purely imaginary*: a contract with the Devil may be a normative fact that operates to determine the ethical impulsions of someone who believes in its existence. Where these impulsions are imperative-attributive they are examples of law. Indeed, following Petrażycki's theory, 'one wood-goblin may make a contract with another' (Babb, 1938, p. 518; cf. Petrażycki, 1955, p. 83). Law that is unrelated to normative facts, Petrażycki calls *intuitive law*. In this case the experience of right and duty arises directly in the individual's mind unmediated by some accepted authority, so intuitive law encompasses the sense of justice (which may or may not correspond with positive law). Thus, Petrażycki makes justice, as a sense of entitlement and obligation, a kind of law existing intuitively in the citizen's mind. Justice 'is nothing but intuitive law in our sense' (1955, p. 241). So law as a class

encompasses *all* imperative-attributive experiences without exception. As one writer notes, this definition of law is 'arguably the widest… ever proposed' (Motyka, 2007, p. 34).[4]

It would seem at this point as though Petrażycki's theory has few direct links to juristic thought.[5] The distinction between what (positive) law is and what it ought to be (justice), which is at the base of modern positivist jurisprudence, is brought *inside* the Petrażyckian concept of law. And even positive law seems to be merely a mental experience rather than the objective datum that jurists study.

Matters seem to be made only worse when, alongside the positive-intuitive distinction, Petrażycki introduces an entirely different one between *official and unofficial law*. Official law is the law 'which is to be applied and sustained by representatives of the state authority in accordance with their duty to serve society' (1955, p. 139). So, at least here, we are clearly addressing the law of jurists. However, there is also unofficial law 'which does not possess this significance in the state'. Petrażycki seems to be identifying official law as an objective social reality (the state representatives and their use of law can be generally observed) and this makes it a phenomenon that jurists can recognise as their normal province of law. However, the idea of unofficial law, which Petrażycki defines only negatively, indicates vast horizons of 'law' (such as the internal regulation of families and of organisations and associations of all kinds) which jurists would typically not recognise as such.

With the notion of unofficial law, Petrażycki confronts state law with a radical *legal pluralism* – indicating types of regulation that from some standpoints (sociological, non-juristic) can be considered as law but from others (those of state representatives) cannot. So he puts at the heart of his work the idea, often juristically disturbing, of a plurality of effective regulatory regimes co-existing in the same place and time, with the possibility of a diversity of determinants of their relative authority.

These characteristics of Petrażycki's theory surely show why it has been resisted by most jurists who have studied it. As a descriptive account of law it avoids normative evaluation. Hence it recognises law in each of the four categories it identifies and in their combinations. It makes no judgment about the general value or validity of any of these kinds of law, treating this as a matter for decision in particular contexts. But such valuations are juristically fundamental. So it seems that it inhabits a different intellectual terrain from the juristic one. This is so, even though it contains many juristically relevant insights, especially in its reflections on the law-morality distinction and in arguments about the unifying tendencies of law, the various kinds of sanctioning of law and their development, the

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[4] It has even been claimed that Petrażycki's concept of law is 'so comprehensive that it contained all human and social phenomena' (Gella, 1977, p. 76) but this is to miss its specific analytical focus and purpose.
[5] Walicki (1967/1992, p. 216) notes that 'he was often accused of representing an anti-juridical approach, dissolving law in the vast variety of socio-psychological phenomena; on the other hand… he saw law as virtually omnipresent in human life….'

significance of intention and motive in law, the place of third party intervention in legal disputes, and the role of law in economic life and in the emergence of structures of political authority.

PETRAŻYCKI'S RECEPTION AMONG SOCIOLOGISTS OF LAW

In the light of this, the prospects for drawing productively on Petrażycki's legal studies today might seem greatest in fields of research not tied to juristic concerns but aimed at studying the nature of law empirically as a social phenomenon, using the resources of social science. After all, his aim, as has been seen, was to develop a scientific explanatory theory of law and he came to recognise the importance of sociological theory and a sociological approach to law (Lande, 1975; Pałecki, 1984; Walicki, 1967/1992, pp. 245-51). But obstacles seem to have existed and they can best be identified by noting how the three most prominent Western sociologists of law who have been deeply influenced by Petrażycki and who have tried to apply his ideas have felt the need to modify or supplement them. It is significant that each of these scholars (Pitirim Sorokin and Nicholas Timasheff in the United States, Georges Gurvitch in France), as Russian speakers and former students or colleagues of Petrażycki in St Petersburg, had exceptional access to his teachings.

Both Gurvitch and Sorokin addressed the question of whether Petrażycki's psychological theory of law could give rise to an appropriately *sociological* perspective. Sorokin felt the need to defend Petrażycki against criticisms of the 'alleged one-sidedness' of his theory in confining the reality of law to psychological experience and 'its alleged neglect of the objective social form' of this reality by treating it as a mere projection or phantasm (Sorokin, 1956, p. 1153). Sorokin insisted that 'Petrażycki deals with trans-subjective, social forms of law as a reality' and he summarised how this reality arises: the projection of mental experiences as norms allows them to be 'objectified' or 'externalised'; they can then be communicated (in speech, writing, etc.); through such communication they can 'become diffused among many individuals and groups' and take on 'a sociocultural form' (1956, pp. 1155-6).

Indeed, Petrażycki writes that the inevitable and potentially dangerous conflicts arising between individuals' different personal sense of rights and duties make harmonisation among them essential. In the face of such conflict or the threat of it, they cannot remain purely subjective experiences of each individual. They have somehow to become trans-subjective, so that they are shared and take on a social character. Differences between individuals' mental experiences of law have to be removed. On this basis, generally recognised positive law and official law may develop and large structures of social and political life (such as the state and its agencies) arise (Petrażycki, 1955, pp. 112-13, 129-37) as what we might call a crystallisation of harmonised individual legal experiences to form a sociocultural reality. Thus 'objective' socio-legal phenomena emerge from their origins as purely

individual mental phenomena. In emphasing such ideas, Sorokin notes that he draws on Petrażycki's writings, on his teaching in St Petersburg (which Sorokin experienced) and on unpublished writings. All of which is a reminder of the fact that much of what Petrażycki wrote on sociology was not published and no longer survives.

Elsewhere Sorokin was more critical of Petrażycki. He claimed that the theory did not explain why people have particular law-convictions, why some such convictions prevail in certain groups but are absent in others, and why in a complex society only some law-convictions become official law while others are suppressed and persecuted. If the state's power only exists in the law-convictions of its subjects, why do people continue to accept state authority which they despise? How and why do only a few people determine what official law is? He thought that 'the law-factor appears principally as a mere channel through which numerous non-law forces find their aggregate outlet' and that the power of these forces is what determines law's power (Sorokin, 1928, pp. 704-5). In other words, there was much that the psychological theory of law and state could not explain but that sociology had to address.

Later, however, Sorokin restated the essence of Petrażycki's legal theory in his own sociological terms, emphasising the 'objective' social reality of what he called law-norms and seeing these as 'the skeleton, the heart and the soul' of every organised group calling forth 'a government-power' within it to enforce them (Sorokin, 1947, pp. 677, 679). Thus, for Sorokin, official law is seen not (as by Petrażycki) merely as the law administered by state authorities. It is the primary law of *any organised group*, backed by the coercive power of the group or its governing agents. Thus, an attempt is made to retain the idea of norms as grounded in law-convictions but to foreground the need *to analyse them sociologically as instruments of power and control*. At the same time Petrażycki's commitment to a radical legal pluralism is maintained because law is found in every organised group and pervades all social life.

Gurvitch accepted (like Sorokin) the psychological basis of law in imperative-attributive experiences but insisted that law's thoroughly social character had to be emphasised in a way that he thought Petrażycki had failed to do. Seeing legal experience as 'necessarily *collective experience*' (1947, p. 45. Emphasis in original), Gurvitch treats it 'as the convergent recognition of values by group members', thereby overcoming Petrażycki's 'principal shortcoming… the treatment of law as a phenomenon of individual conscousness' (Timasheff, 1955, p. xxxiii). Thus, contrary to Petrażycki's view, *all* law must be positive (in Petrażycki's sense) and the normative facts on which it relied have to 'really exist and incarnate spiritual values'; they must be an 'objective social reality'; in this way all

'subjectivism' is abolished from the theory;[6] all kinds of law are fully *social* phenomena, none exists only in individual mental experiences. No place for the contracts of wood-goblins in this view of law. Gurvitch (1931, p. 292) saw Petrażycki's 'psychological individualism' as having led him to accept too wide a range of normative facts (including many having no social significance) as legally relevant. It was the necessary positivity of law that brought together authority and regulatory effectiveness in a specific social milieu.

Thus, while Sorokin thought that the observable socio-legal phenomena that sociology of law can study arose from individual law-convictions as Petrażycki envisaged, Gurvitch considered it necessary to depart decisively from Petrażycki to insist that all law-convictions *ab initio* have an inbuilt *social* element. But he went on to build on Petrażycki's rejection of the juristic view that nothing can be law unless it is recognised as such by the state, enthusiastically accepting that many other kinds of law exist.

The radical legal pluralism of Petrażycki, Sorokin and especially Gurvitch (who identified sociologically a vast array of types of law) surely has the great advantage of giving socio-legal scholarship ways of thinking about law that are entirely independent of juristic concepts. Thus, sociological approaches to legal inquiry are not limited by any juristic or 'official' demarcation of law's scope. But, in fact, socio-legal studies have often been content to accept lawyers' assumptions about this scope, perhaps on the basis that it is realistic to recognise the dominance of state law and the practical power of state agencies (legislatures, courts, etc.) to determine conclusively what is to count as law. Timasheff's sociology of law reflects this thinking (Schiff, 1981, p. 405). He advocates 'a narrower concept of law' than Petrażycki's to 'emphasize enforcement by politically organised society' and he sees 'no cogent reason to consider [as] legal all social phenomena in which rights and duties are involved' (Timasheff, 1955, p. xxxvii). For Timasheff, the task of sociology of law is to study how behaviour is determined by legal norms, treating law as the intersection of social power and ethics, represented in complex modern societies by state law (see Timasheff, 1939/1974).

These various ideas of Petrażycki's admirers are of interest as well-documented but rare attempts not only to engage directly with his theory but also to relate it explicitly to the concerns of socio-legal research. Taken together they suggest problems, or at least ambiguities or absences, in the theory. But it is important to note also that the work of these three followers of Petrażycki is now also neglected in Anglophone socio-legal scholarship. Their work is not much read and socio-legal studies are the poorer as a consequence.

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[6] Gurvitch, 1931, p. 292; 1935, p. 166; 1947, pp. 45-6, 75.

This situation points to a larger issue. The task of purely *conceptual* legal analysis (the effort to specify rigorously a coherent scientific concept of law), which Sorokin, Gurvitch and Timasheff perhaps inherited from Petrażycki, was pursued by them in different ways as a fundamental part of sociology of law. But, in general, socio-legal researchers today leave the task of formulating a concept of law to jurists and philosophers of law. They do not typically see a need to develop rigorous definitions of law and finely delineated categories of law – scientifically 'adequate' concepts in Petrażycki's sense. Instead they tend either to adopt juristic demarcations of the sphere of 'the legal', or to use provisional, pragmatic notions of law that are sufficient for their particular projects of research. The often elaborate classifications of types of law (almost entirely distinct from juristic classifications) produced by the Petrażyckian sociologists tend to appear merely *formalistic* to contemporary socio-legal researchers, whose focus, in any case, is much more likely to be on social action and process. Petrażyckian conceptual analysis is not part of the main agenda of socio-legal scholarship today.

Surely this current orientation with its rejection of formalism has much merit. Socio-legal studies should not pay excessive attention, for example, to the project of many contemporary legal philosophers of trying to elaborate a *universal*, *timeless* definition of law, or a concept that will *conclusively* mark off the legal realm from the rest of social experience; presenting some 'perfect' philosophical understanding of the *essential* nature of the legal. Socio-legal inquiries do not need any such project. They need only flexible frameworks for analysis and provisional models of law, working conceptions that lend themselves to revision and adaptation as the task of studying changing forms of regulation and their sources and consequences proceeds.

Today, the classic Petrazyckian sociologists of law can best be seen as having provided conceptual *maps of legal experience* as they recognised it. These maps should not be taken as ends in themselves (as comprehensive theories or 'true' understandings of the nature of law) but as suggestions of where and how to look systematically and empirically for insights in studying regulation. They should be used to help to refine and extend the *methods* of sociology of law; in particular, inspiring provisional conceptual frameworks to guide research. And such frameworks are especially important where the forms and conditions of regulation are rapidly changing under the impact of globalisation, technological change, and intensifying cultural interactions.

It remains to consider some prominent elements in the contemporary agenda of socio-legal scholarship, and how far aspects of Petrażycki's theories, insofar as they are accessible to an international audience, can relate to them.

PETRAŻYCKI'S RELEVANCE FOR CURRENT SOCIO-LEGAL ISSUES

In the space available it is not possible to do more than identify a few themes in relation to which, it will be suggested, Petrażycki's insights are relevant. After his time, sociology of law became a well-established international research field and, as sociologically-oriented scholars have, increasingly, resisted tying their methods and theories exclusively to sociology (or any other social science) as a distinct academic discipline, a much broader idea of socio-legal studies has developed, implying a willingness to seek insights about the social character of law from a range of disciplines, or to resist any specific disciplinary allegiances.

Increasingly, the impetus of socio-legal research is to observe the many forms that contemporary governmental regulation takes, and the variety of ways in which it is experienced. Socio-legal research today studies the social effects of legal regulation and the social conditions that produce it, the experience of those subject to it and those who invoke it, and the practices and procedures of the agencies that create, interpret and enforce it. Some such research focuses entirely on the law of the state while other research adopts a pluralist view, finding law, as Petrażycki did, in many social settings not addressed by state law.

Three developments that have attracted the attention of contemporary socio-legal scholars seem to me to be especially significant in considering Petrażycki today. They are (i) the dominance of instrumental conceptions of law, (ii) the impact, in most complex modern societies, of cultural pluralism or multiculturalism and (iii) the growth of transnational law and new forms of international law. In what follows each of these will be discussed in turn, relating them to Petrażycki's work.

Legal instrumentalism and the ethical worth of law

Modern socio-legal research over the past half century has largely presumed – and been strongly promoted by – an instrumental view of law. That is to say, law has been generally treated, not necessarily by jurists but usually by legislators and administrators, as an *instrument of government*; a means of framing and implementing policy, setting social goals, encouraging and regulating economic life, and shaping desirable behaviour by citizens. Alongside this it has often been treated as a *private resource*: an instrument available to citizens, corporations and others to promote and secure their interests, if necessary through litigation. Socio-legal scholarship in general can be said to have adopted this instrumental approach to law as its dominant, if often implicit outlook on the nature of law (Cotterrell, 2009a, pp. 488-91). On this basis Western socio-legal research has flourished as a

support for legal policy, especially in combating racial and sex discrimination, and in economic regulation, the organisation of welfare provision, the support of family life and the control of crime.

It is hard to deny the usefulness of empirical research on the effects of legal policy in these and other areas. Research has often identified what Roscoe Pound (1917) called 'the limits of effective legal action' and the conditions under which law can and cannot achieve the results envisaged by lawmakers. But a purely instrumental view of law can also be criticised. To treat law as no more than an instrument is to ignore the question of whether law should have qualities that allow it to flourish as a valuable cultural phenomenon *in itself*, rather than merely for what it may be used to achieve. Petrażycki saw the imperative-attributive character of law as valuable in this way. The consciousness of rights would be a means of entrenching in individuals a sense of dignity and self-respect and the firmness, confidence, energy and initiative 'essential for life'.[7] Thus, if the legal experience of right and duty is well organised in its social settings it can serve not merely pragmatic or short-term governmental or private aims but a larger ethical purpose. The development of a general legal consciousness has, so it seems, a cultural value in itself. On this Petrażycki is explicit – law can be a powerful *educative* force as well as a motivating force. In terms that few modern scholars would dream of using, Petrażycki suggests that law can, indeed, make us ethically better people.

It is easy to mock such claims. Many decades of empirical research have shown the limits of law's ability to achieve intended effects and there is strong resistance in socio-legal scholarship to moral prescriptions of any kind. But one can also note in the literature urgent criticisms of the excesses of legal instrumentalism, on the basis that this can make law seem no more than a weapon available to be used in socially irresponsible ways by any person or agency able to gain control of it (see e.g. Tamanaha, 2006). The image of the lawyer as amoral 'hired gun' is very familiar. Petrażycki was in no way opposed to the use of law as an instrument of policy – indeed he pioneered the project of a 'science of legal policy' and developed this idea extensively (Babb, 1937; Gorecki, 1975). But his image of what legal policy could be goes so far beyond the assumptions of contemporary socio-legal research as to seem, at first, shockingly naïve or bizarre.

He sees law's ultimate task as to promote 'the complete dominance of active love'.[8] What this means in essence is the promotion of a social life characterised by solidarity, altruism, active citizenship, public spiritedness and social responsibility. Law, in this view, is to shape not only behaviour (through incentives and penalties) but also *character* (by inculcating experiences of duty and entitlement). These are long-term aims for law but they set immediate challenges: for example, to

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[7] Petrażycki (1955, pp. 88-9). For some closely related ideas see Jhering (1915).

[8] Babb (1937, p. 810). The idea reflects wider currents of thought in the Russia of Petrażycki's time, and it became, in effect, the central focus of Pitirim Sorokin's sociology (as 'Amitology') in the last phase of Sorokin's career in the United States. See e.g. Johnston (1998, pp. 5, 42-9).

make official (state) law as understandable and accessible to the citizen as possible, to adapt it carefully to the psyche of those subject to it, to make it vivid and clear through factual illustrations, and to enforce it firmly and consistently; the ultimate aim of legal policy is to make official law increasingly unnecessary insofar as the ethical regulation of social life becomes more effective (Babb, 1937, pp. 810, 826-8).

Petrażycki's extensive work on the science of legal policy is hardly represented in the English translations of his work. But indications of its content, insofar as they are available to this writer, suggest that it points to ideas largely absent from, but an important supplement to, those that inspire much contemporary socio-legal research; one of its important messages for today seems to be that socio-legal studies should link their existing concerns about the effectiveness of legislation and the legal experience of citizens to a wider sense of law's potential *moral meaning*.[9] It implies the need for renewed attention to the often neglected *expressive* functions of law – attention not restricted merely to this function in the context of criminal law. At a time when law is often seen as a mere technical calculus, divorced from the moral experience of citizens, Petrażycki's voice from a century ago insists that studies of law in action can and should be guided by a vision of what an ethical life and a well-organised society might be.

How far can the vigorous assertion of rights really be seen in contemporary conditions as means of promoting ethical life in a society? Emile Durkheim drew an important distinction between what he called egoism (the selfish assertion of right to promote only one's private interests) and individualism (a moral position characterised by respect for and willingness to defend the rights of all individuals to their personal autonomy and dignity, no less than to defend one's own such rights) (Cotterrell 1999: 112-13). Hence, this moral individualism recognises an obligation to the rights of others as a basis for defence of one's own rights. The mere assertion of one's own rights without concern for others does not promote ethical life in any sense, on this view. In itself, such conduct has no ethical value to the individual or moral worth to society. What then is to be made of Petrażycki's enthusiasm for the active assertion of rights?

A Petrażyckian concept of law treats the experience of right or entitlement and that of duty or obligation as inseparable (Petrażycki, 1955, p. 46), as two sides of the psychological impulse to which the word 'law' refers. Current juristic thought often puts strong emphasis on the securing of private rights (especially of property) as the primary purpose of law, alongside the guaranteeing of basic personal security. But the very structure of Petrażycki's imperative-attributive concept of law suggests that the sense of obligation is as fundamental as that of entitlement. The recognition of duty by one

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[9] For somewhat related ideas about the expressive, communicative and rhetorical potential of reflexive legislation in a dialogue with societal values, see the thoughtful discussion in Witteveen (2005).

person does not seem, in this conceptual architecture, to be the mere consequence of the assertion of right by another; the recognition of duty can equally be seen as the psychological experience that, in law, *allows rights in others to exist*. One might also say that although the sense of right or entitlement is what gives law the special quality that distinguishes it from morality, this sense gains its truly 'legal' quality only because it also embodies a *typically moral* experience of prescribed duty. The attributive (sense of right) and imperative (subjection to duty) elements in law are experienced as one.

It is surely this quality of law which, for Petrażycki, can make it valuable in itself, independently of its instrumental value. It makes possible legal *relationships* as social relationships. This is not to confuse law with morality, or to imagine that law is always (or even often) intuitively experienced as morally good; it is merely to note that *as psychic phenomena* law and morality are closely related, especially when understood as expressions of a vibrant culture.

Cultural pluralism, intuitive law, positive law

Some eighty years ago, praising Petrażycki's emphasis on legal pluralism, Gurvitch (1935, p. 164) noted the emergence of many new forms of regulation that it was becoming hard for jurists to ignore – legal institutions outside the scope of state law, but existing inside national society as well as in the international sphere. In the national sphere he mentioned the regulation of working practices produced in enterprises through processes of industrial democracy. Today we might think especially of the demands of minority cultural groups for legal recognition of their religious or traditional norms.

Throughout much of Western Europe the issue of the female Muslim veil – the right to wear it, or a legal duty not to do so in certain contexts, has attracted a huge literature (e.g. Ferrari and Pastorelli eds., 2013). More broadly, the claims of many Muslims in Britain and elsewhere to have some effective legal recognition of their distinctive practices – for example, of marriage, divorce, inheritance and commerce – have led to unending debate. They have also often posed difficult problems for state courts faced with the need to apply official law (in Petrażycki's sense) to situations and practices already shaped and given meaning by other kinds of legal ideas. These are often ideas derived from interpretations of Islamic Shari'a law or from customary practices of particular cultural groups within the larger national society.

A persistent question in much discussion has been how far these ideas, which may possess great authority and be firmly applied in the groups that recognise them, should be generally accepted as 'law'. If so, what kind of law would this be? What would be its relation to official state law? How could its status as law be understood? By whom should it be accepted as law? What situation exists if

some groups in the national society consider it legal, but others do not? What happens if it is inconsistent (perhaps irreconcilable) with state law?

Such matters are increasingly ones for everyday juristic practice. State law in Western societies may, for example, refuse to recognise polygamous marriages, but how should it deal with the position of wives married and divorced from polygamous marriages when, being dependent and perhaps destitute, they seek financial support from their former husbands? Should state law ignore their situation? More generally, how can state law purport to regulate family life in communities where couples marry (and perhaps divorce) under the authority of religious law but not state law? Petrażycki's legal theory allows the organisation of such issues in terms of law, cutting through the limitations of a rigid demarcation between state law and all other forms of authoritative social regulation. The claim of the deserted polygamous wife, even if not based on an appeal to religion or custom, can be interpreted in terms of intuitive law (a sense of justice). But it may well be a claim that refers to the 'normative fact' of religious or customary authority. As such it is a claim of positive law, irrespective of whether the state recognises it. In Britain, Muslim arbitration bodies decide family cases brought before them on the basis of their interpretations of religious and customary sources and in an effort to find reasonable solutions consistent with the expectations of the communities they seek to serve. In practice, in these conditions, it is possible to observe, *co-existing*, all of Petrażycki's types of law (various kinds of official and unofficial, positive and intuitive law, and their combinations).

And Petrażycki's idea of legal policy might suggest some particular responsibilities of official law: to encourage conditions in which all individuals can flourish, their sense of social responsibility as active citizens is promoted, and communication and solidarity between communities in the larger society as well as within them is promoted. Petrażycki's legal pluralist conceptions may not solve regulatory problems. However they make it possible to see that a radical, irresolvable conflict between different and exclusive conceptions of 'law' can be replaced by a *single* perspective – one that accepts the *co-existence* of a variety of distinct *types of law* and the need to facilitate their stable interaction or interrelation. This implies that the relative authority of different kinds of law has to be recognised and negotiated so that society can be regulated in a practical, effective, socially meaningful way.

A critic of this approach might say that it is unimportant whether the conflicts and interrelations of regulatory regimes and aspirations are thought of as problems of *legal* pluralism or simply of normative pluralism. Are the problems made any easier by particular choices made in applying the word 'law'? The real issue is the clash of expectations as to what regulation is to be applied to particular problems. Whether or not regulation is called law by jurists or legal theorists may not alter popular convictions as to whether the regulation should be applied to cases that concern them. The

activity of defining should not be confused with empirical study of conditions defined.[10] As argued earlier, a socio-legal perspective should not become entangled in efforts to produce a conclusive definition of what counts as law, as contrasted with non-legal regulation.

However, Petrażycki's radical reconceptualization of law, extending it to embrace much that jurists serving state legal systems would not accept as law, may make it possible to reconsider issues of normative (or legal) pluralism in some illuminating ways. In particular, it shifts focus from the positivist position of seeking to identify particular social sources (e.g. legislative procedures, judicial decisions) that determine whether or not a norm is valid law. Such a positivist position often provides no useful answers in cases where popular opinion refuses to accept that the linking of norms to such identified sources is the only conclusive way of attributing operative authority to them. Equally, legal positivism provides no adequate answers where regulatory regimes are in conflict and competing social sources of validity can be identified, with no established hierarchy of importance accepted as between these sources.

A Petrażyckian approach would focus not on identifying 'pedigree tests' of what is to count as legal or non-legal by looking to see what social sources the regulation in question has been brought into being. Instead it would focus on the subjective experience of those who encounter the regulation. It would not need to treat as irrelevant the sense of the 'legal' held by those who experience, as law, types of regulation that the state does not recognise. It would presumably seek to understand the phenomenon 'law' at least partly in terms of their legal aspirations and their sense of what for them is authoritative regulation. It would not see the problem of regulating as one of demanding acceptance of the state's legal prescriptions irrespective of citizens' understandings (or, conversely, of accepting those understandings as the only legitimate basis of state law), but of appreciating, negotiating, influencing and organising citizens' complex and often contradictory senses of legal authority.

Petrażycki's approach to law appears to downgrade state law to merely one kind of law among many – a radicalism that may seem highly dangerous. Yet we should recall that in Russia he was a jurist serving the official law of a huge multi-cultural empire. It may be that his approach is best seen, like that of his contemporary, the pioneer legal sociologist Eugen Ehrlich (Cotterrell, 2009b), as aiming to protect the state from itself; that is, from its own regulatory hubris, and from isolation and alienation from the perceptions of citizens. It would do this by encouraging a view of law that is sufficiently wide to allow the jurist (who is professionally committed to the idea of law) to see the realm of state law as if 'from the outside' – that is, from the imagined standpoints of citizens who recognise many kinds of intuitive, positive, official and unofficial law. In this kaleidoscope of many kinds of legal

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[10] As it was once memorably put, 'Who likes may snip verbal definitions in his old age, when his world has gone crackly and dry.' (Bentley (1908/1995, p. 199).

experience, the experience of positive law held in place by the state is just one element. This does not mean that it must be seen as in any way a minor element; rather it should be continually confronted with (and enriched in) a larger regulatory environment that is not rendered juristically redundant simply by having been denied a priori – by definitional fiat – the designation 'law'.

The nature and authority of transnational regulation

Petrażycki recognised international law as a reality but he could hardly have envisaged the vast range of different regimes of regulation that exist today in, for example, international trade law, international criminal justice, international human rights, international financial regulation and European Union law. International law is no longer necessarily confined to regulating the relations of states. It can also often directly address individuals (as, for example, in the prosecution of offenders in international criminal law) or indirectly shape the conditions in which they live and work, as in the case of international economic law, such as that of the World Trade Organisation. Much new legal regulation can be considered not only as governing relations between states but also as operating across, or irrespective of state boundaries: it is often called *transnational law* (Cotterrell, 2012).

Some of it arises from treaties or conventions between states, some from national laws that have effect extraterritorially, some from the creative activity of transnational networks of community such as the business networks in which international commercial arbitration (the new *lex mercatoria*) has developed, some from international agencies (such as the World Trade Organisation or the International Criminal Court) claiming independence from specific national allegiances, and some from within transnational professions, industries or interest groups defining 'best practice' through authorities which they support to set uniform standards.

The growing importance of transnational law (and, in some cases, its controversial character as 'law') raises the question of whether Petrażycki's legal pluralism can help in analysing this phenomenon. Much transnational law is not official (state) law in his sense and yet it is sometimes applied by officially recognised institutions (international courts; regulatory agencies; standard-setting bodies). It is often created and imposed 'top-down' on those it regulates. But some of it is created 'bottom-up' through the interactions of those for whom it is useful (transnational traders, financiers, internet technologists, etc.) as what is sometimes called 'transnational private law' (Calliess and Zumbansen, 2010). What seems to be emerging is not a single new transnational realm of law but a multitude of legal regimes claiming different kinds of authority, arising from different sources and regulating in different ways.

Petrażycki's legal theory teaches that many forms of positive law can exist outside state law. This makes it possible to portray the entire complex universe of transnational law as an array of different kinds of positive law. And if, as Sorokin argued, Petrażycki's theory shows adequately how law as a trans-subjective social form can arise from the harmonisation of individual psychological experiences, it is not difficult to see how legal structures can arise through interaction in social groups and networks and the common recognition of normative facts as the basis of positive law. The varieties of transnational positive law created in this way may have different kinds of relationships with state law.

By separating the idea of positive law from that of official state law Petrażycki moves us past unhelpful debates as to what kinds of transnational regulation should be recognised as law. Instead, the issues become: how do these different kinds of law relate, from where do they derive their ethical meaning as structures of rights and duties, what gives them authority over those they are supposed to regulate? Ultimately, the key juristic question is: how is their relative authority – their authority *relative to each other* – to be judged when these kinds of law clash, purporting to regulate the same people, or the same situations or transactions?

Surely this Petrażyckian perspective is helpful. It makes possible a focus on law's practical authority rather than its abstract definition. Petrażycki's open, flexible and minimal model of law in terms of imperative-attributive experiences seems to undermine any assumptions that the challenges of normative pluralism can be dealt with simply by defining them away as outside juristic concern. Positivist legal theorists might adopt concepts of law that exclude from the 'province of jurisprudence' many regulatory forms and normative ideas now populating the socio-legal world that do not correspond with orthodox conceptions of state law. But Petrażycki shows that law can be thought of coherently in ways that do not depend on the concepts that have traditionally served to police the boundaries of the juridical world. This was surely the scandal of his theory in his own day, and it remains so in today. The socio-legal realm does not need positivist juristic theory to mark out what is to count as law within it, though it should take account of the ideas offered by that theory. The freedom to think about legal development *inside* but also *beyond* orthodox juristic categories is a main legacy of Petrażycki for scholars seeking to understand evolving forms and characteristics of transnational law.

However, it is still important to bear in mind Sorokin's claim that important questions are not satisfactorily solved by Petrażycki's psychological theory. Some of these seem to be about the authority of official (publicly organised or recognised) legal agencies. What Petrażycki calls official law (law 'to be applied and sustained by representatives of the state authority') is often remote from individual citizens. Although they may recognise the normative facts that authorise it (and so they experience it as positive law), those normative facts are not necessarily (or even typically) their own

choices. Certainly, the psychological theory of law may show how some law can take social form as a development from the legal experiences of individuals interacting and communicating with each other. But it is surely important to ask sociologically how official law exerts its 'psychical effects' (Pałecki, 1984, p. 137, quoting Petrażycki), how it gains coercive power over individuals who have had little influence on its creation, and how the authority of the state comes into being, is sustained, and in various conditions is challenged or overthrown.

Official law, wrote the legal realist Karl Olivecrona bluntly (1948, p. 178), 'cannot be reduced to psychical experiences, to "law-convictions"'. However, it might be more accurate to say that it cannot usually be reduced to those of *citizens in general*.[11] Its nature requires sociological explanation. If these issues are pertinent to state law, they may be even more so for the kinds of transnational law that are created by agreement between states (treaties, conventions) – processes in which most citizens are even less involved. In sociological terms the problem is one of 'moral distance' between official law-makers and law enforcers and those whom they seek to regulate.

It is not possible here to say more than that these issues remain unresolved, on the basis of the materials available. It seems that the following conclusion can be reached. Petrażycki's theory points towards the important idea that a great deal of transnational law might be understood as created in transnational communication between individuals in groups, organisations and networks. This interaction and communication gives rise to various kinds of positive law as sociocultural phenomena. So, transnational law as a social form can be produced 'bottom up' in such a way. Thus, it is easy to see where the source of its authority lies. We might say it lies in the culture of those who interact to create it; it can be said that it has *cultural* legitimacy. But the problem of where 'top-down' law (such as much international law created by conventions) gets adequate authority to achieve widespread recognition and wide-ranging effects as social regulation seems to remain (Cotterrell, 2013). Where does the law-making authority, for example, of the World Trade Organisation, lie? Why, by whom, under what conditions, and with what limitations, is such international regulation experienced as positive law in Petrażycki's sense? Must it be seen as having only a relatively weak *political* legitimacy so that it is experienced as law only by the relatively few officials directly involved with it, but has little or no resonance in the legal consciousness of most of those who live within the jurisdictions it addresses?

Does, then, top-down, cross-border law-making depend entirely on the support of the governments of nation states that authorise international law-making institutions or international judicial processes? If

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[11] Pałecki (1984, p. 150). For example, it might represent only the law-convictions of its creators. Claims have been made that Petrażycki's (social) category of official law cannot be derived from his (individualistic) psychological definition of law: see Motyka (2007, p. 37); Motyka (2006); Peczenik (1975, p. 94).

so, the authority supporting it is not culturally-based but technical-political. But contemporary transnational regulation in general seems dependent for its stability on uneasy, shifting combinations of cultural and political sources of authority.

CONCLUSION

Because much of Petrażycki's work remains untranslated and so inaccessible to most international scholars it is impossible for them to draw firm conclusions with any confidence about the overall significance of his theories. At best, his available writings can be treated as suggestive, as a store of extremely imaginative ideas about law that imply fruitful avenues for contemporary theoretical development, for example on the topics discussed in this article. But there is no doubt that, if more of his extensive scholarship could be made available to international scholars, more productive debate around his ideas would be possible. To achieve this, it would be very desirable to have more of his writings translated into English.

Petrażycki certainly suffered both during his lifetime and posthumously as a consequence of the accidents of history. Uprooted from pre-revolutionary Russia where he had been a dominant intellectual force and one of the most celebrated jurists of his day, he found his career almost entirely driven off-course after the Bolshevik revolution and his subsequent relocation to Poland. Thereafter the political and cultural crises and divisions of twentieth century Europe and the dislocations of war surely further hampered the development and long-term reception of his thought. However, such of his work as is internationally available, together with the many informative and accessible commentaries on his ideas,[12] should make it possible for scholars to recognise more widely something of the scale of his great achievement as a theorist of law. This article has examined various specifically intellectual obstacles that, in the past, may have limited his international influence. However, the main purpose here has been to suggest that, a century after he wrote, Petrażycki's thought continues to offer valuable insights that can inform debate around some of the most pressing contemporary issues in socio-legal studies.

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[12] For a sample of valuable commentary, see Gorecki ed. (1975); Motyka (2007); Motyka (2006); Rudzinski (1976); Kojder (2006); Walicki (1967/1992); Fittipaldi (2012).

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