

What is Offered to the Modern Science by Leon Petrażycki? (Following Three Descriptions of Legal Principles)

Sławomir Tkacz

University of Silesia
in Katowice, Poland

e-mail: slawomir.tkacz@us.edu.pl

Abstract:

The aim of this paper is to outline the general oversight of the concept of law in Leon Petrażycki's legal theory. On the example of the principles of law, an attempt was made to answer the question, what Petrażycki's theory proposes to modern science. In the first part of the presentation, the Author presented the current state of theoretical knowledge in the field of principles of law. The attention was paid to the problem of various characteristics of legal principles. In further considerations, an attempt was made to answer the question about adoption of models proposed by Petrażycki in the contemporary theoretical discourse. The summary presents general conclusions of the paper.

Keywords: Leon Petrażycki, legal principles, official law, intuitive law, scientific policy of law.

1. Introductory Remarks

Józef Zajkowski wrote in 1936 that the modern science would not be able to sum up everything that have been developed directly or indirectly under the impact of Leon Petrażycki's views. Lawyers are not always even aware of this what they owe to Petrażycki [26, p. 4]. The purpose of this presentation is to illustrate the thesis stated here [9]. I will do it following the issues addressed in the law regulations.

I'm going to present the latest condition of theoretical and legal knowledge in the first part. I will pay attention to the issue of various features of legal rules. I will attempt to answer the following question: Which constructions offered by Petrażycki are present in the contemporary theoretical and legal discourse during my presentation. Authors, who undertake the issue of legal principles are often unaware of it. General conclusions will constitute the summary of the presentation.

The assumptions developed by Petrażycki's psychological theory of law, whose legal order is characterised by the categories of the mental experiences, are known and there is no need to refer to them here in this presentation [16], [17], [11]. In the paper entitled *About law principles in the theory of Leon Petrażycki*, which was published in Russian in the volume prepared by the Warsaw

University and Justice Academy in Krasnodar, I undertook the issue of characterising the law principles in Petrażycki's theory [21]. This paper continues the previously completed deliberations.

To start with the conclusions which ended the previously performed research. It has been established that the term of "law principles" belongs to Petrażycki's terminology. However, the author uses this term rarely, often during the other issues discussed. It then difficult to establish the way he defines the term. Petrażycki pays attention consequently to dangers waiting for the lawyers who use professional legal terminology (which "legal principle" belongs to). At that point, there is no doubt that to analyse "legal principles" as theoretical category in Petrażycki's perspective, similarly to the other cases we "get" – following Zajkowski's words – into "the notional maze." We can get lost in this maze and we can also overcome it. I will attempt to overcome it during my presentation.

2. Legal Principles as a Special Type of Regulation

Legal principles have been the subject matter of numerous publications in Polish literature. Yet, the issue has remained a matter of interest and controversy, as evidenced by works published in the period 2011-2014 [6], [8], [24]. Paradoxically, although it is indeed difficult to find a monograph which would not use the term legal principles, there is no consensus as to the substance of this notion.

The term legal principle is not unambiguous in jurisprudence, and discussions on this matter are accompanied by conceptual confusion [28, p. 21]. It is pointed out that the term legal principle "is attributed not one, but several fundamentally different meanings, and yet attempts to arrive at a definition are made as if in each case it is just one, always the same, concept" [27, p. 59]. It is also noteworthy that various representatives of dogmatic disciplines formulate differing catalogues of legal principles and attribute various characteristics to them. Speaking of such discrepancies, we can identify the following groups of issues: a) understanding of legal principles; b) criteria for segregation of legal principles; c) relation legal principle-legal text; d) validity of legal principles; e) characteristics of legal principles; f) functions of legal principles and ways of using them in the process of application of the law.

Legal principles are mandatory legal norms characterised by certain features, which make it possible to segregate them and set them against those norms within the system, which are not considered to be legal principles. We shall leave outside the scope of our analysis these characteristics which use the notion of legal principles to describe the way legal concepts are formed or to present the leading ideas within a legal system [25, pp. 28-52].

In the Polish legal culture the term legal principle is traditionally reserved for norms which are of a fundamental (underlying for the system) character. They are distinguished by an exceptional axiological, functional and hierarchical significance [7, p. 81]. The proposed criteria for selecting legal principles are diverse. However, it is stressed that their character is different from that of other norms and that the role they play in the system is special. It is emphasised that legal principles express (formulate the obligation to realise) values. For the most part, these are indeterminate norms, characterised by a high degree of generality.

In the literature written after the system transformation of 1989, authors have also referred to characteristics of legal principles proposed by Ronald Dworkin, Robert Alexy, Manuel Atienza and Juan R. Manero, and Humberto Ávila [1]. It is stressed that it is necessary to accept the differentiation between principles and rules. Principles are norms that are used to a larger or smaller extent in accordance with the maxim *more or less* [4], [5]. There are different ways to classify legal principles. In particular, complex divisions of principles, whereby in addition to principles in the strict sense of the word policies are selected, are meeting with acceptance [2, pp. 6-11]. Another point raised is that the legal text is merely a starting point that is supposed to be used in a specific way in the process of application of the law [3, p. 2]. Whether a given norm will be considered a principle is determined by how it is used in the discourse. Principles, as opposed to rules, which determine the contents of the decision, make it possible to conduct the argumentative process that

leads to the issuance of the decision. They offer arguments for adopting a specific decision, or alternatively encompass merely part of the aspects that are important for the issuance thereof [3, pp. 133-134].

The very fact that views like the ones I have discussed above exist makes it legitimate to conclude that there is indeed significant conceptual confusion surrounding legal principles. The fact that there are multiple views on this matter does not make the decision-making process easier. Since the various authors adopt different theoretical assumptions, their views are on many occasions incomprehensible for legal practitioners. Also, the situation is not made any better by the fact that authors of theoretical works use different sets of tools, which results in this complex matter being even more difficult to understand.

3. Three Understandings of Legal Principles in Petrażycki's Theory

It should be accepted that the issue of legal principles is not an isolated notion from the other author's theoretical and legal theses. Here first I think about Petrażycki's essential concept which involves the description of law and its divisions (positive law – the intuitive law and the official one or the unofficial one) as well as the programme for the scientific policy of law.

In my opinion, legal principles in Petrażycki's perspective can be linked both with the postulates of law as well as with the legal norms applied. As far as the postulates of the system are concerned, the program of "the scientific policy of law" should be stressed. Following Lande's writing, development of such policy has remained Petrażycki's beloved idea. The subject of the legal policy is to establish findings referring to the future law. The policy of law as science aims to solve *de lege ferenda* principles in the scientific manner. Here an extremely interesting issue of the policy relation towards the natural law appears just in Petrażycki's understanding. The author points clearly that a postulate to develop the policy of law would be a renewal for the dualistic division of jurisprudence, which was in the period so called the natural law. Petrażycki's motto of "rebirth of natural law" (*Wiedergeburt des Naturrechts*) was presented and justified in the work entitled *Die Lehre vom Einkommen* [14, p. 579]. As it was written in the study entitled *O ideale społecznym i odrodzeniu prawa naturalnego* (*About social ideal and rebirth of natural law*), the motto was understood in a sense of "developing the science for the policy of law based on the scientific and psychological research on casual ownership of law (...) [15, p. 28]. The author points *expressis verbis* that the policy of law, among others, develops principles scientifically that should have been introduced into a system of law [19, p. 3]. The law legally binding should be based on these principles. They do not have the character of the norms in the law legally binding. At this point they are legal principles as the so-called postulates of the legal system for example the policy of the law does not investigate what the law is like but what the law should be like to as to fulfil the goals of the law and its aspiration for ideal.

More difficult seems to be an analysis of the legal principles as the norm legally binding. Since legally binding law is not a notion on which Petrażycki focused on, he offered an introduction of construction for the official law instead. However, its description is extremely laconic. The official law is the applied law and supported by the representative governing authorities of the states. Taking into consideration the issues linked with the legislative principles, types of norms included in the official law achieve a special importance. I stress that content of the official law can be construed in various countries. The official law can include:

- a) various types of the positive law
- b) considerable amount of facts with the intuitive law in nature [12].

Ad a) I would like to remind that the positive law includes a reference to the normative facts (experience of facts), which outline a specific convention of procedure, in its structure [18, p. 303]. This convention can be composed by the facts with various nature. The author lists the legislative law, customary law and the court practice as well as a legal doctrine and legal dicta (are the so-called "varieties of the positive law") [18, p. 320]. Here the attention should be paid to a very wide range of the positive law in Petrażycki's perspective not compatible with a definition of the law

origin understood in the traditional manner [22]. Undoubtedly, the positive and legislative convention of procedures may be also established by the legal principles which play the integrating function in a discourse. It seems that in this perception of the legal principles they are the closest ones to the description most often accepted in Polish legislative culture.

Ad b) Petrażycki, presenting the characteristic features of the official law, focuses especially on the phenomena being intuitive and legal in nature and involved in its composition. As the author writes, the official law includes not only various types of the positive law but the intuitive one as well [18, pp. 451-452]. Decisions of the intuitive law are adjusted in a free way to the specific and individual circumstances. It differentiates it from the positive law, which is hindered by the convention established in advance [18, pp. 250-251].

Following the views in the analyses dedicated to the description of the intuitive law, which has been conducted in Polish theoretical and legislative rules, the concluding was justified that Petrażycki links the intuitive law with justice. Józef Nowacki points *expressis verbis* that “justice identified by Petrażycki with the intuitive law becomes the key concept in the theory of law developed by him” [10, p. 79]. He focuses foremost on the role of the outside factors (upbringing, education, religion, etc.) that have an impact on the content of the intuitive law leading to the uniformity in the content of intuitional and legal beliefs [10, pp. 83-84].

The intuitive law understood in this way (justice) constitutes a criterion for evaluation of positive law [18, p. 291]. Petrażycki indicates directly that various types of the positive law are subject to criticism from the point of view of justice (the intuitive law) as superior criterion [18, p. 291]. It changes the positive law into the basic element of the official law.

The so-called axioms of the positive law possess the extraordinary meanings (among others justice, impartiality and good faith, etc.) [18, pp. 452-453]. These are the universal and consolidated beliefs of the intuitive law, according to which some principles and duties cannot be open to doubt [18, pp. 452-453].

Due to the presence of the suitable axioms of the intuitive law, nobody who is serious argues about that a human being has got the responsibility to refrain from killing other people or whether s/he has got the right on her/his side not to be killed by the others, etc. [18, pp. 452-453]. I would like to stress that axioms of the intuitive law, on condition that they are related to the matters from the sphere of the official law, are accepted both by the courts and other governing authorities. It seems that a following view can be presented: under the pre-arranged Petrażycki’s term of “axioms of the intuitive law” hides a set of universally accepted (introduced) values (under the form of principles), which are supported institutionally. They are so obvious that nobody strives for the introduction of positive and legal conventions (norms of the positive law) in this subject.

I think that Petrażycki’s description for the axioms of the positive law is very close to Dworkinowski’s perspective of legal principles. Since they are legally binding due to its authority which leads to the universal acceptance by the state governing authorities and judiciary. Consequently, they are the criteria for the evaluation of the positive law, leading to the fair decision (the only and correct one) in the individual case investigate by the state governing authorities particularly courts. Following the analysis mentioned above, a question must appear: is the description of the official law in Petrażycki’s definition possible to maintain viewing the assumptions of psychological theory. Various interpretations of this issue are expressed in writings. Detailed analyses of this matter were presented in different stadium of mine [23]. They led to a conclusion that Petrażycki, defining the official law, transfers his reflections on law unconsciously from the sphere of psychical experience into the sphere of real and social practice. Norms at that point remaining in the individual psyche must exist socially in some way [20, pp. 289-290]. Here as a matter of fact a concept of the official law is getting close to the views, which are linking the notion of law with development of specific convention. A definition of law described within the category of social fact can be found in many current concepts both in Polish and international literature.

A different issue is whether it is possible to develop a legally binding concept of law omitting real social practice. It can be stated carefully that even Petrażycki, who had attempted to

bring completely the legal phenomena to its psychological surface, was not successful in developing a concept of legally binding law. The law which assumed that it will be completely transferred into field of psychological experience [24, pp. 346-355]. Consequently, his reflections devoted to the official law focus in fact on functions of governing authority of states.

4. Conclusion

Aleksander Peczenik paid attention to Petrażycki's research results which modern theory of law has been filled deeply with [13, p. 13]. I have no doubts that this statement can be referred to the issue of legal principles. We can find a division into legal principles as norms of binding law and its postulates (in the form of the scientific policy of law) in Petrażycki's statements. Still, the most inspiring part of the author's concept related to legal principles is the notion for the composition of the official law. It seems that Petrażycki has been a precursor of the view that the legally binding law (in the form of the official law) can be perceived narrowly. Consequently, it involves norms of various nature. If we add to it that axioms of the intuitive law are surprisingly like Dworkin's legal principles, the composition of the official law (including both positive-legal norms as well as intuitive-legal norms) becomes extremely close to the concepts differentiating rules and principles. Certainly, Petrażycki tries to remain loyal to his assumptions of his theory, transferring the official law in the sphere of psychical experience. However, the opportunity to defend psychological criterium for the definition of official law is terribly dubious. Concerning this support, is this legally binding and accepted by the representatives of the governing state authorities different than the institutional support, which was described by Dworkin analysing the legal principles. Simultaneously, his theory evolves in this place towards the concept of social facts. In the last words of my presentation I underline that the reflections here described are only the interpretation of Petrażycki's statements. It is because of his definitions with the designing nature, the analyses based on his theory of many views, which are traditionally implemented by jurisprudence, are the subjective interpretation of the author's words. It is just like they are understood by a researcher entering the maze, which was mentioned earlier in the introduction.

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