



RUSSIAN LEGAL REALISM AND TRANSDISCIPLINARITY IN SOCIAL SCIENCES AT THE TURN OF THE XXTH CENTURY

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ABSTRACT: This paper examines the academic context in which the Russian-Polish legal scholar Leon Petrazycki formed a transdisciplinary approach in legal philosophy, which served as a basis for development of legal sociology by his followers. The author contends that Petrazycki's legal conception included "social engineering", "living law", and other aspects that allow characterizing his conception as one of the branches of legal realism. These realist stances were afterwards reconsidered by Gurvitch, Timasheff and other his followers who placed Petrazycki's legal ideas into a framework of sociological jurisprudence. Going back to the beginnings of this approach, the author studies the common places in legal and economic sciences at the turn of the XX century, and foremost the predominating orientation to empirical data with discrimination of metaphysical speculation. The author asserts that the prevailing orientations at that epoque formed similar attitudes to understanding of legal and economic behaviors of social actors in countries seemingly belonging to different intellectual cultures. In this context, the author draws certain parallels between the methodological programs of Petrazycki and von Schmoller.

KEY WORDS: Transdisciplinary approach, Legal sociology, Methodology, Leon Petrazycki, Gustav von Schmoller, Georges Gurvitch, Nicholas Timasheff, Methodological pluralism, Legal realism.

RESUMEN: El presente artículo trata de examinar el contexto académico en el que el jurista ruso-polaco Leon Petrazycki llevó a cabo una aproximación interdisciplinaria en la Filosofía del Derecho, que sirvió de base para el desarrollo de la Sociología jurídica por sus seguidores. El autor entiende que la concepción jurídica de Petrazycki incluye la "ingeniería social" y el "living law" y otros aspectos que permiten caracterizar su concepción como una de las ramas del realismo jurídico. Estos posicionamientos realistas serían más tarde reconsiderados por Gurvitch, Timasheff y otros de sus discípulos y seguidores, quienes ubicaron las ideas jurídicas de Petrazycki dentro de un entramado de sociología jurídica.

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Retrotrayéndonos a los comienzos de este planteamiento, el autor estudia los lugares comunes en las ciencias jurídicas y económicas en el tránsito al siglo XX, y como primera y principal la orientación hacia datos empíricos dejando completamente al margen las especulaciones metafísicas. El autor afirma que las especulaciones predominantes en aquella época establecieron unas actitudes similares para entender las conductas jurídicas y económicas de los actores sociales en países aparentemente pertenecientes a diferentes culturas intelectuales. En este contexto el autor induce ciertos paralelismos entre los planteamientos metodológicos de Petrazycki y de von Schmoller.

PALABRAS CLAVE: Aproximación interdisciplinar, Sociología jurídica, Metodología, Leon Petrazycki, Gustav von Schmoller, Georges Gurvitch, Nicholas Timasheff, Pluralismo metodológico, Realismo jurídico.

The turn of the XX century was marked by a series of fierce disputes about methods (*Methodenstreit*) in different areas of social sciences from history and sociology to economics and law. In these two latter disciplines disputes about methods developed mainly between the supporters of the inductive method and those who advocated the deductive method. As to legal sciences, this époque was marked by attempts to counterbalance the prevalence of legal positivism with the help of other methodological approaches such as revived natural law, legal sociology or the psychological conception of law. It is this latter approach

established by a Russian-Polish legal scholar Leon Petrazycki (1867-1931) that will be examined below in the context of academic culture of that period.

So called “the first legal positivism” (represented by such scholars as John Austin or Karl Bergbom) sought, at that time, to be a positive science of law based on observations of power relations, generalizing these observations and deducting statements about the nature of law (Austin understood law as a command of a sovereign) from these observations. With his new conception based on the inductive method, Petrazycki endeavored to fight against this sort of deductivism in legal sciences. Similarly, classical, neo-classical and Marxist schools in economics attempted to formulate certain universal laws of economic exchange and production, deducing from these laws certain regularities, principles and making other statements about development of economy. These deductivist approaches were criticized by such illustrious German scholars of that time as Gustav von Schmoller or Georg Simmel.

The *Methodenstreit* between Carl Menger and Gustav von Schmoller in the late decades of the XIX century, and the controversies between Leon Petrazycki and his opponents in the first decades of the XX century have, undoubtedly, been among the most significant methodological discussions in the history of economical and legal sciences, accordingly. These debates touched on such palpitating issues of social sciences as the limits of generalization, the relation between inductive and deductive methods, criteria of veracity and applicability of truth-values to statements made by social scientists, possibility of value-free scientific analysis (this point was simultaneously raised in the works of Max Weber on *Wertfreiheit* of social sciences). These discussions, in their turn, can be considered as hallmarks of emergence of a new epistemic perspective that we, following the terminology proposed by Choi and Pak ten years ago, dub as “transdisciplinarity”. According to these two authors, multidisciplinary draws on knowledge from different disciplines but stays within their boundaries; interdisciplinarity analyzes, synthesizes and harmonizes links between disciplines into a coordinated and coherent whole, and transdisciplinarity integrates the natural, social and health sciences in a context of human existence, and transcends their traditional boundaries. This latter perspective was the basis for the methodological project of Leon Petrazycki and his followers in legal science, and it seems that von Schmoller, to whom the present volume of the journal is dedicated, also tried to re-elaborate the methods of economics in the light of such a scientific synthesis.

The hypothesis on which we base our present research is that there was certain parallelism in the evolution of social sciences in the first decades of the XX century in Russia, Germany and other countries. This parallelism manifested itself in a series of methodological attempts pursuing to take into account and to frame the existential conditions of human interactions into a scientific paradigm, with the final goal (explicit or implicit) to lay the foundations for multidisciplinary approaches in various social sciences. Both Petrazycki and von Schmoller have accentuated the importance of application of psychological methods in economics and law, trying to provide these scientific disciplines with a “human dimension”, framing them into a transdisciplinary context. This work of Petrazycki and his followers blazed an important trail in legal philosophy; and today such eminent legal scholars as Bjarne Melkevik, among others, advocate this approach in law.

Both von Schmoller and Petrazycki (evidently, focusing our paper on them, we do not contend that these two authors were alone in discussing and problematizing the mentioned methodological issues at that period) seemed to be unanimous in their critical attacks against the axiomatic-deductive methods utilized in their research areas (economics and law, accordingly), calling for more comprehensive approaches that would take into account particularities of each social context, different psychological, institutional and cultural conditions that influence human behavior in different societies. These two scholars also underscored the cultural specificity of economical and legal relations, and the central role that values play in defining human actions in economy and in law. It comes as no surprise that both von Schmoller and Petrazycki were active proponents of social reforms, and vigorously advocated values of social solidarity.

The coincidence of their methodological ideas and the affinities between their *Weltanschauungs* might be not an issue of a simple coincidence. In the beginning of his scholarly career, Petrazycki has spent three years in Berlin (1891-1894) where he attended seminars of Wilhelm Wundt and where he could presumably meet von Schmoller. Petrazycki should have been informed about the *Methodenstreit* between Carl Menger and von Schmoller, as exactly these methodological questions of economics were in the focus of his interest in these years. It is also important that Petrazycki has written two his first books while being in Berlin (these volumes were published in 1892 and in 1893-95), in German, where he investigated such economical issues as the theory of income, economic and legal dimensions of usufruct. That is why it seems to be quite probable that these two scholars knew each other, at least by the way of reading each other's publications.

In the following we will examine the academic context in which Leon Petrazycki formed his transdisciplinary approach, paying particular attention to "social engineering", "living law", and other aspects that allow characterizing his conception as one of the branches of legal realism—this mainstream conception also appeared in legal philosophy at the turn of the XX century. Going back to the beginnings of this approach, one can discern some common places in legal and economic sciences at the turn of the XX century. Among these common places the foremost importance has, in our opinion, the predominating orientation to base every and each scientific assertion on empirical data, with discrimination of any metaphysical speculation. This orientation formed similar attitudes to understanding of legal and economic behaviors of social actors in countries seemingly belonging to different intellectual cultures.

Such was the case of legal realism: almost independently of each other, legal scholars in different parts of the world put forward a program of renewal of the scientific knowledge of law: explaining law in the terms of common sense and day-to-day social experience of human beings. Leon Petrazycki and his school in Russia have forwarded similar claims, even if classifying them as realists is subject to discussions. This overall scientific program of legal realism implied focusing primarily on the correlation between psychological emotions and attitudes of law *vis-à-vis* legal texts and the social behavior brought about because of such emotions and attitudes, thereby placing the science of law into "human" or "existential" dimension. In this respect, Petrazycki comes very close to what Professor Krawietz in 2001 has defined as German legal realism, and where certain common trends between the ideas of Petrazycki and von Schmoller

can be traced. However, we must add that these realist stances were afterwards reconsidered by Gurvitch, Timasheff and other Petrazycki's followers; these latter placed his legal ideas into a framework of sociological jurisprudence, divesting thereby these ideas of their existential connotation and considering law more as a matter of social control as an issue of individual psychological choice.

This Petrazyckean perspective thematically coincides with the formulation of basic tenets of legal sociology (Eugen Ehrlich, Roscoe Pound), and of legal realism (Axel Hägerström, Vilhelm Lundstedt, Oliver W. Holmes Jr., Karl Llewellyn, Leon Petrazycki) at that period. These two mainstream schools pursued the same methodological objectives but within several competing methodological programs; unsurprisingly, they also achieved somewhat different results. There are still on-going debates about what exactly legal realism is, and about who personally can be or cannot be considered as a realist. (It shall be especially underscored that the term "realism" in law has absolutely different meaning as compared with philosophical "realism".) Here we will abstain from taking part in these debates, and our provisory demarcation of legal realism's borderline will be based on the sole criterion of utilization of psychological and intuitivist methods in defining what law is. Such a criterion can surely be insufficient for other research projects concerning the mentioned legal scholars, but its application in this investigation is determined by the particular context that we try to examine here. For the purposes of the present paper we will consider as 'legal realists' those thinkers who based, within the mentioned period of time, their account of the law on the intuitivist qualification of certain emotions or experiences as legal ones. (Here one could draw some interesting parallels with the intuitivist philosophies of William James or Henri Bergson framed in the 1930s into the conception of "integral and pluralist legal experience" by Georges Gurvitch), but these parallels fall outside the limits of our research here.) This context will imply not only reasoning with the help of the intuitivist arguments and comparisons, but also expounding a scientific program comprising these arguments within the framework of positivist philosophy and harmonizing them with the methods of psychology.

In fact, the preceding legal scholarship has been mainly "anchored" to the natural-law tradition that implied an objectivist vantage point from which human relations can be conceived of as chains of a necessary and universal order. This order was thought to reflect a natural order, be it a causal order of nature, a mandatory order of rationality or an imperativeness of morality, obligatory force of which derives from objective ethical precepts. This static vision of law and of its machinery has been vigorously criticized in the XIX century by legal positivists such as John Austin or Jeremy Bentham, by the German Historic School of Law (Carl Savigny, Georg Puchta), and also by the first sociologists (Auguste Comte, Henri Saint-Simon, Emile Durkheim). The ius-naturalist doctrines presupposed there being an eternal law valid for all places and times, and certain precepts of this eternal law, which in reality were products of speculative philosophical thinking. From this point of view, such doctrines did not allow for any transdisciplinarity, if by the latter we understand the interplay of the cultural similarities and divergences, of the social impact and the individual initiative, and integrating them in a context of human existence. Neither such interplay was possible within the scope of the two opposing methods that replaced ius-naturalism in the XIX century: legal orders seemed to be conclusively divided because each legal order was constituted either by the unique will of a sovereign

(for the positivists) or by the original and inimitable *Volksgeist* (for the historicist lawyers).

Bringing down the natural-law doctrines by legal positivists in the mid-XIX century paradoxically did not signify any changes in the basic methodological premises. Instead of “nature”, the positivist lawyers started considering the state as the only lawmaking instance. John Austin’s famous definition of the law as of a set of commands issued by a sovereign is exemplary for this approach. On the other hand, Emile Durkheim’s definition of law interprets it as of a visible sign of solidarity. Lawmaking was still explained as a unilateral relationship between various instances (nature, state, individual, or society...), human beings as creative actors, as architects of the legal order, remained rather in shadow, with almost no light cast on how they create and reproduce law in their communication. In this paradigm, it was completely coherent and plausible to consider each legal order as a closed unitary system that authoritatively reproduces its rules and imposes these rules on its subjects (physical or legal persons). The German *Rechtswissenschaft* and the French *école d’exégèse* are typical examples of this conception of law in the XIX century. As well, this conception is exemplified by the later project of purification of legal knowledge that had been advanced by Hans Kelsen in his Pure Theory of Law (*Reine Rechtslehre*).

This vision of law was, nonetheless, inappropriate for describing the realities of legal regulation in big empires that comprehended a variety of heterogeneous groups and societal systems. An oversimplified look at law as at a mental hypothesis or a command of a sovereign did not come to grips with the realities of social and existential experience of human beings. Putatively, this inappropriateness, as to the needs of colonial administration, suggested to some British and French scholars (one can mention Henry Maine or Lucien Levy-Bruhl) to utilise anthropological methods in the law. Similar trends could be stated at that time in the Austrian (Valtazar Bogišić or Stanislaus Dniestrzanski) and Russian scientific communities (Maxim Kovalevsky or Vladimir Bogoraz). An important question arises in this perspective: to which extent the ethnic and cultural heterogeneity of the Austro-Hapsburg, the Russian, the British or the French Empires determined and justified these research methods and made the findings from these researches to be the tools for better government in empires. However, we shall leave this topic aside, as it falls outside the scope of our research. (Monica Eppinger excellently underlines some interesting ideas and references on this propos as to the legal sociology in the Austro-Hapsburg Empire; here we refer readers to her paper.)

As persuasively demonstrated in the writings of the French legal anthropologist Norbert Rouland, adopting an anthropologic perspective at that time allowed grasping the real processes of formation of the law both in primitive and in developed societies. Human being, her primary needs, functions, interests, practises—all this could serve as common denominators for an integrated comprehension of different societal regulatory systems that otherwise would remain incomprehensible from the vantage point of the legal positivism. Although, this anthropologic challenge to prevailing dogmas of the *Rechtswissenschaft* was not taken seriously by the majority of legal scholars of that time: legal anthropology and legal ethnology were treated rather as peripheral scientific disciplines that do not exert any influence on jurisprudence. The anthropological approach to law could become a fertile and rewarding ground for fostering

transdisciplinary studies, but unfortunately the strategy of the lawyers of that time was not to react to this challenge and to ignore it as irrelevant for the “Province of Jurisprudence Determined” (to allude to the title of John Austin’s famous writing). This dividing line between anthropology and jurisprudence has endured for many years to come, and still exist.

Another counter-current of the legal thinking of that time, sociological jurisprudence, deserved more attention of lawyers and brought about more controversies. In the second half of the XIX century a new discipline of sociology claimed (as did, e.g., its founding father Auguste Comte) to become the only scientific method to understand and to explain society, as opposed to other, metaphysical methods. Non-surprisingly that this new discipline attempted also to conceptualize law as one of the societal mechanisms. From the first scornful comments made by Comte about law, sociology went to more balanced and accurate accounts, as those by Herbert Spencer, Ferdinand Tönnies or Emile Durkheim. The holist perspective adopted by these prominent authors and their schools, prevented them from grasping the variable balances between individuality and community, between community and society (*Gemeinschaft* and *Gesellschaft*); these balances were largely distorted in the profit of the social whole. In this perspective, the individuality and its practices—including the law, culture, and so on—have been conceived of mostly as functions of the society. The idea of Auguste Comte and Emile Durkheim to see in society a kind of *grand être* was recurrently repeated by other writers after these controversial French sociologists. In these terms it was problematic to grasp the existential ‘betweenness’ of human being who stands between the extremities of her dissolution in social life (and becoming merely a function of the society, a cog in the social machine) and absolutisation of her independence and sovereignty (what Dostoevsky called “Man-god approach”), and to consider this ‘betweenness’ from the standpoint of transdisciplinarity. (Needless to say that the Kantian ‘Critics’ have considerably promoted such absolutisation of human intellectual and ethical capacities.)

Especially relevant for enhancing legal studies in this direction was the work of Leon Petrazycki. Although his psychological theory of law had been developed at the turn of the XX centuries, it only drew attention of the worldwide scientific community later on: when his disciples, through the intermediary of their own works, introduced it to this community in 1930s. The key elements of this theory were close to the ideas that were disseminated at the time by the first American and Scandinavian legal realists. The particular treat of Petrazycki’s conception was his accent on psychological emotions. The disciples of Petrazycki have enriched this theory by bringing together psychological research of law with examination of sociological dimensions of law. It is with this scientific program of an “integrated knowledge about law” that such prominent legal sociologists as Georges Gurvitch and Nicholas Timasheff entered into the history of ideas. These two exiled Russian legal philosophers strongly contributed to development of legal sociology, bringing into it some specifically “Russian elements”, some key concepts characteristic of Russian philosophy (*Sobornost’*, *Vseedinstvo*), remaining nonetheless within the limits of the Western legal tradition.

But before their important works appeared, legal science and sociology coexisted relatively peacefully during the last decades of the XIX century and the two first decades of the XX century, without intervening in each other’s respective fields. In spite of the fact that the Italian thinker Dionisio Anselotti had coined the

term 'legal sociology' already in the end of the XIX century and that the Austrian Eugen Ehrlich had published his ground-breaking "Sociology of Law" in 1913, lawyers and sociologists received these attempts nonchalantly, without great enthusiasm or interest, so that these two disciplines continued to preserve their methodological autonomy for a while. Only in the 1930s Georges Gurvitch or Nicholas Timasheff have definitively institutionalized the sociology of law as a scholarly discipline.

Following the general moods in social sciences, in the first decades of the XX century not only Gurvitch and Timasheff but also some other European scholars endeavoured to revise, or rather broaden, the methods of legal science according to the standards of scientific rationality of that time. The science of law has been challenged because of its presumed metaphysical character (the reproach that had been made as early as in the mid-XIX century by Comte), these challenges being supported by lawyers, some of which were aware of the methods of sociological inquiry and were impatient to substitute the traditional metaphysic (both of the natural-law doctrine and its competitors) to these methods. In the first years of the XX century the '*Freie Rechtsfindung*' movement has put the first signposts of this 'protest movement': its proponents, such as Hermann Kantorowicz or François Géný, claimed that judge is not 'the mount that pronounces words of the law' (the notorious expression of Charles L. Montesquieu) but a real creator and master of the law. There is a bulk of various societal interests and circumstances that judge shall reconcile in her judgement, and words of law are just points of reference for the judge to justify the balance she found for this reconciliation, recurring to this justification *post factum*, after her decision is made. Therefore, the texts of laws are nothing more than the signs according to which we can guess what a court judgment will be, but they do not provide any definite clues for forecasting and explaining this judgment.

After this preliminary critical work, there remained only one step to establishment of a new legal discipline that would provide a sociological account of the law: the discipline of legal sociology with its particular method (or a set of methods). Such an establishment took place almost synchronically in several leading Western scientific communities. The priority is usually ascribed to the Eugen Ehrlich who in 1913 has symbolised the birth of this new discipline by the publication of his opus '*Grundlage der Soziologie des Rechts*'. This publication has made quite much noise and provoked a virulent criticism from the part of legal positivists headed by Hans Kelsen. Bronislaw Malinowski in England developed similar ideas; in the US this trend was supported and promoted by Roscoe Pound, a dean of Harvard Law School. Was the legal sociology able to provide a comprehensive framework for accessing transdisciplinarity in law? Looking at the contemporary field of "law and society", "socio-legal studies" and similar trends, one is tempted to give rather a positive answer. But at that period of time, legal sociology mainly implied considering law within a holist framework of social interaction where society organises itself and its members (humans, institutes, groups) rather in a mechanical manner. In this light, the idea of sociological explanation of law meant placing law among other social institutes and finding its appropriate function within the social whole. This perspective did not encourage studying the inter-individual communication (a reference to the ideas of Gabriel Tarde, Georg Simmel or Max Weber could seemingly repudiate this conclusion, but the focus of their interest has never been centred on the law), and thence did

not enhance continuing of transdisciplinary research in the sense indicated above.

Along with sociological analysis of law, some scholars of that era started to examine psychological determinants of lawful and lawless behaviour in society. The main slogan of the realist school of law was to study the law such as it is, to examine the reality of law. This reality was perceived in the terms of psychological reactions and of mental projections that accompany rights and obligations exercised in social interaction. Founding fathers of the legal realism –Axel Hägerström in Sweden, Oliver Holmes Jr. in the US, Léon Petrazycki in Russia– sought for a common denominator of law in human psyche. Petrazycki has found this denominator in specific emotions connected with rights and obligations, and tried to reduce the complexity of law to psychological reality of individual consciences. (This falls pretty close to Ehrlich's definition of law through different emotions raised in human psyche by violation of law.) For Hägerström, the psychological mechanism of law worked analogously to the mechanism of magic. He asserted that human beings have the predisposition to connect in their imagination some ritual or speech acts with certain consequences, and depending on what kind of consequences they are, we deal either with law, or with religion, or with magic, etc. Thence, law as a *prima facie* social regulator sets out a compulsory order in society; all beliefs and emotions that make human agents to act in a coordinated manner are legal ones. The Chief Justice Holmes famously insisted that law is what judges say law is; in order to prognosticate how legal rules will be interpreted and applied by a judge, we need to investigate mentality of this judge, her habits, beliefs, style of reasoning, her prognosis of what the higher instances would probably say about her judgments, and so on.

It seems that Petrazycki's program of upgrading legal science seemed to be the most radical one. He suggested that the only verifiable way to take cognisance of law was to single out a special class of emotions that we usually associate with law. From this standpoint, in Petrazycki's opinion, law is about bilateral emotions that have two converging sides: the imperative (to feel oneself empowered to require) and the attributive (to feel oneself under an obligation to perform other's requirement) ones. The scientific programs of Petrazycki and other realists included not only psychological but also sociological conditions of the human existence that create a coercive order in society that we call "law". It is true that this sociological side was not in the centre of attention of the first realists, but it was nonetheless visible in the basic premises of the conceptions elaborated by Holmes, Hägerström, and Petrazycki. This role of sociological factors became especially evident in the works of their continuators, such as Karl Llewellyn, Carl Olivecrona, Georges Gurvitch or Nicholas Timasheff. These latter thinkers underscored the importance of social environment that enhances these specific emotions and their conceptualization in the words of law (in the terms of mutual rights and obligations).

The foregoing enables us to discern three perspectives in which one can speak about transdisciplinarity in legal science with reference to Petrazycki and other representatives of the "first realism". Firstly, it was a methodological program that set out to find a 'golden middle' between the extremities of metaphysical and empiric approaches to law that correspondingly either excessively generalize law (because law purportedly emanates from nature that is the same everywhere) or make it too parochial (being concentrated on individual wills of concrete sovereigns). Transdisciplinarity in this context can imply a sound degree of both

particularity and generality in describing law. Secondly, this category permits to assess from another angle the problem of mutual relationship between individuality (the particular), community (the whole) and intermediating institutes of social control and of communication (such as law). This problem has been known and discussed as early as in the Antiquity, and ever since different philosophers (to begin with Plato and Aristotle) sought to give the prevalence either to the whole (the communitarian ideology), or to the particular (the liberal ideology). Here too, the reference to the realist conceptions would allow establishing a balance between communitarian and liberal extremities. Thirdly, this approach suggested that cultural differences between countries could be viewed not necessarily as irreducible (exceptionalism) or as insignificant (universalism). These extremities can also be combined (in what concerns legal regulation) in a synthesis that recognizes both the dependence of law on social culture (later, this became a mainstream research field for comparative-law scholars), and the leading role of law in changing this culture. Here, a dual nature of human beings (at the same time as a unique and autonomous actor, and as a product of social education and interaction) can be examined in the light of interplay between individual emotions and cultural/social habits.

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