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The present volume comprises papers presented at the Special workshop "The Experience of Law" within the 29th World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR) held in Lucerne, Switzerland, during July 7–12, 2019. The contribution brought together 13 researchers from 5 countries in order to view an experience of law from different epistemological perspectives among them phenomenological hermeneutics and postmodernism, psychoanalysis and neo-Kantianism, legal realism and psychological theory of law. The volume reflects the wide range of topics that were addressed by contributors: from general phenomenology of law and lawlessness to philosophy of liberation, from genesis and experience of normativity to psychological foundations of legal validity. What is common to all authors is an attempt to take a fresh look at the basic question of the philosophy of law and consider law not as an object of our cognition or our technical domination, but as something that happens to us.

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PREFACE

Is it possible to take a fresh look at the basic question of the philosophy of law? Can we consider law not as an object of our cognition or our technical domination, but as something that happens to us?

The present volume comprises papers presented at the Special workshop "Experience of Law" within the 29th World Congress of the International Association for Philosophy of Law and Social Philosophy held in Lucerne, Switzerland, during July 7–12, 2019. The Workshop brought together 16 researchers coming from 8 countries in order to view an experience of law from different epistemological perspectives among them phenomenological hermeneutics and postmodernism, psychoanalysis and neo-Kantianism, legal realism and psychological theory of law. The volume reflects the wide range of topics that were addressed by contributors: from phenomenology of lawlessness to philosophy of liberation, from genesis of normativity to foundations of legal validity.

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Continental Legal Realism: Legal Validity as a Psychological Experience[232]

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I. Exactly What is Legal Validity?

The problem of the validity of law is comprised of a set of interrelated questions traditionally analysed within ontological legal research, such as the normativity of law, its efficacy, legitimacy, justice, the relationship of law and coercion, law and morality, etc.

Researchers use the term "validity of law" in three different meanings that reflect different aspects of validity as an essential property of law: (1) normative importance; (2) social and/or psychological efficacy/effectiveness; (3) objective givenness. Such ambiguity is due to the differences in understanding of law worsened by the dual nature of the problem, which combines the problems of validity's *definition* and *foundations*.

Discussion on legal validity among representatives of various approaches to law is impossible without a common ground, i.e. without a working *definition of validity* that is free from any limitations that a certain understanding of law might cause. The *validity of law* as its essential property can be defined as law's binding force that drives its particular mechanism of normative influence on people's behaviour. As opposed to the working definition of validity, *foundations of validity* are inextricably linked with the choice of a certain legal approach and constitute various interpretations of the source of law's binding force.

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Translated from Russian to English by Artem Samarsky, Natalia Vasilyeva and Elena Timoshina.

II. Psychological (or Continental) Legal Realism as a School of Legal Thought

Ideas of law as a certain – to be more specific, psychological – experience form the basis for the teachings of such legal philosophers as Leon Petrażycki (and some of his pupils), Alf Ross (as well as Axel Hägerström and his prominent followers) and Enrico Pattaro – who could be considered representatives of so called Continental, or psychological, legal realism.

The main tenets of psychological legal realism are identified by Edoardo Fittipaldi as following: (1) strict realism denying that law exists in any unique reality of "ought" different from the physical or psychological one; (2) careful legal reductionism; (3) immediate irreducibility of law as a psychological phenomenon to physical phenomena, behavioural actions; (4) indirect reducibility of norms to unique legal emotions; (5) law's objective nature experienced by an individual arises from the rationalization of his mental experiences; (6) distinction between the internal psychological (validity) and external behavioural (effectiveness) aspects of norms' existence; (7) the hypothesis about the existence of unobservable psychological phenomena underpinning law is used to explain observable legal phenomena; (8) distinction between truth and correctness.[233]

This school of thought analyzes ontological questions related to the specifics of legal experiences, nature of normativity and legal validity and so on. In psychological legal realism legal validity is considered to be an impulse in human brains (an impulse related to a certain idea of action, behaviour pattern), a psychological (or mental) experience.

III. Leon Petrażycki

Leon Petrażycki (1867–1931) was a prominent Russian-Polish legal scholar whose innovative legal notions were significantly ahead of his times. Fittipaldi views

[233] Edoardo Fittipaldi, "Introduction: Continental Legal Realism," in *A Treatise of Legal Philosophy and General Jurisprudence. Volume 12. Legal Philosophy in the Twentieth Century: The Civil Law World. Tome 2: Main Orientations and Topics*, eds. Enrico Pattaro, Corrado Roversi (Dordrecht: Springer Netherlands, 2016), 299-307, 309, 313, 315, 318.

Petrażycki's theory of law as one of the branches of continental (psychological) legal realism, along with Hägerström's school. Petrażycki's psychological theory of law originated independently of Hägerström and even before Hägerström's theory did: in the year 1900 we already see "Essays on the philosophy of law" where Petrażycki presented foundations to his new approach to legal studies. Both of them tried to develop a proper empirical theory of law, which would be based on the research of real – primarily psychological – facts. Another principal similarity is the idea that the real nature (reality) of law is psychological: law does not actually consist of norms, but of unique psychological phenomena (emotions, impulses, notions, experiences, etc.); in other words, law exists in the heads of those who are subject to specific psychological experiences. Both scholars pointed out authoritative and mystical character of legal experiences.

Petrażycki turns to psychological acts as the data that is fundamental, credible and directly accessible to scholars.[234] Petrażycki's theory is based on several key concepts: ethical emotions, self-sufficient motivation, normative judgement (conviction).

Petrażycki views law as a psychological phenomenon, as fact of a person's inner life: law is described as bilateral imperative-attributive emotions, while moral emotions in contrast are seen as unilateral, imperative. Ethical emotions (both legal and moral) are characterised as motivational emotional processes underlying human behaviour. Ethical emotions can also be described as blanket (abstract): they need a certain intellectual representation – action representation (*akcionnoe predstavlenie*), i.e. representation of an "image of action".[235] Action representations evoke corresponding "emotional processes motivating various positive or negative actions (inaction)".[236] Motivation that is related to action representations Petrażycki calls actional or self-

[234] Лев Петражицкий, "Очерки философии права [Notes on Legal Philosophy]," in *Теория и политика права. Избранные труды* [Theory and Policy of Law. Selected works], науч. ред. Елена Тимошина (Санкт-Петербург: Университетский издательский консорциум «Юридическая книга», 2010), 251.
[235] Лев Петражицкий, *Теория права и государства в связи с теорией нравственности* [A Theory of Law and State in Connection with a Theory of Morality] (Санкт-Петербург: Лань, 2000), 26-29.
[236] Ibid., 35.

sufficient motivation. It is self-sufficient in a sense that being aware of a legal obligation is enough to give rise to a motivation for the obedience. Thus, the binding, motivational force is inherent to a subject's inner emotional experience of the self-sufficient value of a certain behaviour (i.e. a type of behaviour as an action representation related to the legal emotion). Ethical experiences are normative: they are motivating subjects to perform actions experienced as "ought". Petrażycki calls ethical emotions (including legal) – normative emotions.[237] He describes a psychological mechanism of binding or in fact self-binding (even in case of legal emotions): this mechanism is characterised by the properties of the ethical emotions per se and excludes any external factors determining behaviour.

According to Petrażycki, a legal norm is the content of a normative judgment – where a normative judgment is understood as an emotional act, namely, an emotion, the disposition to experience which Petrażycki called "normative conviction". The specific feature of normative judgments – as well as of normative emotions (of which legal emotions are a species) – is that (1) they approve or reject a certain type of behaviour "not as a means to a certain end but as such," and that (2) they motivationally affect the subject's behaviour.

The "mystical and authoritative" character of ethical emotions is their most important property in Petrażycki's thinking.[238] Legal emotions are considered a type of moral emotions, with their imperative-attributive character recognized as their unique feature. The idea that norms, rights and duties, legal institutions exist objectively is based, in Petrażycki's view, on an ethical emotional projection.[239]

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[237] According to Petrażycki, ethical experiences (including legal ones) do not only include ethical impulses and intellectual action representations, but a number of other cognitive elements too, such as representations of normative facts. Ethical experiences that contain representations of normative facts are called heteronomous or positive in Petrażycki's theory. Heteronomous legal experiences are seen as positive law.

[238] Елена Тимошина, "Концепция нормативности Л. И. Петражицкого и проблема действительности права в юридическом позитивизме XX в. [L. I. Petrażycki's Conception of Normativeness and the Problem of Legal Validity in 20-th Century Legal Positivism]." *Известия вузов. Правоведение*, no. 5 (2011): 62.

[239] For further information on ethical emotional projection see: Петражицкий, *Теория права и государства в связи с теорией нравственности* [A Theory of Law and State in Connection with a Theory of Morality], 51-52.

IV. Alf Ross

Ross's legal thinking corresponds to the main features of psychological legal realism.[240] The psychological outlook inherent in Ross's legal thinking is one of its key properties, largely underlying the foundations of legal validity. The key ideas of Ross's legal thinking are driven by his methodology, a combination of Uppsala School philosophy and the logical positivism (empiricism) of the Vienna Circle: rejection of metaphysics, non-cognitivism, coherentism, verification principle, etc.

Ross frees the *notion of the validity of law* from any metaphysics and reinterprets it within the factual realm. He depicts the validity of law as a *conceptual rationalization* of certain individual experiences, or psychological phenomena. He calls such phenomena "experiences of validity" and links them to a particular type of impulse – a disinterested motive. This impulse may be seen as a kind of psychological compulsion: it is not underlain by necessity, interest or a threat of penalty, but is experienced as originating from an external source of authority and engenders a feeling of being bound by the law.

Ross explains the influence of legal norms on human behaviour by describing motives of human behaviour. These motives can be divided into two groups:[241] (1) impulses based on biological needs and perceived as "interests"; (2) impulses suggested by social environment and perceived as an imperative, which "obliges" an individual without taking his "interests" into account or even contradicting them.[242] It

[240] Unlike Fittipaldi we do not think that Ross made a mistake of immediate reduction of law to the mind and behaviour of the individuals who apply it and that mistake makes it not possible to mention Ross among psychological legal realists. In "On Law and Justice" Ross does not turn to the analysis of the mind and behaviour of those who apply law for the sake of reductionism, but in order to build doctrinal study of law on the foundation of logical positivism. In his other works, especially "Directives and Norms," Ross is more interested in primary and secondary norms and is more clear with his opinion that legal experiences (valid law) are present in all individuals and that norms addressed to private individuals are legal too.

[241] For more information, see Chapter 17 in "On Law and Justice" (Alf Ross, *On Law and Justice* (Berkeley: University of California Press, 1959), Ch. 17). Ross's concept of "disinterested impulses" becomes crucial for defining the binding force (validity) of law.

[242] The origin of such impulses (the mechanism of legal validity) is a complex psychological question, Ross only provides its broad outline. Petrażycki and Pattaro adopt a similar approach. For instance, Pattaro indicates that the binding nature of a norm's requirement to perform certain actions

follows from the definition of the second type of motives that they can easily be interpreted in metaphysical terms as manifestations of the highest "validity." According to Ross, it is these disinterested motives unique to law (and morals) and their rationalization that resulted in the notion of validity as law's objective quality and its metaphysical interpretation. From the realistic point of view, however, legal validity only indicates that such motives, impulses, and emotions associated with legal norms do exist.

Ross states that it is the very existence of these experiences (i.e. experiences of validity) that has caused the belief in the objective existence of "validity" as a quality of law:[243] misinterpretation of these experiences has given rise to the idea of an objective and knowable quality of validity.[244]

It is postulated that the validity of law as a system is based on a combination of interested and disinterested motives (impulses, emotions) in their inextricable inductive iteration (and its specifics distinguishes law from morals). An institutionalized system of enforcement gives rise to an interested motive (stemming from the fear of physical compulsion) that coexists with a disinterested one, the latter being the experience of the validity of law, belief in the authority and legitimacy of the system. None of the motives takes precedence – the two mutually give rise to and impart stability on each other. Such confluence of the two motives – one stemming from the fear of physical compulsion, and the other being based on the respect for the institutionalized enforcement – is unique to law as a system that combines the properties of physical coercion and its institutionalized nature.

According to Ross, validity of law manifests itself in reality as effectiveness and is only available for direct observation and scientific analysis within jurisprudence

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does not depend on favorable or unfavorable consequences that may result from compliance or incompliance with such a requirement. In certain conditions the impulse to comply with the required behaviour arises by itself. Petrażycki calls this "self-sufficient motivation": the idea of the conduct is itself sufficient to evoke corresponding impulses. The distinctive feature of Petrażycki's legal thinking is that it implies positive or negative reaction to the required conduct (experience of its self-sufficing value) motivating an individual to behave in a certain way, rather than just an impulse to comply.

[243] Alf Ross, *Directives and norms* (New York: Humanities Press, 1968),104.

[244] Ibid., 86.

through effectiveness. Effectiveness of a norm allows to make a conclusion about its validity; a norm is a directive which corresponds to social facts. A directive is regularly and consciously adhered to and experienced as binding because the corresponding pattern of behaviour is internalized and invokes the experience of validity. Although Ross focuses more on the effectiveness of law, such effectiveness cannot be separated from validity, i.e. a binding force, a feeling of being bound by law.[245]

V. Enrico Pattaro

Scandinavian legal realism was created within a consistent effort of building an exclusively empirical science of law. However, as Mikhail Antonov and many other researchers point out, there are also some objective qualities of law that cannot be reduced to pure empiricism.[246] Therefore, Antonov believes that Pattaro seeks to integrate empirical and ideal elements of law, while at the same time removing all additional metaphysical impurities.[247] It seems necessary to stress that "ideal" elements in Pattaro's legal thinking are not seen as existing in any reality other than psychophysical. Therefore, it would be more correct to say that Pattaro's theory combines psychological realism, indicative of Scandinavian realists, and normative distinction of "is" and "ought."

Pattaro calls his own version of legal realism "normative realism." Scandinavian legal realists sought to prove that norms and their validity are illusions, since they do not exist in reality and, therefore, cannot serve as motives underlying behaviour (although they can be interpreted as something based on facts of reality). While norms

[245] According to Petrażycki, the binding force of law is mainly based on unique emotions of duty (motivational mental processes) or legal emotions that in themselves constitute motivation for a certain behaviour. This may be regarded as an experience of being bound by law: awareness of the duty generates a motive for its execution. Later we will show that Pattaro separates efficaciousness and effectiveness and believes that a norm is only efficacious when it serves as a motive for a person who agrees with the norm to comply with the obligation expressed in it. If in a similar situation the norm is observed without any indication as to the motives behind such compliance, this norm is applied, but not efficacious. And it's the efficaciousness that truly matters in the context of binding force of law.

[246] Михаил Антонов, "Скандинавская школа правового реализма [Scandinavian School of Legal Realism]," *Российский ежегодник теории права*, no. 1 (2008): 668.

[247] Ibid.

do not exist in the world of "is," the world of "ought" has no independent existence at all, according to Scandinavian legal realism, and does not belong to the subject of jurisprudence (theory of law). Pattaro suggests another approach: on the one hand, norms have no reality of their own, but on the other hand, they exist in the mind (consciousness) of a person.

Pattaro defines a norm as a mental phenomenon, a motive of behaviour: "It is the belief (*opinio vinculi*) that a certain type of action must be performed, in the normative sense of this word, anytime a relevant type of circumstance gets validly instantiated".[248] The term "belief" here should not be understood in a religious sense, but rather similarly to the term "conviction" ("*ubezhdenie*", as Petrażycki systematically used it). It should be noted that conviction implies the possibility of rational justification and conscious change. According to Pattaro, beliefs are to some extent autonomous, they are often irrational and determined by emotions; therefore, beliefs are not something that can be consciously "generated" or changed.

The binding force of the requirement to perform a certain action does not depend on any favorable or unfavorable consequences due to compliance or lack thereof in relation to such requirement. Norms are deontologically (not teleologically) oriented and do not depend on goals.[249] A person who believes in the norm consciously or unconsciously ascribes normative character to deontic modality ("obligatory", "permitted" or "forbidden") set forth in this norm. What the person believes to be objectively law is the type of action defined by the norm as obligatory, permitted, or forbidden under the conditions specified in the type of circumstance, which the norm attaches to the relevant type of action.

Thus, a norm is a rule that is *binding per se*. A norm represents a certain mental state of an individual, a normative belief. Normativity is understood here as

[248] Enrico Pattaro, *A Treatise of Legal Philosophy and General Jurisprudence. Volume 1: The Law and the Right: A Reappraisal of the Reality that Ought to Be* (Dordrecht: Springer Netherlands, 2007), 97.
[249] Ibid.

psychologically experienced self-binding. Although those who believe in a norm[250] ascribe non-empirical existence to its content, the content of a norm can only exist as a belief that it is a norm, an *experience* of the norm's binding nature. Pattaro uses the term "catholodoxia" to describe the origin of ideas about the nature of legal norms independent from and external to the subject. Since every person adhering to a norm believes in the obligation to perform a certain type of behaviour, each of them believes that a certain type of behaviour will be binding for them if they hold an obligation under this norm. This is connected to the concept of "universalisability". Catholodoxia is a belief in universal nature of our personal beliefs, an assumption that our belief applies to everyone. Norms are typical examples of catholodoxia. Catholodoxia often leads to a reification and hypostasis of regulatory systems and the "reality that ought to be" in general. This way of thinking facilitates the operation of a legal system but requires one to assume that law consists of certain objective norms, legal system exists and operates by itself and norms are produced regardless of whether anyone believes in their existence.[251]

Pattaro states that "a norm, like any other belief, cannot be internalised except in someone's mind, so it exists qua norm only in minds (or in brains, if we so choose to express ourseves)".[252] One individual who believes in a norm is enough for a norm to exist; the norm becomes a belief in the mind of this person. Pattaro uses the term "doxia" in reference to norm's existence in someone's mind.[253] Doxia is distinguished from deontia, i.e. the quality of an individual under a certain norm. He speaks of a norm *being in force* (nomia of the individual regarding this norm) only when doxia and deontia coincide within the individual.[254]

Thus:

[250] A person who believes in a norm is an individual in whose mind the norm exists as a belief, as a certain psychological state.
[251] Ibid., 215-216; Petrażycki calls this projection: the content of internal emotional experiences is projected into the external world because corresponding impulses are experienced as impulses with higher clout and authority. Ross describes this a conceptual rationalization of certain psychological experiences. This process can also be named objectification or hypostatization.
[252] Ibid., 98.
[253] Ibid., 98-101.
[254] Ibid., 105, 108.

– a norm is in force in the mind of its believer and individual under the obligation;

– a norm is not in force in the mind of an individual who is under the obligation but is a non-believer;

– a norm cannot be in force or not in force in the mind of a person who is not under an obligation, although it may exist in the mind of a believer.

Pattaro draws a line between *efficaciousness* and *effectiveness* of a norm.[255] A norm is effective if it is abided by without any indication of motives underlying this compliance. A norm is efficacious if it serves as a motive of compliance (*causa agendi*) for a person who is both a believer in this norm and a duty-holder under it. Effective norms are practiced norms, while efficaciousness depends on the norm's motivational effect. In other words, we are interested in the motivational effect of norms. Pattaro understands nomia (being-in-force) as a necessary requirement for both norm's efficaciousness and inefficaciousness. Therefore, a norm cannot be efficacious or inefficacious for those individuals in whom it is not in force.

Note that Pattaro uses the notion of validity – a central concept of his theory – in a way that is new to *legal* scholarship. According to him, validity is the state of a token that conforms to its type (the congruence of a token with a type), regardless of whether the type is set in a norm or somewhere else. A type is a set of characteristics by which something can be recognised, while a token is an example or an instance of a type. A type allows one to distinguish one state of affairs or an event from another, even when two types belong to the same generic class. The concept of "type" allows us to interpret activities, events and states of affairs as valid or invalid tokens of certain types without making any reference to law, norm, rule, etc. Actual states of affairs and events are tokens, i.e. instances of various types of states of affairs or events.

Types may be described in norms (among other phenomena). What is the relationship between validity in this sense and norms, according to Pattaro? The "type" and "valid token" concepts are tools that explain the relationship between "reality that

[255] Ibid., 109-114; for more on this matter see also Энрико Паттаро, "Действительность, нормы как верования и их эффективность [Validity, Norms as Beliefs and Their Efficaciousness]," *Известия вузов. Правоведение*, no. 6 (2015): 50–54.

is" and "reality that ought to be" in the continental dogmatic tradition.[256] Unlike Scandinavian legal realists, Pattaro does not reject the "is-ought" dualism. According to the scholar, the relationship of "is" and "ought" lies in the fact that actual events can lead to normative consequences (ought-effects), i.e. changes in the reality that ought to be. Rights and obligations of legal subjects, as well as norms and their content, exist in the reality that ought to be. The emergence, modification or termination of rights and obligations of legal subjects as well as creation, modification, or disappearance of norms are examples of ought-effects. Ought-effects can only result from valid tokens of the types set forth in norms which ascribe an ability to produce such effects to these types. Norms use types and their valid tokens to control the emergence of ought-effects, manage them, and ultimately regulate changes and development of the reality of ought. Moreover, norms do it only with the help of the types that they themselves contain. According to the Italian scholar, herein lies the true sense of "typicality" as a distinctive feature of law.[257]

Aforementioned approach allows Pattaro to perform a detailed analysis of traditional concepts of legal theory, reinterpreting them in the context of realistic psychological approach, developed by Petrażycki and Scandinavian legal realists.

VI. Conclusion

It is possible to trace the common line of reasoning on the problem of legal validity within psychological realism from Petrażycki to Ross to Pattaro. 1) Legal validity is based on psychologically experienced self-binding: Petrażycki's self-sufficient motivation, Ross's disinterested motive and Pattaro's perception of norms as "binding per se." 2) Internal existence of a norm (in psychological reality) is considered a motive of behaviour. A norm appears to consist of two parts: an intellectual representation of behaviour (Petrażycki's action representation, Ross's intellectual representation of certain patterns of behaviour or abstract idea content and Pattaro's image of a certain type of action or deontic propositional content) and

[256] Pattaro, *A Treatise of Legal Philosophy and General Jurisprudence*, 24.
[257] Ibid., 23.

specific emotions, connected to it. External existence of a norm is a behavioural aspect in the observable physical reality of human behaviour, which allows to hypothesize about the existence of unobservable psychological phenomena underpinning law. 3) The idea of a unique non-empirical "mystical and authoritative" binding force of law is explained through a psychological objectification of validity experiences: Petrażycki's naive projection, Ross's conceptual rationalization and Pattaro's catholodoxia. 4) An attempt to avoid problems of Ought-Is dualism: norms and other deontic objects exist in human brains, in psychophysical reality and not in some separate reality of Ought.

While the psychological approach to legal phenomena and legal experience roots back to the beginning of the 20th century to the works of Leon Petrażycki, it developed over time, staying relevant, and has even more potential to thrive in the 21st century, when humanity is ready to drastically expand its knowledge of the human brain and psyche.

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