

# Did Leon Petrażycki Set the Foundations of the Behavioural Economic Analysis of Law?



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*The foundation of political economy and, in general, of every social science, is evidently psychology. A day may come when we shall be able to deduce the laws of social science from the principles of psychology.*<sup>1</sup>

Vilfredo Pareto (1903)

*Law is a psychological factor of social life and acts in a psychological way.*<sup>2</sup>

Leon Petrażycki (1925)

*Never has law relied as heavily on psychology as it does today.*<sup>3</sup>

Jeffrey J. Rachlinski (2011)

## 1. Introduction

Leon Petrażycki may be considered the founder of the second generation behavioural economic analysis of law. His views regarding the role of psychology in legal sciences, conviction about the influence of legal principles on the decision-making process of the addressees of legal norms as well as the conviction that law can be analysed as an empirical fact using available scientific tools which are the best at a given moment, make his research programme, namely “the scientific legal policy”, surprisingly similar to the papers of psychologists, lawyers and economists who identify themselves with the movement of the behavioural economic analysis of law. Furthermore, it seems that Petrażycki may be perceived nowadays as the founder of a more mature behavioural analysis, *inter alia* due to his conviction about the dependence of legal systems (and, in fact, psychology) on cul-

1 V. Pareto, *Manual of Political Economy: A Variorum Translation and Critical Edition*, Oxford 2014, p. 20.

2 L. Petrażycki, *O ideale społecznym i odrodzeniu prawa naturalnego*, Warsaw 1925, p. 21.

3 J. J. Rachlinski, *The Psychological Foundations of Behavioral Law and Economics*, “University of Illinois Law Review” 2011, No. 5, p. 1675.

tural factors which determine the effectiveness of specific regulations.<sup>4</sup>

## 2. Scientific Legal Policy

The scientific legal policy is a wide-ranging research programme which entailed the necessity of conducting new research in logics, psychology, sociology, philosophy and legal sciences because none of those fields was scientific – according to the requirement of the Polish philosopher and sociologist of law. Nevertheless, if we undertake to reconstruct the characteristics of Petrażycki's legal policy, we will encounter an obstacle. He outlined the general frameworks of this new field of legal sciences in his book entitled *Wstęp do nauki polityki prawa* (Introduction to Legal Policy), which was originally published in 1897.<sup>5</sup> However at that time, Petrażycki outlined only a “road map” and he began systematic studies on psychology, sociology, philosophy and law only later. Due to the lack of another complete description of the legal policy concept from later years, it befits to present the primary assumptions in a way in which they were presented by their author. The legal policy was to be based on four theses: 1) on the social ideal, 2) on ethical progress, 3) on the educational role of law and 4) on legal psychology.

According to the first thesis, the aim of law is to achieve the social ideal, which was named by Petrażycki – somewhat poetically – the ideal of love. This aim is to be achieved in an evolutionary, yet controlled way. We should not wonder why it is love that constitutes the social ideal, the direction of which the provisions of law should lead us to,<sup>6</sup> because the ideal of love is the axiom of a practical mind. It does not need any proof, the same as the statement that love is the highest good, which also does not need any proof. Petrażycki was thinking of the ideal of love as a situation where there is no law or morality because altruistic behaviours are the dominant pattern of behaviour.<sup>7</sup> The role of legislators, and thus the aim of legal rules, is

to intentionally accelerate the ethical development of societies and promote “the highest rational ethics among people”.<sup>8</sup> Already at first glance there appears a question whether it is practically possible to fulfil such an ideal. Andrzej Kojder called Petrażycki a “Big Romanticist” because he did not believe, most probably similarly to Petrażycki, that such a situation could be achieved in the foreseeable future.<sup>9</sup>

The ideal of love has practical application because it should serve as a tool which allows for the identification of dominant ethical views in society and thus it may help in the proper selection of legal acts so that they are appropriate for the current level of ethical development of society. Even if we were to agree with the above statements, there remains a question how the legislator can change the ethical views of an entire society. How to encourage citizens to altruism-based behaviours?

The thesis about the social ideal assumes that some form of the ethical evolution of society and entire mankind is possible and takes place. To be honest, that thesis makes sense only when the ethical evolution is already pending. Petrażycki was searching for proof of that evolution but he was conducting his search using methods which were available at the end of the 19<sup>th</sup> century. The legal systems of previous eras, in particular Roman law, constituted the subject matter of the search. Being a lawyer and a philosopher, he believed that historical and legal studies on changes of legal systems from ancient times until the beginning of the 20<sup>th</sup> century would enable him to identify the ethical evolution and thus to specify the stages of that evolution in particular societies.<sup>10</sup>

The ethical evolution thesis and the ethical behaviour thesis are interconnected. The first one assumes the existence of the evolution of values and behaviours and possibilities of accelerating it thanks to the use of

4 L. Petrażycki, *O dopełniających prądach kulturalnych i prawach rozwoju handlu*, Warsaw 1936.

5 L. Petrażycki, *Wstęp do nauki polityki prawa*, Warsaw 1968.

6 Ibidem, p. 25.

7 A. Habrat, *Ideal człowieka i społeczeństwa w teorii Leona Petrażyckiego*, Rzeszów 2006, p. 11–18; H. Leszczyzna, *Petrażycki*,

Warsaw 1974, p. 69–90; K. Motyka, *Optymizm Petrażyckiego*, “Kamena” 1981, No. 11, p. 9.

8 R. Zyzik, *Ideal społeczny w polityce prawa. Perspektywa ewolucyjna*, “Archiwum Historii Filozofii i Myśli Społecznej” 2015, No. 60, p. 175–188.

9 A. Kojder, *Godność i siła prawa: szkice socjologiczno-prawne*, Warsaw 1995, p. 123.

10 L. Petrażycki, *Wstęp do nauki...*, op. cit., p. 25–28.

an appropriate legal motivation on a large scale. The second one assumes that the evolution moves towards the ideal of love, namely a state in which egoistic behaviours are marginal and law and morality are no longer needed. However, before the ideal of love is achieved, it may – according to Petrażycki – serve as an objective assessment criterion of legal norms understood as impulses influencing the behaviours of citizens in a way which, on one hand, is in line with the ethical level of society and, on the other, brings them closer

create habits of desired behaviours. However, to that end, the legislator should be aware which measures can be used in a specific situation and which should be resigned from, thanks to which they will be able to assess which goals from among those intended by the legal system are achievable at all.

The last thesis which constitutes the core of Petrażycki's scientific legal policy is the thesis regarding legal psychology. Psychology which tests the influence of law on behaviours of the addressees of norms. Law can



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to achieving the ideal of love. When putting forward those two theses, the researcher identified the aim of law and indicated a mechanism thanks to which we can try to achieve that aim. Those two theses may be confirmed empirically, according to their author.

The third thesis of the scientific legal policy underlines the educational role of law. Law, as a tool with unprecedented strength of impacting the psyche of millions of people, successfully influences the ethical development of societies.<sup>11</sup> If the legislator tries to establish law which is contrary to the values shared by the majority of society, they will definitely not be able to achieve the intended goals and ensure that such law is used properly and observed. Petrażycki assumed that the evolution from egoism to altruism, from hatred to love, from distrust to trust is real and continuous, however, as every evolutionary process – it is slow, full of mistakes and dead-ends and sometimes even steps backwards. Nevertheless, it may be “corrected” if legislators create law in accordance with the requirements of the scientific legal policy. Only then will law constitute a tool of the conscious ethical education of a society; only then will it be possible to accelerate the ethical development of members of society and

influence behaviours through short-term motivations as well as motivations which take effect even when the enacted law does not exist anymore. The author of that theory was expecting – which nowadays seems right – that provisions of different law branches, and even provisions of the same law branch, activate different psychological mechanisms. In different social situations, different psychological processes will be responsible for making decisions.<sup>12</sup> Thus assuming one decision-making model in law (e.g. the rational decision-making model) is an incorrect strategy of creating law. The legislator should use the entire spectre of behaviour motivations: starting from desire for profit, love for the country, responsibility, empathy

12 Compare R. Zyzik, *Spójność czy prawda? Rola reguły „istnieje tylko to, co widzisz” w postępowaniu cywilnym*, “Przegląd Sądowy” 2015, No. 5, p. 83–94; idem, *Decyzje pojedyncze i łączone w orzekaniu środków karnych. Kazus nawiązki*, “Przegląd Prawniczy, Ekonomiczny i Społeczny” 2014, p. 147–157; idem, *Wokół intuicyjnych decyzji sędziego*, “Zeszyty Prawnicze UKSW” 2014, No. 2, p. 187–200; idem, *Błąd perspektywy czasu a odpowiedzialność odszkodowawcza*, “Archiwum Filozofii Prawa i Filozofii Społecznej” 2015, No. 2, p. 131–141; R. Zyzik, *Dlaczego zmęczenie decyzyjne może być zagrożeniem dla niezawisłości sędziego?* “Forum Prawnicze” 2014, No. 3, p. 17–24.

11 A. Habrat, *Ideal człowieka...*, op. cit., p. 62–83.

and even unwillingness to act, ending with fear of punishment. The contemporary psychological literature successfully identifies psychological processes responsible for various actions, even those undertaken in legal or moral contexts.<sup>13</sup>

Studies on behaviour motivations are just one side of the coin, studies on “legal pedagogy”, namely on mechanisms responsible for the formation of habits of behaviour, constitute the other side. How are habits formed? Can law successfully form long-lasting hab-

Only when we answer the question about the level of society’s ethical development, about the values which are commonly shared and which political, legal, social and economic institutions enjoy the biggest support, will we be able to use psychology as a tool of forming successful and long-lasting patterns of behaviour.

If we were to enumerate, in a specific scope, fields which constitute the components of the scientific legal policy, we should list: philosophy of science (what does it mean that a given field is scientific?), philosophy (the



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its of desired behaviour? How can we change habits which already exist? Those are the questions which legal pedagogy should answer. According to Petrażycki, the first task of law is to create such motivations which will successfully convince people to specific behaviours. However, the legislator will be fully successful only when, even after the derogation of a given legal norm, individuals behave as if it was still valid (provided that no new legal norm is enacted).<sup>14</sup>

We should once again underline here what was mentioned when discussing the thesis regarding social behaviour. The knowledge about changing behaviours, forming habits and learning about motivations should come not only from psychology because it is culture-dependent (knowledge as well as psychology).<sup>15</sup>

social ideal as the axiom of the practical mind), sociology, evolutionary sciences as well as the history of law (the ethical progress of societies) and, last but not least, cognitive and social psychology and cognitive neuroscience (legal psychology and legal pedagogy). Already this short list makes us realise how complex Petrażycki’s legal policy is, nevertheless, those are only those fields which play the main roles in developing the scientific legal policy.

It seems that the behavioural economic analysis of law may be perceived as the long-awaited continuation of the scientific project of the Polish philosopher and sociologist of law. Obviously, the contemporary behavioural analysis of law does not, to any extent, use his papers. However, interesting similarities between those two projects deserve a closer analysis because Petrażycki’s wide-ranging theoretical studies may enrich the practically oriented movement of the behavioural economic analysis of law.

### **3. Behavioural Economic Analysis of Law**

It does not matter for these considerations, whether the behavioural economic analysis of law (hereinafter: BEAL) is only a school, a scientific movement, a

13 D. Kahneman, *Thinking, Fast and Slow*, Poznań 2012; K. Stanovich, *Rationality and the Reflective Mind*, Oxford 2011; R. Thaler, C. Sunstein, *Impuls: jak podejmować właściwe decyzje dotyczące zdrowia, dobrobytu i szczęścia*, translated by J. Grzegorzczak, Poznań 2008.

14 L. Petrażycki, *Wstęp do nauki...*, op. cit., p. 30.

15 R. Nisbett, *The Geography of Thought: How Asians and Westerners Think Differently*, New York 2005.

research paradigm or already a legitimate scientific field. It is even not easy to identify BEAL's development directions. Nevertheless, the starting point for all scientists who identify themselves with the behavioural analysis of law<sup>16</sup> is to focus on actual psychological processes that occur at the moment of making decisions. Therefore, it is based on empirical data provided by cognitive psychologists, economists but also lawyers.

According to Jeffrey Rachlinski, an American psychologist and theoretician of law, two texts had a significant influence on the development of BEAL. The first one was *A Behavioral Approach to Law and Economics* written by Christine Jolls, Cass Sunstein and Richard Thaler.<sup>17</sup> The second one was *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics* by Thomas Ulen and Russel Korobkin.<sup>18</sup> Those two articles, whose theses were subsequently developed in thousands of other publications, include the presentation of BEAL's main goals, description of methodology and description of cases in which BEAL might be used. In fact, those two articles created the behavioural economic analysis of law.

However, before we move on to presenting the general description of the behavioural analysis of law, it is worth examining Rachlinski's remarks regarding its status. He believes that the non-recognition of BEAL's psychological origin constitutes one of the biggest defects of BEAL. Even though nowadays, the behavioural analysis is used in an obvious way by economically oriented lawyers, legally oriented economists, psychologists and public policy specialists, among others, it is psychology that constitutes the foundation of the behavioural economic analysis of law.<sup>19</sup>

Psychologists Daniel Kahneman and Amos Tversky and economist Richard Thaler are its founding fathers.

Thaler undertook to empirically test decision-making processes under the influence of contacts with Daniel Kahneman as well as huge differences which he identified between the then-existing psychology and the assumptions of economy.<sup>20</sup> Christine Jolls, one of the first people who were dealing with that issue, defines BEAL in the following way:

“Behavioural law and economics involves both the development and the incorporation within law and economics of behavioural insights drawn from various fields of psychology (...). Behavioural law and economics attempts to improve the predictive power of law and economics by building in more realistic accounts of actors' behaviour”.<sup>21</sup>

Similarly, Jolls, Sunstein and Thaler define the characteristics of BEAL in their text in the following way:

“The unifying idea in our analysis is that behavioural economics allows us to model and predict behaviour relevant to law with the tools of traditional economic analysis, but with more accurate assumptions about human behaviour, and more accurate predictions and prescriptions about law”.<sup>22</sup>

One of the characteristics of the behavioural economic analysis of law is the use of psychology in order to better understand the way of decision-making, which later might be used to more effectively apply law to shape the behaviours of the addressees of legal norms. The behavioural economic analysis of law was not created or developed because more refined mathematical models appeared but because a lot of

16 The term “behavioural analysis of law” will be hereinafter used interchangeably with the “behavioural economic analysis of law” and “BEAL”.

17 C. Jolls, C. Sunstein, R. Thaler, *A Behavioral Approach to Law and Economics* (in:) C. Sunstein (ed.), *Behavioral Law and Economics*, Cambridge 2000, p. 13–58.

18 T. Ulen, R. Korobkin, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, “California Law Review” 2000, No. 4, p. 1051–1144.

19 J. J. Rachlinski, *The Psychological Foundations...*, op. cit., p. 1679.

20 D. Kahneman, A. Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, “Econometrica: Journal of the Econometric Society” 1979, No. 2, p. 263–291; A. Tversky, D. Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, “Science” 1974, No. 4157, p. 1124–1131; R. Thaler, *Toward a Positive Theory of Consumer Choice*, “Journal of Economic Behavior & Organization” 1980, No. 1, p. 39–60.

21 C. Jolls, *Behavioral Law and Economics*, “National Bureau of Economic Research” 2007, No. 12879, p. 2.

22 C. Jolls, C. Sunstein, R. Thaler, *A Behavioral Approach...*, op. cit., p. 1.

work was done by cognitive psychologists but also by evolutionary biologists or cognitive neuroscientists<sup>23</sup>”.

Jolls, Sunstein and Thaler identified three interconnected tasks which should be performed as part of BEAL. Those are the following: a descriptive task, a prescriptive task and a normative task. The descriptive tasks is the starting point for any other research. Actually, it is not only the starting point but also the *sine qua non* condition for the whole behavioural analysis.

How does law influence human behaviour? How do people make decisions under conditions of uncertainty? How do they decide on concluding an agreement? What guides them when they decide to break the law? How will citizens react to introduced regulations? How does law motivate to action? Those are only examples of puzzles, questions which the representatives of BEAL try to solve as part of the descriptive task. We can see at first glance that any person who undertakes to answer such questions, will have to use psychological knowledge.<sup>24</sup> The descriptive tasks consist in the need of understanding the determinants of the actual human behaviour and the influence of legal provisions on that behaviour. The descriptive tasks consists in answering the “how is it?” type of question. The description of psychological processes which are behind decisions made by people and the description of the way in which legal provisions influence human behaviour will constitute the final result of performing the descriptive task.<sup>25</sup>

The next step in BEAL is the performance of the prescriptive task. If we assume that the descriptive task is a part of descriptive and theoretical sciences, then the second task should be characterised as the one which falls within the competences of practical social sciences. The legislator, when trying to achieve a specific goal, establishes legal principles with specific wording. Therefore, they should be equipped with tools and knowledge regarding the achievement of goals using the most effective methods to do so. They

should be able to effectively motivate people to a desired behaviour or on the contrary: if they consider a particular behaviour harmful, they should be able to successfully prevent people from such behaviour. Legislator’s aims are different and thus there are also different means to achieve them – from prohibition on certain behaviours to an order of desired behaviours by encouraging or facilitating the undertaking of initiatives which are important from the point of view of the addressees of legal norms themselves. The prescriptive task consists in using knowledge about the relations between psychological processes and behaviours and impulses of behaviours in the form of legal norms. When performing that task, the question such as the following one are answered: “How to use knowledge about X in order to achieve goal Y using legal provisions?”<sup>26</sup>

Last but not least, BEAL should perform one more task. The normative task, because that is the one referred to, consists in identifying, formulating and assessing the main aims of the legal system. The issue regarding the aims of law, the aims of the legal system is an everlasting problem of legal philosophy. Despite the fact that BEAL owes its current success to a modes step-by-step strategy – from using specialist knowledge about the mechanisms of human behaviour in complex social situations, to using tools in order to achieve intended goals – the question about the intended goals had to be asked at some point. As admitted by Jolls, Sunstein and Thaler, the issue of a dispute between paternalism and libertarianism lies exactly there. How should then the legislator select goals which are to be achieved by legal actors?<sup>27</sup> The supporters of BEAL try by all means to avoid accusations of paternalism. Therefore, Thaler and Sunstein suggested libertarian paternalism as the philosophy of a social change underlying the behavioural analysis of law. This term is supposed to mean that the legislator changes the decision-making situation of legal actors in such a way to convince them, by anticipating their possible behaviours, to choose such a solution which will be compliant with the interest of the whole of society. Nevertheless, the freedom of choice of par-

23 N. Wilkinson, M. Klaes, *An Introduction to Behavioral Economics*, New York 2010, p. 15–18.

24 G. Mitchell, *Taking Behavioralism Too Seriously? the Unwarranted Pessimism of the New Behavioral Analysis of Law*, “William and Mary Law Review” 2002, No. 5, p. 1907 et al.

25 C. Jolls, C. Sunstein, R. Thaler, *A Behavioral Approach...*, op. cit., p. 2.

26 Ibidem.

27 Ibidem, p. 2–3.

particular addressees of legal norms will not be limited. The term “paternalism” results from the state’s attempt to directly or indirectly influence choices made by particular members of society and the adjective “libertarian” indicates that the final choice lies with an individual. That proposal caused a dispute between supporters and opponents of the behavioural analysis. The former believe that libertarian paternalism is possible and constitutes the best solution for the

#### 4. A few words about Petrażycki’s contemporary period

We should explain here how Petrażycki’s theoretical papers can enrich the behavioural economic analysis of law. The first issue that should be examined is the non-trivial issue of paternalism. The second issue concerns the cultural dependency of the legal policy and law in general, which is often ignored or unnoticed by BEAL supporters.



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legislator who wants to successfully influence society and, at the same time, does not want to deprive its members of the freedom of choice. However, the opponents argue that this is nothing else than a very sophisticated form of manipulation because it is the legislator who knows more about the ways of behaviour of members of society in specific situations and uses that knowledge in order to achieve their own goals. Thus the freedom of choice, even if seemingly kept, is an illusion which is supposed to hide the paternalistic tendencies of legislators.<sup>28</sup>

The three above-mentioned tasks constitute the main goals of the behavioural economic analysis of law. As underlined by Korobkin and Ulen: because the provisions of law constitute impulses which either encourage people to undertake specific actions or discourage them from doing so, psychological knowledge about decision-making processes should be incorporated in the legal models of decision-making.

If the issue regarding the aims of law was put aside at the initial stage of works on BEAL, paternalism became a significant practical issue at the moment when the possibility arose to broadly use behavioural analysis in the law-making process. By contrast, the issue of the cultural dependency of legal policy and law in general is important already at the stage of developing methods and tools because it concerns the universal effectiveness of BEAL. Something that can work properly in the conditions of Anglo-Saxon law in the American version does not necessarily work as effectively in the civil law legal system applicable in the countries of Central and Eastern Europe.

Leon Petrażycki suggested the social ideal as the aim of the legal policy but also as the assessment criterion of specific legal solutions. Maybe this criterion may not be used in the case of every new normative act, however, the area of its usage does not necessarily need to be narrow. Nevertheless, the fact that the social ideal was put forward as the aim of the legal policy does not mean that its author was a supporter of paternalism. However, staying on the grounds of that theory, we can see that the ethical evolution

28 C. Sunstein, R. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, “The University of Chicago Law Review” 2003, No. 4, p. 1–43.

of society is a fact. The evolution runs from egoistic and unfair societies which limit the group of legal actors to a narrow group of citizens – to societies which are more solidary and characterised by less severe punishments and a broad group of legal actors. Thus the order of implementing the social ideal through legislative processes is not, in its essence, an order of a normative but of a prescriptive character. And prescriptive judgements, unlike normative ones, may be justified scientifically – even though, there is a pending dispute regarding the scientific justification of normative judgements in philosophy – because they are based on descriptive statements identifying casual dependencies. So, if a specific descriptive statement (“The ethical evolution of societies is a fact”) is true, then a prescriptive statement (“If the legislator wants to strive for the achievement of the social ideal, they should observe the requirements of the scientific legal policy”) is a statement which is empirically justified.

The above reasoning makes sense as far as the ethical progress of society is a fact. Even though, Petrażycki’s arguments in that field are interesting, nowadays, proof of the empirical character of ethical progress may be

“If we assume this vision of the evolution of morality – morality which constitutes a logical consequence of co-operative tendencies – it will turn out that we do not go against our nature by taking care of caring moral attitude, similarly to the civil society which is not a chaotic garden being taken care of by a gardener with the sweat of his brow, as imagined by Huxley. Moral attitude has been with us from the very beginning and the gardener – as brilliantly expressed by Dewey – is a supporter of a natural growth. An effective gardener creates conditions for the growth of plants which normally would not yield a good crop on a given territory, “however, they belong to the nature as such”. In other words – when we act in a moral way we are not hypocrites lying to everybody: we make decisions which are based on social instincts that are older than the humankind, even if we add to it typically human unselfish care for other people and for the society as a whole<sup>29</sup>”.

Frans de Waal states that morality is a part of our nature and it is based on inborn tendencies to co-operative behaviours. Morality is a part of our evolutionary structure and therefore, proper ruling should not



## Morality is a part of our nature and it is based on inborn tendencies to co-operative behaviours.

found in other scientific fields which, by the way, did not exist when Petrażycki was writing his *Wstęp do nauki polityki prawa* (Introduction to Legal Policy). The question about progress, or what is more correct now – ethical evolution immediately forces us to draw attention to contemporary evolutionary sciences and primatology. Studies on the evolutionary character of cognitive processes and more broadly: the human mind render it possible to assume a new perspective in assessing the ethical progress assumed by the Polish lawyer. For instance, Frans de Waal, one of the most famous representatives of evolutionary sciences and primatology, notices in his book *Primates and Philosophers. How Morality Evolved?*:

be done contrary to our evolutionary tendencies. Law, as a tool of constant influence on human behaviours, can create an environment in which our inborn evolutionary tendencies can develop without hindrance or on the contrary: it may promote behaviours which do not necessarily lie in our evolutionary-understood nature. However, there is something that distinguishes us from among other creatures, namely typically human care for society as a whole and unselfish care for others. Even though evolution has no aim and in the case of evolutionary processes, we cannot talk about

29 F. de Waal, *Malpy i filozofowie. Skąd pochodzi moralność?*, Polish translation by B. Brożek, M. Furman, Kraków 2013, p. 55.

any progress but only about adaptation and reproductive success, if we were to search for any regularities in the evolutionary history of humankind, undoubtedly, this would be an increasingly big role of cooperation and moral rules which guarantee it.

Leon Petrażycki could not study primacies because evolutionism – even though already popular – was only in its initial stages and evolutionary psychology did not exist at all at that time. Nevertheless, it seems that studies on the history of legal institutions put him on the right track. Civil law can be an indicator which helps to identify the ethical level of society. The group of legal actors in ancient times was much narrower than the group of legal actors in the 21<sup>st</sup> century. Slaves did not have the status of a person under law. In some cultures, foreigners could be killed and there were no legal consequences for the killer. Investigation methods used in the middle ages could be qualified today as torture. The status of children changed only at the beginning of the 20<sup>th</sup> century, when they stopped being treated as cheap labour. Women in Switzerland did not have voting rights until 1971. We can assume with great caution that Petrażycki had this exact type of ethical progress in mind when writing about the empirical foundations of ethical progress. Thus his statements regarding the role of evolutionary mechanisms and their influence on egoistic and altruistic behaviours even today seem legitimate.<sup>30</sup>

If we look at the social ideal thesis from such a perspective, on one hand, and at libertarian paternalism related to BEAL on the other, we can identify a common foundation of those two approaches to the legal policy. It starts from the words “If people knew”. And then: if people knew how to behave, for sure they would behave this way and because they do not know, someone needs to help them. Petrażycki believed that the legislator should support a natural tendency to eradicate egoistic behaviours and strengthen solidarity ones. The supporters of BEAL contend that due to limited cognitive possibilities, the lack of strong will and the dominant motive of behaviour, people do not always behave in a way which will make their lives better, healthier and longer.

30 A. Biernat, *Poglądy filozoficzne Leona Petrażyckiego i ich interpretacje*, Toruń 2001, p. 43.

There are two common things of the scientific legal policy and BEAL. Firstly, faith in science and its capabilities of discovering important facts which can help legislators to create better and more effective law. And secondly, conviction that there exists key knowledge (mostly psychological but not only) which, if only used, will render it possible to increase the quality of life of individuals and whole societies. While BEAL gets tangled in an unsolvable dispute between libertarianism and paternalism, suggesting a middle solution – namely libertarian paternalism, the scientific legal policy avoids accusations of paternalism, by assuming the social ideal axiom based on the empirically-confirmed (even though, this is a disputable thesis) ethical evolution, because the choice of the main aim of law is not a normative but rather a prescriptive statement. Obviously, we may ask why we should strive for the social ideal and accelerate the ethical evolution or, at least, not hinder it. In that case, Petrażycki hides behind the axiomatic character of the ideal of love which, in turn, may not constitute a sufficient explanation for some people but only a way to avoid answering the actual question.

A statement that people think in the same way, regardless of whether they live in North America, Eastern Europe or the Middle East, constitutes one of the assumptions of BEAL. It is about an assumption that there exists an identical thinking mechanism in ethical, legal and moral categories. If specific motivational impulses in the form of legal norms work in the United States, there is probability verging on certainty that they will work also in Lithuania, India or Japan. Nevertheless, cultural psychology suggests something different (which was noticed by Petrażycki much earlier). The way of thinking is influenced by geographical, cultural, political, legal and economic conditions and all of them have far-reaching consequences.

Below, we will refer only to a few examples of studies conducted on the territory of the countries of Central and Eastern Europe, which show that the legal and economic history of a given society is important for the currently applicable legal principles.

Studies of Axel Ockenfels and Joachim Wienmann show that there are significant differences between the solidarity level of those societies which were unlucky enough to function within the socialist system imposed

by the USSR and the level of the societies of western democracy. People living in the socialist system were willing to offer significantly lower amounts of money (it was possible to offer a maximum of 10 German marks) than people which were lucky enough to find themselves on the western side of the Berlin Wall.<sup>31</sup> On the other hand, other studies confirmed that the citizens of Eastern Germany preferred the social policy of a redistribution character and, at the same time, they do not consent to the increase of public levies which allow for such redistribution. In addition, those people have much less trust to their co-citizens.<sup>32</sup>

It was also possible to establish, as part of conducted experiments, that the longer people lived in socialist conditions, the more prone they were to lie if the probability of discovering the lie is marginal. Nevertheless, even people who were born after the fall of the Berlin Wall but in families from Eastern Berlin were still lying more (although slightly) than people born in families from Western Berlin. And a higher tendency to lie may translate into higher public costs because the control of the behaviours of such citizens should be appropriately proportional to their tendencies to break the law and thus maximise their individual benefits.<sup>33</sup>

Studies on the influence of political, economic and legal systems on – using the language of Petrażycki – the ethical progress of societies are more and more common.<sup>34</sup>

Taking into consideration the results of the above-mentioned studies, we should recognise that

31 A. Ockenfels, J. Weimann, *Types and Patterns: an Experimental East-West-German Comparison of Cooperation and Solidarity*, "Journal of Public Economics" 1999, No. 2, p. 275–287.

32 A. Alesina, N. Fuchs-Schündeln, *Good-Bye Lenin (or Not?): The Effect of Communism on People's Preferences*, "The American Economic Review" 2007, No. 4, p. 1507–1528.

33 D. Ariely et al., *The (True) Legacy of Two Really Existing Economic Systems*, "Munich Discussion Paper" 2014, No. 26, p. 1–25.

34 N. Nunn, *The Importance of History for Economic Development*, "Annual Review of Economics" 2009, No. 1, p. 65–92; N. Nunn, L. Wantchekon, *The Slave Trade and the Origins of Mistrust in Africa*, "The American Economic Review" 2011, No. 7, p. 3221–3252; G. Tabellini, *Culture and Institutions: Economic Development in the Regions of Europe*, "Journal of the European Economic Association" 2010, No. 4, p. 677–716.

the scientific legal policy should be culturally dependent in a sense that one of its elements should be the history of the evolution of legal, economic and political institutions, as stated by Petrażycki, but also the actual ethical state of societies which nowadays can be measured e.g. by measuring the confidence that citizens have in the state, the level of corruption, the grey zone or by learning about the assessment of issues which are important in terms of morality. None of those indicators alone would say much, however, a set of such data could be an indication which the legislator should take into consideration.

Some of the representatives of the behavioural economic analysis of law seem to notice that problem:

"Yet it is not only the law that can differently shape the behaviour of legal actors, but also the broader social and cultural institutions it is embedded in. Specifically, a significant and growing literature documents systematic cross-cultural differences in different areas of judgement and decision-making, from probability judgements, through risk perceptions, to risk preferences and beyond. (...) Naturally, we should expect such systematic cross-cultural differences to impact (...) both the nature of a given culture's legal institutions and the ways in which these institutions, in turn, affect individuals' behaviour"<sup>35</sup>.

The new generation of the behavioural analysis should take into consideration not only easily identifiable differences between the Anglo-Saxon and civil legal systems but also the cultural, social, economic and political characteristic of a given society. People might be different not only in terms of their views but also in terms of their ways of thinking and how they formulate opinions. They might present tendencies to lie and, on the other hand, to be guided by principles. Depending on a society, the effectiveness of orders, prohibitions or permissions may be different. According to Petrażycki, such differences exist and they should be taken into consideration by those legislators who abide by the requirements of the scientific legal policy.

35 A. Tor, *The Next Generation of Behavioral Law and Economics* (in:) K. Mathis (ed.), *European Perspectives on Behavioural Law and Economics*, London 2014, p. 18–19.

## 5. Summary

The aim of this paper was to present arguments supporting the thesis that Leon Petrażycki may be perceived as the founder of the behavioural economic analysis of law. Despite the fact that his theory is a result of research conducted in the 19<sup>th</sup> century and the first three decades of the 20<sup>th</sup> century, it is surprisingly compliant – in its assumptions and partially aims – with the behavioural economic analysis of law. However, the aim of the behavioural analysis is more modest and thus more realistic. It does not aim at making the world a better place and making people treat each other better. Its aim is to enable people to make right decisions regarding health, happiness and wealth, as we can read in the subtitle of *Impuls* – a classic book in the field of behavioural economics. It

practice. The relation between the social ideal and the practice of applying law is complicated and unnecessary in many cases. Not every regulation which will increase the quality of life of an individual or society has to fulfil the social ideal. Some regulations are simply irrelevant in those terms. From the perspective of the law application practice, it seems that the *bottom-up* strategy is effective.

Nevertheless, the questions about values need to be asked at some point. We should answer, more or less definitely, the question which values law should fulfil and to what extent psychological and economic knowledge is to be used. The normative task facing the supporters of the behavioural analysis is nothing else than the question about the values which are fulfilled by law. The use of the *bottom-up* strategy moves this problem



**People might be different not only in terms of their views but also in terms of their ways of thinking and how they formulate opinions.**

is about creating law which will encourage people in a non-invasive, easy to avoid and costless way to make decisions which will be better from their point of view.

The behavioural economic analysis of law may be characterised as an example of the *bottom-up* strategy. Its supporters do not start their work from identifying general ambitious goals of the legal policy but they focus on improving specific legal institutions using psychological and economic knowledge for that. On the other hand, Petrażycki's scientific legal policy resulted from using the *top-down* strategy. At first, he presented a general and very ambitious goal of the legal policy, then he identified a mechanism which will help to achieve that goal. And only then did he indicate where to find knowledge which would render it possible to create the desired law. Therefore, his research direction was totally opposite to the one assumed in the behavioural analysis.

Petrażycki's methodology has its pros and cons. The behavioural analysis is much easier to be used in

away but it does not eliminate it completely because anyway the issue regarding the assessment of alternative aims of law will have to be solved at some point. The question about the criterion of such an assessment and its justification will be asked. In that sense, Petrażycki's social ideal and its empirical foundations, which are more or less convincing, constitute a way to avoid the accusation of arbitrariness in choosing the aims of law.

In addition, such an understanding of the aim of the legal policy limits the possibility of using the legal policy only in the interest of the current political power. Thus, on one hand, the social ideal may seem to be a limitation of the political power at least in the scope in which that power would want to fulfil particular interests at the expense of a society and, on the other hand, considering that ideal would constitute some form of a regulative idea which would have an indirect influence on the legislator so that they create law which supports co-operation, trust in other society members and in the public sphere.

Behavioural economy has made huge progress within the last decades. Therefore, it is not surprising that there are voices encouraging to expand and deepen the studies which are already being conducted. Studies on cultural factors influencing the effectiveness of legal regulations based on the results of analyses of a behavioural economy and cognitive psychology are supposed to constitute one of directions of that deepening. Petrażycki's statement regarding the evolutionary and cultural nature of the legal policy should be taken into consideration here. He had no doubt that social, economic and legal differences between countries translate into different patterns of behaviour, different assessments of legal and social institutions and, most importantly, different ways of thinking about values. Thus the behavioural economic analysis of law – which, in fact, was developed in the United States and Western Europe – does not necessarily need to have the same effective influence on the behaviours of the citizens of countries in Central Europe, Asia or South America. This is an extremely important fact and it requires deepened studies because it questions the character of behavioural analysis tools which have been universal so far.

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