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THE AUTHORITY OF LEGAL EMOTIONS:  
MYSTICISM OR TRUTH? LEON PETRAŹYCKI'S  
LEGAL REALISM VS. NATURAL LAW\*

EL AUTORITARISMO DE LAS EMOCIONES JURÍDICAS:  
¿MISTICISMO O VERDAD? EL REALISMO JURÍDICO DE  
LEON PETRAŹYCKI VS. LA LEY NATURAL

O AUTORITARISMO DAS EMOÇÕES JURÍDICAS:  
MISTICISMO OU VERDADE? O REALISMO JURÍDICO  
DE LEON PETRAŹYCKI VS. LEI NATURAL

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## Abstract

The present paper examines Leon Petrażycki's realistic theory of law and John Finnis' natural law-driven criticisms on the concept of legal emotions. At the beginning of the 20th century Leon Petrażyc-

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ki developed psychological theory of law. Petrażycki's theory had a substantial influence on the formation of original, apart from the American and Scandinavian legal realism, version of legal realism. Petrażycki's theory is based on his concept of legal emotions which he regarded as belonging to the wider class of ethical emotions. Initially, the author analyses Petrażycki's and his followers approach, which centers around the idea that legal emotions are both mystic and authoritative and to some extent they are perceived as internal restrictions of our freedom. Particular attention is paid to the analysis of the authoritative nature of legal emotions. The author offers an interpretation of the authoritativeness of legal emotions within legal realism. The author postulates that this term should be interpreted as resulting from mental processes associated with experiencing emotions, i.a.(inter alia) intuitive reasoning. In the second part, the author analyses the approach proposed by John Finnis, who holds that legal emotions have the authoritativeness of truth. In the final section, the author discusses the most recent research in the field of legal philosophy, including results of cognitive neuroscience relevant to emotions and intuitive reasoning.

**Keywords:** legal emotions, psychological theory of law, John Finnis, Leon Petrażycki

## RESUMEN

Se examina la teoría realista del derecho de Leon Petrażycki y las críticas iusnaturalistas de John Finnis al concepto de emociones jurídicas. A principios del siglo xx, Leon Petrażycki desarrolló la teoría psicológica del derecho. La teoría de Petrażycki tuvo una influencia sustancial en la formación de la versión original del realismo jurídico, aparte del realismo jurídico estadounidense y escandinavo. La teoría de Petrażycki se basa en su concepto de emociones jurídicas, que consideraba pertenecientes a una clase más amplia de emociones éticas. Inicialmente, se analiza el enfoque de Petrażycki y sus seguidores, que se centra en la idea de que las emociones jurídicas son a la vez místicas y autoritarias y, en cierta medida, se perciben como restricciones internas de nuestra libertad. Se presta especial atención al análisis del carácter autoritativo de las emociones jurídicas. El autor ofrece una interpretación de la autoridad de las emociones jurídicas

dentro del realismo jurídico. El autor postula que este término debe interpretarse como resultado de procesos mentales asociados con experimentar emociones, i.a. (inter alia) razonamiento intuitivo. En la segunda parte, el autor analiza el enfoque propuesto por John Finnis, quien sostiene que las emociones jurídicas tienen la autoridad de la verdad. En la sección final, el autor analiza las investigaciones más recientes en el campo de la filosofía jurídica, incluidos los resultados de la neurociencia cognitiva relacionados con las emociones y el razonamiento intuitivo.

**Palabras clave:** emociones jurídicas, teoría psicológica del derecho, John Finnis, Leon Petrażycki

## Resumo

A teoria realista do direito de Leon Petrażycki e a crítica do direito natural de John Finnis ao conceito de emoções jurídicas são examinadas. No início do século 20, Leon Petrażycki desenvolveu a teoria psicológica do direito. A teoria de Petrażycki teve uma influência substancial na formação da versão original do realismo jurídico, além do realismo jurídico americano e escandinavo. A teoria de Petrażycki é baseada em seu conceito de emoções legais, que ele considerava pertencer a uma classe maior de emoções éticas. Inicialmente, analisa-se a abordagem de Petrażycki e seus seguidores, que se concentra na ideia de que as emoções jurídicas são ao mesmo tempo místicas e autoritárias e, em certa medida, percebidas como restrições internas à nossa liberdade. Atenção especial é dada à análise da natureza autoritária das emoções jurídicas. O autor oferece uma interpretação da autoridade das emoções jurídicas dentro do realismo jurídico. O autor postula que este termo deve ser interpretado como resultado de processos mentais associados à vivência de emoções, i.a. (inter alia) raciocínio intuitivo. Na segunda parte, o autor analisa a abordagem proposta por John Finnis, que sustenta que as emoções jurídicas têm a autoridade da verdade. Na seção final, o autor revisa as pesquisas mais recentes no campo da filosofia jurídica, incluindo os achados da neurociência cognitiva relacionados às emoções e ao raciocínio intuitivo.

**Palavras-chave:** emoções jurídicas, teoria psicológica do direito, John Finnis, Leon Petrażycki

## INTRODUCTION

Leon Petrażycki's theory of law remains practically unknown in the English-speaking world of legal theory and philosophy. However, apart from the well-known American legal realism and Scandinavian legal realism, there also exists an Eastern European one – proposed by Leon Petrażycki and his followers. The purpose of this paper is to discuss John Finnis' views on the Leon Petrażycki's theory of law, particularly on the essence of the authority of morals.<sup>1</sup> To this goal, the following research methods will be used: historical and philosophical analysis of Leon Petrażycki's theory, conceptual and theoretical analysis of legal emotions. I first determine how the concept of ethical emotions was understood by Leon Petrażycki and his followers.<sup>2</sup> Among ethical emotions, Petrażycki distinguished between legal and moral emotions. Both Petrażycki and his followers primarily focused on the analysis of legal emotions and their types. Nevertheless, all the results arrived at in this paper in regard to legal emotions can also be applied to moral emotions. This section ends with an interpretation of Petrażycki's views (and those of his followers) on the mystical character of legal emotions. I believe that the term mystical, in relation to the authoritativeness of ethical emotions, following Petrażycki's view, should be interpreted as resulting from unconscious psychic processes, i.e., from intuitive reasoning. I also put forward the thesis that the authoritative character of legal emotions does not result from either mysticism or truth but is dependent on the character of legal emotions. In the Section 2, I will address John Finnis' contentions regarding ethical emotions. Finally, in Section 3 I will present the contemporary views on emotions and intuitive reasoning based on the findings of the cognitive sciences, including neurosciences.

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1 John Finnis discussed his criticism at the International Academic Conference “The Scientific Legacy of Leon Petrażycki: History and Modernity (on the 150th Anniversary of His Birth)”, which was held on December 14th-15th, 2017, at the Saint Petersburg State University. Finnis John, Some Questions about Normativity and History in Petrażycki, in: eds. Andrey V. Polyakov, Elena V. Timoshina, Edoardo Fittipaldi, John Finnis Meets the Saint Petersburg School of Legal Philosophy: Is a Dialog Between Legal Realism and Natural Law Tradition Possible? Springer Nature, 2022, in preparation.

2 I consider them to belong to the tradition I refer to as Russian legal realism (Brożek *et al.*, 2018).

## Ethical emotions

Ethical emotions (also called emotions of duty) play a key role in Leon Petrażycki's theory of law. They are passive-active experiences that do not trigger predetermined special behaviors.<sup>3</sup> In other words, ethical emotions are abstract or blanket emotions. Ethical emotions cause the undertaking of the actions which we represent to ourselves when we experience with them. All ethical experiences amount to the representation of a certain behavior and an ethical emotion, either appulsive or repulsive.<sup>4</sup> This experience, however, may be enriched with additional elements such as perception or representation of ethically relevant facts,<sup>5</sup> the perception or representation of a duty-holders,<sup>6</sup> and the perception or representation of normative facts<sup>7</sup> (Petrażycki, 2000 [1909-1910], pp. 55-56). By normative facts, Petrażycki understood the perceptions or representations of certain facts that determine the content and condition the obligation and, most importantly, are experienced as the justification of that obligation (e.g., one should behave in a certain way, because this is the custom) (Fittipaldi, 2016).

In Petrażycki's opinion, ethical emotions are characterized first by the fact that they have a peculiar mystical and authoritative character. These emotions may counteract our other desires because they are perceived as "impulses of higher power and authority, flowing out of an unknown, mysterious source (mystical, not without a tinge of fear), separate from our ordinary 'I'" (Petrażycki, 2000 [1909-1910], p. 45).

According to Petrażycki, this kind of emotion is mirrored in the achievements of human civilizations', especially language, poetry, and religion. In general, in a variety of cultures we can find references to a mysterious voice that we perceive as something outside of our ordinary "I". We submit to this voice; we follow its precepts. Based on the analysis of the

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3 This makes them different from the emotions that trigger specific actions (e.g., hunger). Petrażycki understands "action" broadly as encompassing both physical and psychological behaviors.

4 By "appulsive emotion" Petrażycki understands emotions that prompt, or encouraging to take a specific action. Repulsive emotions, instead, prompt, or encourage *not* to take certain actions.

5 They are perceptions or representations of conditions, or circumstances the occurrence of which results in the necessity of taking or not taking certain actions (e.g., a red traffic light, which prompts drivers to stop).

6 In other words, it is the perception or representation of an individual from whom a certain conduct is required.

7 At this point it is worth pointing out that Petrażycki does not define the concept of a normative fact.

term “conscience” in different languages,<sup>8</sup> Petrażycki shows that there is an element in this word that indicates the presence of a being other than our ordinary “I”. In addition, the belief in the existence within one’s psyche of, as it were, another being goes hand in hand with such linguistic expressions as “voice of conscience” or “listening to one’s conscience”. As Petrażycki points out, these expressions indicate the higher authority attributed to ethical emotions. By the same token, in numerous cultures, this “voice” is ascribed to various imaginary mystical beings, such as the ghosts of ancestors, deities, or God (Petrażycki, 2000 [1909-1910], p. 46). Petrażycki remarks that the essence of ethical emotions —their mystic-authoritative character— also manifests itself in the works of philosophers in the form of such metaphysical entities as “the nature” or “the wisdom of the world”. Moreover, Petrażycki observes that even those who expressly eschew mysticism in their explanations and arguments inadvertently end up with mystical explanations. Good examples are “the spirit of the nation” or “the general will”. As a consequence, these essentially mystical constructs are ascribed an authority which is greater than the will of the individual.

A second characteristic feature Petrażycki ascribes to ethical emotions is that “we experience them as an internal limitation of freedom, as a kind of obstacle to free choice and satisfaction of our tendencies, wishes and goals, acting as an irresistible pressure towards behavior, from which the emotions connect” (Petrażycki, 2000 [1909-1910], p. 46).

According to Petrażycki, ethical emotions play a fundamental role in our behavior, because they act as

motives for behavior, inducing one to undertake some actions and refrain from others (motivational impact of ethical experience)”, but also “cause some changes in the psyche (dispositional) of individuals and overall, developing and strengthening one’s habits and inclinations, while weakening and uprooting others (pedagogical and educational impact of ethical experiences) (Petrażycki, 2000 [1909-1910], pp. 126-127).

For this type of emotion, it is characteristic that we experience them not only in relation to others we interact with but also between others we merely perceive or represent to ourselves as well as in relation to future or

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8 For example in Polish: *s-umienie*; in Russian: *so-vest’*; in French: *con-science*, in German: *Ge-wissen*.

past events. Petrażycki explains this in terms of projection processes.<sup>9</sup> This process also explains the internal experience of orders and prohibitions, which we perceive as possessing a higher authority and a mystical character.<sup>10</sup> As a result, there are only real experiences of ethical emotions, and the orders and prohibitions and duties and obligations that relate to experiencing a given emotion are only an emotional projection.

Depending on the type of emotional ethical experiences and their projections in the form of duties and norms, we can distinguish between ethical emotions, that is, between moral and legal emotions. In the case of moral emotions, their projections are obligations and norms that have a purely imperative character. Moral norms impose authoritative duties on their addressees, i.e., certain rules of conduct, but at the same time they do not give rights to others, for example, to initiate proceedings in accordance with those norms due to their being unilaterally binding. In contrast, the projections of legal emotions are obligations and norms characterized by an imperative-attributive character.<sup>11</sup> A legal norm, in addition to setting the obligation of a particular behavior, also shapes the entitlement of others to demand compliance with this norm. In the case of legal norms, our legal obligation is reflected as a right: the right of another being.

## Interpretation and critique

A pupil of Petrażycki's, George Gins offered an interpretation of emotions similar to that of Petrażycki. He proposed to distinguish between biological and cultural emotions. The counterpart of this distinction in Petrażycki's theory is the latter's distinction between special and blank emotions. Gins' conceptualizes biological emotions in terms of urges to satisfy

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9 Here, it is in order to spend a few words on Petrażycki's projection, or emotional phantasms. By these terms he referred to the phenomenon by virtue of which —according to him— the objects that evoke specific emotions within some individual one are ascribed by this latter certain corresponding features. For example, if we experience love towards someone, we also ascribe positive qualities to them, we think they are nice, kind, pleasant. Emotions cause us to ascribe to objects characteristics which in actual fact they do not have.

10 "The categorical orders endowed with higher authority that in ethical experiences appear as objective and as directed to these or those subjects as well as the peculiar states of being bound, obligated, unfree, and subjected that are ascribed to (imagined) subjects to whom (imagined) ethical laws impose or prohibit appropriate conduct are products of emotional projections, or phantasms" (Petrażycki, 2000 [1909-1910], p. 51).

11 The legal duty is a specific reflection of that which is due from us to others.

biological needs that can be found in all living entities. According to Gins, this kind of emotions can be identified with instincts and include hunger, sleep, fear, etc. In contrast, cultural emotions relate to a social actor's functioning in society and can be found only among humans (Gins, 1931, pp. 520-525). These are emotions that arise because of the interaction and communication with others in society (Gins, 1936, p. 41). Nikolai Timasheff, who compares special emotions to conditional reflexes, also thought in a similar direction: "in terms of contemporary psychology, special bilateral experiences correspond roughly to conditional instincts, in which the passive element (stimulus) triggers the active element (reaction), in accordance with specific laws of learning" (Timasheff, 1955, p. 25).

In turn, Max Laserson —one of the continuators of Petrażycki's thought— notes that "special emotions could be called biological-adaptive emotions, and blank emotions (i. a. ethical) social-adaptive emotions" (Laserson, 1930, p. 82).

However, not all students and followers of Petrażycki's ideas agreed on the above characteristics and the properties of ethical emotions. For example, Mikhail Reisner believed that two characteristic features of ethical emotions (i. e., their mystic-authoritative character and their being experienced as an internal restriction of freedom) are not equally important. Referring to the mystic-authoritative aspect of emotions, he notes that mysticism is not unique to ethical emotions. He understands mysticism as a sort of magical thinking, specific at a certain stage of intellectual development. In his opinion, this kind of thinking only provides a means to explain the gap between observed reality and our experiences and imaginations. In Reisner's opinion, the mystic-authoritative character of ethical emotions is not the original feature of those emotions. The "mysticism" of ethical emotions is only a consequence of the fact that we experience them as an internal limitation of our freedom, a limitation which we cannot explain (Reisner, 1908, pp. 62-63). According to Reisner, the basis of legal emotions is "to realize the boundaries that define the scope of a man's internal aspirations" (Reisner, 1908, p. 64). At the same time, it is irrelevant whether this "border" is perceived as independent or as a creation of a "higher being".

Another outstanding Petrażycki student —Georges Gurvitch—, despite his appreciation for Petrażycki's contribution to the understanding of the essence of legal phenomena, did not agree with him on several key issues. In Petrażycki's theory, legal emotions are understood as individual experiences. According to Gurvitch, this approach is contrary to the very

essence of law, which is experienced collectively. In Gurvitch's opinion, legal experiences have a collective character, but not all of their elements have such a character. He argues: "data of legal experience are not understood by Petrażycki as objective data, which are confronted by the subject only as connected with this particular subject" (Gurvitch, 2004, p. 256).

According to Gurvitch, Petrażycki's basic mistake was that legal experience can only be individual and subjective.

Gurvitch redefines Petrażycki's normative facts. Through this concept Gurvitch understands the most directly experienced legal reality. According to him,

a characteristic of legal experience is, on the one hand, the mutual penetration of moral and logical experience (the experience of logical ideas), and, on the other hand, a spiritual and sensory experience, which is characterized by the fact that this experience consists in specific acts of intuitive recognition (Gurvitch, 2004, p. 264).

As a result, legal experience consists of collective acts of recognition of normative facts. Gurvitch, unlike Petrażycki, states that appulsive and repulsive emotions are not the primary elements of legal experience. He believes that what evokes these emotions are the "acts of recognition that are expressed in the form of satisfaction or disappointment" (Gurvitch, 2004, p. 264). Acts of recognition are passive-active and evoke intuitions that have no emotional character. In turn, the induced intuitions have a specific nature. They can be understood as a kind of combination of intellectual and moral intuition. In Gurvitch's opinion, in the process of their creation, emotions are generated as derivatives.

In the case of acts of intuitive recognition, moral intuition is necessary for the determination of moral values and, together with intellectual intuition, it interacts and permeates as part of legal intuition. Ultimately, this results in the fact that the moral experience, which is unique, distinctive and individual, gets generalized and "stabilized" within the framework of the legal experience.

## From ethical emotions to legal emotions and law

For the sake of clarity, we will concentrate on one kind of ethical emotions —legal emotions. In a simplified manner, we can assume that Pe-

trażycki and his pupils' distinguished between two basic types of law: positive and intuitive. The accepted criterion for distinguishing these types of law was the existence (or lack thereof) of reference to external normative facts within imperative-attributive experiences. Following Petrażycki, Laserson argued that

[the] legal experiences, which in their intellectual composition contain representations of authoritative-normative facts: laws, customs, ancestors' traditions, etc., we will refer to as the area of positive law. [The] law, which is devoid of references to normative facts ... is an intuitive law (Laserson, 1930, p. 160).

There are many manifestations of positive law. One of its oldest forms is customary law, which is considered unchangeable, existing since the dawn of time. The development of society is conditioned by the fact that customary law is replaced by legal provisions. These latter are more flexible forms of positive law and through them it becomes possible to adapt the law to the ever-changing social reality. Nevertheless, in a sense, each form of positive law stiffens and prevents rapid changes in the law. At the same time, this possible character of positive law may sometimes be advantageous. Slow changes in positive law allow for the unconscious consolidation and transmission from generation to generation of "the valuable common experiences gained".

In the case of intuitive law, it is worth recalling the extremely interesting development of Petrażycki's theory proposed by his pupil Max Laserson (Timoshina, 2016). He argued that it is impossible to accept Petrażycki's contention that intuitive law is always individually variable. A similar view was also expressed by Mikhail Reisner, who claimed that "gradually, intuitive law covers wider and wider social circles, becoming dominant and prevailing in a given environment" (Reisner, 1908, p. 158). As a result, this leads to the creation of intuitive laws of groups, environments and social classes. Following Petrażycki, Laserson acknowledged that there are as many intuitive laws as there are individuals, but claimed that in the area of intuitive law we can distinguish between two subtypes: the individual-adaptive and the social-adaptive intuitive law.

Individual-variable (or individual-adaptive) intuitive law is a legal area in which no fixed templates of behavior exist. This kind of law includes legal experiences from the most intimate sphere of life, including friendship

and love relations. If a specific situation (e.g., a social interaction) is not regulated by a positive law, intuitive-legal individual norms are generated (i.e., intuitive and legal experiences). These legal experiences are short-lived, they are characterized by scant content, and usually do not become fixed in any way, they leave no trace in the form of behavioral patterns.

In Laserson's opinion, the existence of an individual-adaptive intuitive law gives the opportunity to quickly make decisions and take actions in everyday life.<sup>12</sup>

The second sub-type of intuitive law is the social-adaptive one. This type, of law, unlike the individual-variable one, which is different for each individual, varies at the level of individual social groups. As Laserson states:

social-adaptive intuitive law does not consist of individual "answers" to individual circumstances, which essentially remain random, but rather from typical responses, which repeat themselves in a similar way in different units of one within the same social group. Thus, in individuals from one social group, the individual-variable intuitive law has different aspects, however, is completely convergent with social-adaptive law (Laserson, 1930, p. 280).

Within any given social group there are different experiences of individual-adaptive intuitive law, but in principle there are the same social-adaptive ones (e.g., regarding work conditions, social security, etc.).

The basic difference between the subtypes of intuitive law is their motivational ability. The social-adaptive intuitive law, unlike the individual-adaptive one, has a tendency to establish such rules of conduct that will act "always, everywhere and for all" (Laserson, 1930, p. 284). Positive law, in order to ensure its operation, usually includes sanctions, while social-adaptive intuitive law, in order to have motivational ability should be unquestionably authoritative, its norms should be formulated apodictically. Laserson points out that

at the lowest level there is an individual-adaptive intuitive law, adapted only to the peculiarity of the individual': it has the weakest motivational nature, it is not able to transform in the pattern of behavior,

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12 For these reasons, he contends that only with regard to this type of law is it correct to claim that there are as many intuitive laws as there are people capable of legal experiences.

has extremely poor intellectual content, and above all does not lead to subordination outside the person's intimate-individual zone where it resides. The next step—social-adaptive intuitive law [—] ... reaches a high motivational power. Finally, at the highest level ... [we have] positive law (Laserson, 1930, p. 287).

According to Laserson, social-adaptive intuitive law is the law that in literature is usually referred to as natural law.

### Authoritativeness of ethical emotions: mysticism or intuition?

To summarize, Petrażycki paid little attention to the issue of the mystical-authoritativeness of emotions—in fact, only a few sections. In his view, the very term “mystical” refers mainly to the fact that the source of ethical emotions—which, according to him, are experienced as authoritative—is not fully understood by those who experience them. Their mysticity does not refer to the assessment of an external observer, who analyzes ethical emotions, but to their internal experience. One experiences orders or prohibitions endowed with a higher authority but does not realize where they come from. Furthermore, the Russian term *mističeskij*, among its meanings has “enigmatic, incomprehensible, inexplicable from the point of view of real experience” (Ushakov 1935-1940, entry *mističeskij*). It seems that Petrażycki held that ethical emotions are associated with unconscious mental processes. Of course, he does not use this concept directly, which is not surprising considering the period during which Petrażycki's works were created. It is worth recalling in this context that Petrażycki's theory of law is based on his own conception of psychology rather than other forms of psychology being developed at that time, like Freud's psychoanalysis. As shown above, Petrażycki's followers did not devote much attention to this subject. They did not focus on the analysis of the sense of authoritativeness either, which, along with mysticity makes up the *differentia specifica* of ethical emotions vis-à-vis the broader class of normative emotions. The only context where they paid attention to it was in reference to intuition. Further, it is no understatement to say that they marginalized the nature of emotion highlighted by Petrażycki.

To generalize and, in a sense, to interpret the ideas of the representatives of Petrażycki's version of legal realism, in regard to the authoritativeness of ethical emotions, the term “mystic” should be understood as

mental processes associated with the experience of ethical emotions. One of the types of these processes is called intuitive reasoning. Significantly, its unconscious character does not mean that it cannot become the subject of conscious reflection.

At any rate, if we bear in mind how diverse ethical emotions may be and focus on *mysticalness*, then it appears as reasonable to confine the next considerations to legal emotions. Considering the above, I believe that the authoritative character of legal emotions is neither due to mysticism, truth or commonsense, but depends on the nature of legal emotions. The authoritativeness of intuitive law results from mostly unconscious mental processes, which are usually defined as intuition. At this point it is worth emphasizing that in the work of Petrażycki and his followers, there were no explicit references to intuition, although the very definition of this type of law as “intuitive” does not seem accidental and may allow such an interpretation. In Russian, the word *intuitive* (rus. *intuitivnyj*) means unconscious<sup>13</sup> or “that which results from direct cognition, received without reasoning and criticism, which is the result of something similar to guessing, when certainty about something arises, but most often it is difficult to determine what it is based on” (Popov, 1907).

However, in the case of positive law, its authoritative character results primarily from the very essence of this law. As mentioned above, in the opinion of this school's representatives, positive law is the result of common experience and the wisdom of generations. In Laserson's words, “positive law, because of its having authoritative references [normative facts], acts as if of itself” (Laserson, 1930, p. 284). When a fact is experienced as normative and so instantiates a type of normative fact (i. e., a law, a custom, a judicial precedent, etc.), positive law requires submission to it, not because “it is convincing for individuals or groups who consider it to be fair or acceptable, but precisely due to its positivity and due to the fact that it has been laid down as a law or custom” (Laserson, 1930, p. 285).

To put it differently, in the case of positive law, through reasoning, we come to comply with the rules of conduct we extract from it. The authority of positive law, and consequently the fact that we submit ourselves to the principles we derive from it, is the final result of our rational reasoning. This does not mean that intuition plays no role in positive law (e.g., when

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13 Cf. the entry *intuitivnyj* in Čudinov 1910.

it comes to the interpretation of normative facts). Intuitive reasoning characterizes every kind of ethical emotion. Sometimes, intuitive law, which is not based on external normative facts, may play no role at all (e.g., when it comes to the way a legal instrument should be executed). This is not to deny, though, the possibility of collisions between intuitive reasoning and positive law, along with the form of rational reasoning it involves.

Nevertheless, as the representatives of the school emphasize, this kind of authority of positive law is conditional. As one of Petrażycki's pupils puts it: "with compliance of the law with the requirements of social and legal conscience, the authority of the law remains high, while with its non-compliance with social legal consciousness, the authority of the law decreases" (Kruglevskij, 1918, p. 417).

Due to the fact that, as compared with positive law, intuitive law constantly changes and develops, it is inevitable that at some point positive and intuitive law begin to diverge from one another as to their contents. In a situation where positive law differs from the intuitive law of a significant part of society, the "struggle" between these two types of law begins. If the generally binding positive law starts being perceived as unfair and out of date, society either stops complying with its norms or continues to obey them, but only out of "fear, coercion, and not according to conscience" (Sorokin, 1919, p. 571). In this situation, law may fail to meet with a widespread acceptance in society.<sup>14</sup> From the above, we can conclude that intuitive law—from a certain moment onwards—will have a greater authority than positive law. To put it differently, if positive law comes into strong contradiction with our intuition, the authority of external normative facts drops significantly and they cease to be valid for us.

At this point it is worth adding that in the opinion of this school of thought the influence of intuitive law on positive law is not one-sided. Intuitive law affects positive law, but also the inverse process occurs—positive law affects intuitive law. This means that positive legal norms inexorably influence and can to some extent shape intuitive legal beliefs. This is especially noticeable when positive law is more progressive and removes "outdated" intuitive law institutions. In some situations, over time, legal experiences caused by normative facts can turn into intuitive legal experien-

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14 And in an extreme case (when there are very large differences between positive and intuitive law, there may occur a "revolution as a protest against an official law that may take the form of an attempt to destroy it". See: Sorokin (1919, p. 571).

ces. This is the result of repeated clashes of intuitive legal convictions with positive ones and of the consolidation of given patterns of conduct, which are ultimately perceived as the objects of intuitive rights or legal obligations. Petrażycki contends that the group in which such processes take place most frequently are jurists, who, due to their continuous exposure to normative facts, over time turn the law based thereupon into their own intuitive law. Of course, this process occurs to a lesser extent among non-jurists (Petrażycki, 2000 [1909-1910], p. 399). Petrażycki's view is impressive and innovative, especially in the light of the currently popular concept of somatic markers, which is discussed later in this chapter. It is also worth to notice that more or less in the same period in which Petrażycki and his followers were developing these ideas, the role of intuition was noticed by judge Joseph C. Hutcheson. In his *Judgment Intuitive: The Function of the "Hunch" in Judicial Decision* (1929) he argues that in judicial decision making intuitive cognition plays a decisive role. As he claims:

when the case is difficult or involved and turns upon a hairsbreadth of law or of fact, [...] I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision (Hutcheson, 1929, p. 278).

Hutcheson's shows that in making decisions, the judge first uses intuition (a hunch) and then somehow rationalizes it in justifying the judgment (Hutcheson, 1929, p. 287).

## THE AUTHORITATIVENESS OF TRUTH AND THE ROLE OF PRACTICAL REASONABLENESS

In the opinion of John Finnis, the mystic-authoritative feature of normative emotions results from the inability to explain normativity. On one hand, it is impossible to unreservedly agree with this claim, because Petrażycki's theory fully explains the phenomenon of normativity in psychological terms. On the other hand, Finnis is in a sense right, because Petrażycki's explanation, based on outdated and unscientific psychology, at some points raises unsatisfactory and reasonable doubt. However, I think that in this connection, the context of the origin of Petrażycki's psycholo-

gical theory of law should be taken into account. I believe that Petrażycki's theory, although extremely innovative and original, in the discussed context only sets the direction for further research. With his theory, Petrażycki identified a key problems, such as the nature of legal experiences, emotions, and motivation, which should be studied using the achievements of modern psychology and its research methods. It is worth noting that neither Petrażycki nor his students actually analyzed the mental processes involved when emotions are experienced. For obvious reasons, the representatives of the Saint Petersburg School of Legal Philosophy did not have a proper understanding of the functioning of our minds, nor did they have appropriate tools for studying the mental processes related to the functioning of law. In any case, both Petrażycki's and the other school representatives theories mentioned above worked before a truly scientific examination of mental processes connected with experiencing emotions become possible.

Returning to Finnis' views, according to him, the primary source of normativity are the principles of practical reasoning. These principles guide us to the attainment of basic goods. Among the basic goods, which each individual pursues through his/her development are: life, knowledge, play, sociability of friendship and practical reasonableness. Finnis proposed to use reasonable criteria (e. g., proximity, dependence, reasonable commitments, productivity) to prioritize basic goods, while at the same time rejecting that emotions could be such a criterion. Practical reasoning is an exceptional good, by virtue of which is we become able to establish an appropriate hierarchy of basic values in our lives. According to Finnis, based on the principle of practical reason, we can formulate a set of general moral norms. The main principles of morality and the "ideal of reason" boil down to promoting human flourishing. In a sense, all other moral principles refer to the principle indicated above. What's more, the result of action is the inhibition of unwanted emotions. Subsequently, moral norms become a guide for shaping the principles of the legal system.

According to Finnis, the authoritativeness of morals is not "mystic", but is "the authoritativeness of truth". From this perspective, "this truth is the object(-ive) of truth-seeking and truth-finding practical reasonableness". Truth is considered a type of collection of true judgments.<sup>15</sup>

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15 Its basic criteria are correspondence to reality and cohesion. The cohesion criterion is broadly understood as consistency with our experience, responsiveness to questions, and compatibility with other true judgments, but also as "correspondence-by-anticipation with human fulfillment".

At the same time, Finnis postulates that the main motivation for people to act is not emotions but reasons for actions. We do not operate under the influence of our senses, but as a result of using our reason and intelligence, which take action after assessing and understanding what obvious benefits are associated with it. As a result, emotions, together with reason and intelligence, are responsible for taking action. Nevertheless, emotions always remain subjected to reason (which Finnis describes as self-discipline). Further, he holds that, if emotional impulsions take the upper hand over the normativity of principles, they may lead us to untruth.

It seems that Finnis understood emotions differently from Petrażycki and his followers. According to them, emotions are something more than the emotional impulses we give in to, which begin to dominate our reason, intelligence and practical reasonableness. Emotions also contain some aspects that we can classify as forms of practical reasoning. Besides, Petrażycki does not claim that we should not use our reason and intelligence to make decisions. Petrażycki points out that in the case of different types of legal emotions (continuing with this example) we have a different “composition” of these emotions.

Analyzing Finnis' views, the question arises whether fast decisions and our moral judgments always have the character of “truth”, or they always rest on the authority of “truth” resulting from practical reasonableness. If they do, is he not overrationalizing intuitive human actions and judgments? In the case of more complicated activities, especially when we have favorable circumstances for making a decision, we may more often avail ourselves of rational reasoning. But are the reasons always the main motivation for our actions? It seems that the answer to this question is negative (e. g., Bergmann & Wagner, 2020). Anyway, as has been shown in numerous studies, reasoning strategies are often very unreliable and carry many disadvantages (Kahneman & Tversky, 1984; Tversky & Kahneman, 1973; Sutherland, 1992).

In Finnis' view, rationality is in a sense contrasted with emotionality. At the same time, rationality has a higher value, and emotions, although they participate in our reasoning, rather more often “disturb” the mind. In light of contemporary research, especially in the area of cognitive sciences, a different picture emerges of the functioning of our reasoning (Bago & De Neys, 2019; Raelison *et al.*, 2020). These emotional reactions, which may also take the form of unconscious intuitive processes, have a significant impact on our reasoning and decision making (e. g., Blanchette, 2014; Haidt,

2013). And more so, some claim that it is evolutionarily older emotional processes that control our thinking. An advocate of this view is, among others, Jonathan Haidt. He holds that “moral judgment is caused by quick moral intuitions, and is followed (when needed) by slow, ex-post facto moral reasoning” (Haidt, 2001, p. 817). The purpose of such reasoning is to justify earlier decisions made under the influence of emotional reactions (i. e. under the influence of intuition). At the same time, Haidt contends that in some cases it is reasoning, not initial intuition, that leads to judgment. However, he believes that such a phenomenon is rare, and occurs when an initial intuition is weak and the ability to process the situation (i. e., the time and the possibility of making an effort) is high (Haidt, 2001, p. 819). Reasoning prevails over intuitions also in the case of contradictory intuitions. Here, the final judgment may be arrived at by “allowing reason to choose among the alternatives based on the conscious application of a rule or principle” (Haidt, 2001, p. 819). Although the assumptions of Haidt’s approach could be questioned (Liao, 2011), there is still a lot of research that shows the great impact of emotions and intuition on our reasoning and decision-making. I will return to this, below.

## EMOTIONS AND INTUITIVE REASONING

Generally, on the basis of contemporary psychological research with regard to intuitive reasoning, two terms appear: intuition and insight. There is no consensus on the meaning and understanding of concept of intuition. However, some common characteristic features that appear in almost every contemporary definition of intuition can be traced (among others, Öllinger & von Müller, 2017; Zander *et al.*, 2016). Intuition is understood as characterized by non-conscious processing. Many ideas have been put forth to explain the functioning of the unconscious processes (Garrison & Handley, 2017; Kageyama *et al.*, 2019). Intuition occurs without the participation of our consciousness, but this does not mean that it is never conscious. Second, intuition is automatic (uncontrolled). Intuitive judgments arise spontaneously and cannot be intentionally controlled. Third, the unintentional nature of intuition is also described as a fast and effortless process. Fourth, intuition is based on experience, that is, on knowledge acquired during a person’s life, as a result of many interactions with their environment. Fifth, it has the ability to initiate action: “The non-conscious, experience-based, and unintentional process finally results in a strong tendency toward a hunch, which

serves as a go-signal that is strong enough to initiate action" (Zander *et al.*, 2016, p. 3).

Another phenomenon described in the context of intuitive reasoning is insight. This term is understood as an unexpected appearance of a solution to a specific problem. The solution to the problem appears suddenly and ideally suits. Those who experience insight have a confidence in the truth of the solution, despite their inability to retrace the steps of thought that led them to the solution (Kounios & Beeman, 2014; Öllinger *et al.*, 2008; Topolinski & Reber, 2010; Zander *et al.*, 2016). Nevertheless, there is still not enough knowledgeable information on the insight phenomenon, therefore below we focus only on intuition.

Currently, the most promising area in the field of intuitive reasoning is research in the field of neuroscience and cognitive psychology. In the first place, it is worth recalling the well-known two-system model of mind by Daniel Kahneman (2011). According to his theory, two separate systems are responsible for all cognitive processes in our brain: System 1 (intuitive) and System 2 (reflective). The basic criteria for distinguishing them are "their speed, their controllability, and the contents on which they operate" (Kahneman & Sunstein, 2005). System 1 (intuitive) is characterized by the fact that it is based on unconscious reasoning (intuition). Further, it is automatic, rapid, effortless, associative, evolutionarily old and is more subjective (value-based). Unlike system 1, system 2 (reflective) is based on conscious reasoning and is: controlled, slow, effortful, deductive, evolutionarily recent and more objective (rule-following). As Kahneman (2011) puts it: "One of the main functions of System 2 is to monitor and control thought and actions 'suggested' by System 1, allowing some to be expressed directly in behavior and suppressing or modifying others" (p. 44). It should be mentioned that it is debatable whether such two separate systems elucidate in a complete and comprehensive way all the mechanisms of our reasoning (Kruglanski & Gigerenzer, 2011; Mega *et al.*, 2015; Newman *et al.*, 2017). Interestingly, some sort of coexistence and simultaneousness of the two systems has been demonstrated in recent studies (Bago & De Neys, 2019; Markovits *et al.*, 2019;). Nevertheless, if we are to refer these findings to Petrażycki's conceptualizations, it is apparent that system 1 is responsible for behavior under the influence of an individual-adaptive intuitive law, while behavior under the influence of social-adaptive intuitive law and positive law should be traced back to both system 1 and 2, with more relevance to be given to system 2, especially in the case of positive law.

It is worth noting that although the concepts explaining the mechanisms of intuition are many (i. a., Churchland, 2019; Sauer, 2017,), one of the best known is the concept of somatic markers proposed by Antonio Damasio (Damasio *et al.*, 1991). Based on the observation of the behavior of patients with damage in the ventromedial prefrontal cortex, it was assumed that in this area of the brain there are centers responsible for personal and social decision making. The somatic marker hypothesis is based on the following background assumptions. Firstly, human reasoning, including decision-making, depends on many (conscious and unconscious) neurobiological processes. At the same time, conscious operations depend on sensory images (dependent on the coordinated activity of early sensory cortices). Secondly, all of these processes depend on the functioning of attention and working memory. Thirdly, for reasoning and decision making it is necessary to have so-called dispositional knowledge. This knowledge includes information about the decision situation, different options of action, and its consequences (Damasio, 2006, p. 166). Damasio proposed a specific classification of the forms of dispositional knowledge.<sup>16</sup> In the ventromedial prefrontal cortex there are structures responsible for the connection between knowledge about a certain situation and emotions, which in turn are associated with the occurrence of similar situations in the past. As Damasio puts it:

somatic markers are a special instance of feelings generated from secondary emotions. Those emotions and feelings have been connected, by learning, to predicted future outcomes of certain scenarios. When a negative somatic marker is juxtaposed to a particular future outcome the combination functions as an alarm bell. When a positive somatic marker is juxtaposed instead, it becomes a beacon of incentive (Damasio, 2006, p. 174).

In conclusion, somatic markers operate (consciously or non-consciously) as assistants in decision-making processes. Damasio (2006) writes that “emotion ha[s] a role to play in intuition, the sort of rapid cognitive

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16 Damasio’s classification is as follows: “A. innate and acquired knowledge concerning bioregulatory processes and body states and actions, including those which are made explicit as emotions. B. knowledge about entities, facts (e. g., relations, rules), actions and action-complexes, and stories, which are usually made explicit as images. C. knowledge about the linkages between B items and A items, as reflected in individual experience. D. knowledge resulting from the categorizations of items in A, B and C” (Damasio, 1996, p. 1414).

process in which we come to a particular conclusion without being aware of the immediate logical steps” (pp. xviii-xix). The above does not mean that we do not have knowledge about those steps, but that emotions are so quick in providing answers that we do not have to “activate” too much knowledge. Importantly, the somatic marker is something learned. This is why

the quality of one's intuition depends on how well we have reasoned in the past; on how well we have classified the events of our past experience in relation to the emotions that preceded and followed them; and also on how we have reflected on the successes and failures of our past intuitions (Damasio, 2006, p. xix).

By transferring the above to the legal field, the more educated and experienced a lawyer is, the more accurate his intuitions will be. Moreover, Damasio concepts can explain the phenomenon mentioned above in the context of Petrażycki's theory, namely, the process of turning the norms of positive law into intuitive legal experiences.

The concept discussed above is grounded on a specific understanding of emotions. It should be remarked that this is not a universally accepted understanding of this phenomenon (Scarantino, 2016; Scarantino y De Sousa, 2018). Generally, there are three main approaches in the study emotions: the feeling tradition (i. a., Duran *et al.*, 2017; LeDoux & Hofmann, 2018; Prinz, 2012), the evaluative tradition (i. a., Neu, 2000; Nussbaum, 2001; Tappolet, 2016) and the motivational tradition (i. a., Frijda, 2010; Scarantino, 2014).

In the context of Petrażycki's theory the motivational tradition is of particular importance. However, this trend is not uniform. It includes such extremely different approaches as the basic theory of emotions<sup>17</sup> and evolutionary approach<sup>18</sup> on the one hand, and constructivist theories on the other (Barrett & Russell, 2015; Barrett, 2017; Van Kleef, 2016). The discussion of the nature of emotions is not limited to the concept of emotion (which is

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17 This approach understands emotions as an affective system and research focuses on the correlation between facial expressions and emotions (i. a. Ekman, 2003; Izard, 2007).

18 This approach treats emotions as adaptive systems (i. a. Tooby & Cosmides, 1992). One of the crucial hypotheses of evolutionary psychologists is that some aspects of human reasoning evolved to solve specific problems in social interactions.

still object of discussion), but comprises among other things the issue of the rationality,<sup>19</sup> intentionality, universality and consciousness of emotions.<sup>20</sup>

Finally, it should be emphasized that contemporary neuroscience and cognitive psychology are not able to explain the nature of emotion and intuition in a clear way. This is related both to the high degree of complexity of the analyzed issues (occurrence of many variables as well as many confounding factors) and to the relatively short history of this research area along with its novelty and the relatively recent availability of complex research tools (such as fMRI or NIRS). This notwithstanding, neuroscience and cognitive psychology have opened a wide horizon for scientists to further study the correlation between the activity of our brain at the neuronal level and our behavior and experiences.

## CONCLUDING REMARKS

In Petrażycki's theory, using the term "mystical" in the context of ethical emotions refers mainly to the fact that an individual experiences these emotions does not realize its source, literally "mysterious source" (Petrażycki, 2000 [1909-1910], p. 45). A different perspective is taken by John Finnis. In his opinion, the authoritativeness of morals is not "mystic", but it is truth and the concept of truth is connected with the idea of practical reasonableness. He relies on the assumptions that reason has a higher value than emotions and that emotions should be subjected to reason, while according to Petrażycki, the basic motivation of people's behavior in society are emotions. Since at Petrażycki's time the study of psychological phenomena was at an early stage, in order to develop a psychological approach to law he had to previously develop his own psychology. For obvious reasons, some aspects of Petrażycki's psychological theory of law are incompatible with the knowledge obtained since that time. In light of contemporary research, especially in the area of cognitive sciences, the term "mystic" should be referred to the fact that an important component of mental processes is repre

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19 Although generally speaking, the majority of scientists agree with the thesis that emotions should not be contrasted with reason, the mechanism by virtue of which emotions get rationalized remains a contentious issue (Scarantino & De Sousa, 2018).

20 Additionally, a lot of further aspects should be taken into consideration in the context of emotion and intuition (e. g., the influence of working memory Maldei *et al.*, 2020).

sented by emotions, and, notably, by intuition. The authoritative character of legal emotions is due to neither mysticism nor truth nor commonsense, but depends on the nature of legal emotions.

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