

MORAL AND LEGAL NORMS

HUNDREDS of pages have already been written about the difference between legal and moral norms. Some authors have seen the difference in their external form, others in their content, some in their origin, others in the circumstances under which they are binding, or in sanctions applied to those who did not conform themselves to their commands. One of these numerous proposals will be discussed here. It seems particularly attractive and has been largely accepted, not only by jurists but also by social anthropologists studying legal institutions in primitive societies. This proposal had been advocated and treated in the most exhaustive way by L. Petrażycki, whose works have been recently translated into English.¹ Petrażycki was professor at the University of Warsaw from 1917 until his death in 1931. It was there that the present author attended his lectures with a number of other students attracted by his fame as a jurist and moral scientist.

According to Petrażycki, moral norms are norms which command without authorizing anybody to claim the deed commanded, while legal norms are not just unilaterally binding but give to others a right to claim the fulfillment of the norm. The former are only imperative, while the latter have an imperative-attributive character. This characterization, as the author explains, is not to be treated as a *description* of the existing division of roles in the domain of morality on the one hand, and law on the other, but it constitutes a *proposal* for a demarcation line. This proposal is not a purely conventional one, but it grasps the very nature of law, which has, as yet, not been adequately characterized by theorists. It is only this distinction which makes it possible to formulate adequate theories concerning either morality or law, i.e., theories which embrace *all* the objects belonging to the characterized class and refer to these objects *exclusively*.

As mentioned above, this theory is widely known and widely accepted. Referring to Petrażycki, the German jurist, G. Radbruch, accepts the former's distinction as one of the differences between morality and law. "The legal obligor," as he writes in his studies on legal philosophy, "is always confronted with an obligee, an interested claimant, whereas to the moral duty such an obligee is attached only as a symbol when it is called a duty toward one's own conscience, toward humanity in one's own person, toward one's better self. In the field of law one

¹ Leon Petrażycki, *Law and Morality*, tr. by H. W. Babb (Harvard Univ. Press, Cambridge, Mass., 1955).

may talk of duty as an obligation that is owed; but the moral duty is not thus owed to a creditor, but is a duty pure and simple."² G. del Vecchio in his article, "Homo juridicus," treats this distinction as firmly established. "L'impératif juridique," he writes, "a ceci de particulier par rapport à l'impératif moral, qu'il fait naître un devoir dans un sujet à l'égard d'un autre sujet, et celui-ci, par cet acte même, acquiert la faculté d'exiger que ce devoir soit rempli."³

This distinction, clear and convincing at first sight, can be interpreted in different ways, and each of these interpretations, as we shall endeavor to show, encounters difficulties that are not easy to overcome. We shall examine them successively, referring to the writings of Petrażycki and especially to his book on the "Motives of Human Conduct," published in German in 1907⁴ and incorporated in an abridged form in the collection recently published in English.

According to the first interpretation, a norm like "Honor thy father and thy mother" would be legal for X if X considered not only that people are under the obligation of honoring their parents, but also that parents are entitled to require it as something due to them. To be entitled to require is, in other words, to have the right to do so or, in still other words, to make justified claims. In fact, in Petrażycki's writings we find on many occasions a distinction of justified and unjustified claims, reasonable and unreasonable demands. It would be absurd, in his opinion, to interpret the rule: "Resist not evil. Whoever shall smite thee on thy right cheek turn to him the other also; and if any man will sue thee at law and take away thy shirt, let him have thy cloak also," as a bilateral rule giving to the offender the right to smite the left cheek or the right to obtain the cloak. Although it would be less absurd to treat the obligation of humility, chastity, and perfection as bilateral, the obligations formulated in the New Testament are generally unilateral and do not allow one to claim from anybody the fulfillment of its ideals.

All those writers who accept Petrażycki's distinction of law and morality also accept his distinction of absurd and reasonable claims. The social anthropologist Bronisław Malinowski adopts, as what he calls the anthropological definition of law, the

² *The Legal Philosophies of Lask, Kadbruch and Dabin*, tr. by Kurt Wilk (Harvard Univ. Press, Cambridge, Mass., 1950), p. 81.

³ This article has been published in the collection *Droit, Morale, Moeurs* (Ed. Sirey, Paris, 1936), pp. 1-20. The quoted passage is on p. 3.

⁴ "Ueber die Motive des Handelns und über das Wesen der Moral und des Rechts," 1907.

following formula: "The rules of law stand out from the rest in that they are felt and regarded as the obligations of one person and the rightful claims of another."⁵ It is, according to him, the only definition which gives an adequate idea of the function of law in a primitive society.

The use of expressions like "rightful" or "valid claims" seems very dangerous for the definition, since a claim is rightful or valid always in reference to some rules which are tacitly assumed. When somebody holds that parents may not request to be honored by their children or that nobody can claim humility from other people, this "cannot" does not constitute a technical impossibility, like the impossibility of being in two different places at the same time. "Cannot" means here: "is in disagreement with a rule treated as self-evident." Bentham already knew very well that the notion of valid claims or rights implied the existence of rules of a higher order. Although he sympathized with the spirit of the "Declaration" of the French Revolution, he could not agree with its form, since the notion of rights, involving a reference to rules, could not, in his opinion, be used as the starting point.

Petrażycki does not usually support by any argument his opinion that a claim in a given case is not valid. Rather exceptionally, when treating the obligation of humility, chastity, and perfection as unilateral, he points to the prejudicial consequences of entitling people to such claims. Claims of this kind would make peaceful conditions impossible within a society, the more so as people are inclined to demand of their neighbors much more than they demand of themselves. Thus in this case Petrażycki thinks it unreasonable to claim humility or perfection from people in view of the tacitly assumed principle of avoiding conflicts between members of a society. A principle of this or of some other kind is always to be found in the arguments of those who consider a claim valid or not. And then the question immediately arises: is this rule of reference moral or legal? This question can be answered only by recurring to new principles, necessary for deciding whether it is unilateral or bilateral, i.e., connected with valid claims or not. Thus we find ourselves involved in a *regressus* which leads us to infinity, or to a point where, having no more rules of a higher order to refer to, we cannot apply the distinction of moral and legal rules any more.

Let me know, one could say, which claims are valid and which are not, according to your opinion, and it will give me an idea of the ethics you advocate, the distinction of valid and invalid

⁵ *Crime and Custom in Savage Society* (London, 1932), p. 55.

claims being symptomatic of people's moral attitudes. He who thinks that chastity cannot be requested from others reveals either that, according to him, chastity does not always deserve approval, or that we cannot interfere in the private life of our neighbors and that everybody may dispose of his own person as he likes. He who holds that humility cannot be a matter of claim manifests his opinions on what should be the proper relations of man to man. A person approving of a social hierarchy, like the hierarchy of a caste system, would probably have a different view of the subject. The decision, whether the norm, "Honor thy father and thy mother," is legal or moral, would, in conformity with Petrażycki's criteria, depend on the opinion whether symmetrical relations of love and friendship are not preferable in family life to asymmetrical ones, and on the opinion whether the very fact of giving birth to their children entitles parents to claim an attitude of respect which can be due only for personal merits. And whoever treats the claim to smite the other cheek as absurd confesses that the idea contradicts his fundamental concepts of human dignity.

The use of the concept of valid claim does not necessarily involve a reference to moral principles. In judging a claim absurd or unreasonable, people may refer also to legal rules, rules of custom, or technical principles. Thus, e.g., he who denies the right of parents to be honored may refer to the fact that emotions are spontaneous and cannot be felt on command. But the very fact that the concept of a valid claim usually implies reference to moral or legal norms renders the use of this concept impossible in the definition of law.

Let us now consider another interpretation of the concept of valid claim, which can also be derived from Petrażycki's writings as well as from the writings of those theorists who share his opinions.

According to Petrażycki, the fact that moral norms are only imperative, while legal ones are imperative and attributive, is not necessarily expressed in the formal structure or the content of a norm, since norms usually have an elliptical form. The distinction is ultimately a *psychological* one, and it is impossible to class a norm either as legal or as moral, without knowing the state of mind of the person who makes use of it, the norm being legal when connected with a bilateral "impulsion,"⁶ and moral when the impulsion is only unilateral.

⁶ The word "impulsion" used in the English translation of Petrażycki's writings which was mentioned above, corresponds to the Polish "emocja" which denotes a particular state of mind of a passive-active nature. [A feeling.—EDITOR.]

By adopting this psychological point of view, we may give a different interpretation to the concept of a valid claim: a claim can be considered valid not with reference to certain principles but with reference to some socio-psychological fact, namely, the fact of being widely experienced in the given group. In this case, a norm recommending action A would be legal when used by X if X felt not only an obligation to perform A, but also the pressure of claims on the part of his fellow-men, these claims being sufficiently widely shared to be treated as justified and not as matter of individual caprice. This reference to claims as social facts gives to the psychological definition of Petrażycki a certain stability, since the person obliged has his counterpart in another person, not imaginary but real, who requires the action recommended by the norm and is in his claims supported by other members of the group. Petrażycki himself often interpreted his distinction in that way, e.g., when he was stressing the pressure of social claims upon the mind of individuals or when he described the social evolution of norms. Whenever people became conscious of their rights, whenever, according to Petrażycki's expression, their mind freed itself from servitude, unilateral norms were transformed into bilateral ones, a social process which he considered not only as evolution but also as progress.

By interpreting in this way the distinction of legal and moral norms, we avoid the danger of defining valid claims by referring to norms of a higher order. But since the validity of claims is here ascertained by their very existence, the notion of claim itself must be clear enough to enable us to decide whether in a given case we have to do with a claim of this sort or not. This notion was not so important when the claim could only be imagined and when the only thing which mattered was whether it was considered valid, from the point of view of certain assumed principles. Now it can be valid only when real and commonly shared.

The notion of claim is certainly not simple, and what seems particularly interesting to a moral scientist is to clarify its relation to moral disapproval. Does not any claim contain a potential disapproval, in case it is not complied with? And does not any moral disapproval imply a claim? He who claims from his employer a two-weeks leave after a year of hard work will disapprove of the refusal. Inversely, does not he who disapproves of his friend, who has deserted his wife and children, claim a different behavior? For some theorists, e.g., E. Westermarck, moral disapproval is always an expression of resentment, and the concept of resentment seems very closely related to that of claim.

These questions being as yet unanswered, the denotation of the term "claim" must be treated as rather vague. It is a well-known fact that every frustrated expectation, e.g., an expectation due simply *to habit*, can give rise to claims. A child who is accustomed to being kissed by his mother when going to bed experiences a resentful claim, when his mother, absorbed by guests, forgets to perform her "duty." Everybody knows that a favor, regularly bestowed, gives rise to claims on the part of the beneficiary, and the "impulsions" of the benefactor, unilateral at first, can in course of time easily take an imperative-attributive form. Unilateral norms, sufficiently integrated by habit in the minds of people belonging to a group, are usually transformed into bilateral ones. This fact explains why, as the example of Petrzycki shows, it is not easy to quote instances of unilateral norms. They always seem bilateral when they are really binding, and in order to find examples of unilateral norms we must turn either to norms which have never been treated as binding, as is the case of the norm which recommends us to offer the other cheek, or to norms which have been binding in the past but nowadays are treated rather as obsolete, as is the norm "Honor thy mother and thy father" in those countries where mutual love and comradeship has replaced a hierarchical structure of the family.

Thus, if the existence of widely experienced claims is decisive for including the given norm in the class of legal norms, among the really binding norms, practically nothing is left to morality. Even the norm recommending love of one's neighbor, always quoted as a typical example of a unilateral norm, can in some cases be bilateral, as, e.g., in the case of maternal love. People disapprove of a mother who does not love her child. The child can claim her warm attention, and the mother herself can feel guilty of disappointing these claims, which she considers valid.

Let us sum up our criticism. As a psychologist, Petrzycki in principle treats the difference between imperative and imperative-attributive obligations as based upon a distinction in the corresponding "impulsions." Whenever X deems himself obliged to perform action A, and thinks of A as owed to another person, his obligation is legal, as, e.g., when he pays the agreed wages to his servant. Whenever he does not consider his obligation as due to somebody, his obligation is moral, as is usually the case in giving alms. In this form the distinction of legal and moral rules does not seem operational, since we have always to inquire what is the state of mind of the person who makes use of the norm, and it may easily happen that the same norm,

recommended by the same person, is moral at one time and legal at another.

It is probably the need to make the distinction more steady and more predictable which leads Petrażycki to introduce the additional condition that the claim be valid and to reject all unreasonable and absurd claims. Even when he does not speak quite explicitly of validity, although he often does, this condition is felt to be latent in his distinction, while it is introduced *expressis verbis* into the definition of law by B. Malinowski who, as quoted above, speaks of rightful claims.

Taking into account this additional condition, we faced two possibilities of its interpretation, neither of them free from difficulties. If a claim is rightful, or even only seems rightful, with reference to some norms, we are engaged in a regress. If a claim is rightful in virtue of the fact that it is widely shared, only those norms which are obsolete or have never been binding are left to morality, since all norms really accepted in society seem associated with claims.

We should like to conclude these remarks with some historical considerations. The distinction between legal and moral norms, as discussed above, has been usually associated with the name of Petrażycki, who undoubtedly was the first to develop it at length and made out of it the basic difference between morality and law. But germs of this distinction are to be found already among 18th-century writers who opposed charity to justice, considering that the first cannot be required from anybody, while the second is subject to claims. This distinction, treated as a distinction *within* the domain of morality, was later discussed in the fifth chapter of J. S. Mill's "Utilitarianism." In that chapter Mill dwells upon the concept of justice in connection with the principle of utility. When referring to a distinction of duties of perfect and imperfect obligation he writes as follows:

Duties of perfect obligation are those duties in virtue of which a correlative right resides in some person or persons; duties of imperfect obligation are those moral obligations which do not give birth to any right. . . . I think it will be found that this distinction exactly coincides with that which exists between justice and the other obligations of morality. . . . It seems to me that this feature in the case—a right in some person, correlative to the moral obligation—constitutes the specific difference between justice and generosity or beneficence. Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right.⁷

This distinction, as we mentioned before, and as is obvious from the passage quoted, is for Mill a distinction of two kinds of *moral*

⁷ *Utilitarianism* (Everyman's Library), p. 46.

rules. But the rules of justice are, according to him, connected with law. The term "just," as he shows, is derived from "iustum," i.e., "that which has been ordered," and is in different languages related to law, while conformity to law is the primitive element in the formation of the notion of justice. Thus the characteristic of rules of justice can be considered as a characteristic of rules of law, which makes the analogy with Petrażycki's distinction still more evident. Later in the same chapter Mill tries to explain what is a right. "When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law or by that of education and opinion." If somebody should ask, why society ought to support this claim, Mill confesses to be able to give no other reason than general utility. The claim, as we see, is addressed here, in his opinion, not to an individual but to society.

There is a further analogy between Mill and Petrażycki which deserves attention: both agree in attributing peculiar importance to bilateral rules. Rules of justice form "the most sacred and binding form of all morality," writes Mill in the same chapter, and "Justice is a name of certain classes of moral rules, which concern the essentials of human being more nearly." Petrażycki makes a comparison of moral rules to champagne, while legal rules are compared to water—to goose wine, as he used to say. They are much more useful in the life of society and endowed with a much greater motivational force. Thus the conversion of moral consciousness into a legal one always constitutes an important step forward.

The difficulties encountered in Petrażycki's characterization of law and morality do not diminish the respect due to all his valuable contributions in these domains. In both of them he combated with great energy and success all possible forms of fiction. This makes him a successor of Bentham, whose tracking of fictions in morality and law only now begins to be sufficiently appreciated.

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