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CRITICISM OF RUDOLF VON JHERING'S CONCEPTS IN LEON PETRAŻYCKI'S PHILOSOPHY OF LAW. REMARKS ON THE RECEPTION OF JHERING'S WORK IN THE POLISH LEGAL THOUGHT IN THE SECOND HALF OF THE NINETEENTH AND THE EARLY TWENTIETH CENTURIES

1. RECEPTION OF JHERING'S WORK

Luis Manuel Lloredo Alix, a scholar who specializes in the reception of works of both Friedrich Carl von Savigny and Rudolf von Jhering, aptly says that the transmission of ideas from one culture into another resembles the situation in the hall of mirrors — the properties of a mirror cause the image to be multiplied and transformed, so finding the original becomes difficult[1]. However, in the case of reception, not only those elements of the original concept or doctrine that have been adopted but also those that have been over-emphasized, as well as those that have been left aside, are of some importance. In the case of Jhering, it is particularly interesting that this German lawyer inspired representatives of very different currents of legal thought — from the adherents of formalism, through those criticising legal positivism, the representatives of the revived natural law, the American legal realism, the anti-formalist current, and the sociological current, up to Marxist lawyers. Thus, we can say that the reception of Jhering's *oeuvre* is quite

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[1] L.M. Lloredo Alix: *Der spanische Savigny. Zwischen Historismus und Traditionalismus*, lecture prepared for the conference "Savigny International?", Goethe University, Frankfurt am Main and Max-Planck-Institut für europäische Rechtsgeschichte, 24 October 2011, pp. 1–2.

diverse[2]. The aim of the present study is to show the impact of Jhering on the Polish jurisprudence of the second half of the nineteenth and the early twentieth centuries, including especially the relationship between the concepts of the German lawyer and the theories of the most eminent Polish legal philosopher of that time, Leon Petrażycki.

2. ASSESSMENTS OF JHERING'S WORK IN THE POLISH LEGAL THOUGHT IN THE SECOND HALF OF THE NINETEENTH AND THE EARLY TWENTIETH CENTURIES

It seems that the reception of Jhering's work in Polish jurisprudence in the second half of the nineteenth and the early twentieth centuries was not very profound. During the life of the famous lawyer, only two small papers, *Znaczenie prawa rzymskiego dla świata nowożytnego* (*The importance of Roman law for the modern world*)[3] and *O tryngielc*ie (*On tips*)[4], as well as a well-known dissertation on the struggle for law[5], were published in Polish. Works that broadly referred to the achievements of the scholar were not too numerous. The references made by a professor at the Jagiellonian University, Stanisław Wróblewski (1868–1938), in his synthesis of Roman law, could serve as an example of how Jhering's work was referred to by Polish lawyers during that period. According to Wróblewski, an attempt at a holistic approach to the history of Roman law that was presented in Jhering's *Geist des römischen Rechts* had an *a priori* nature and could at most testify to the author's intuition[6]. At the same time, Wróblewski to some extent appreciated Jhering's merit in adapting

[2] Cf. L.M. Lloredo Alix: *From Europe but beyond Europe: The circulation of Rudolf von Jhering's ideas in East Asia and Latin America*, Max Planck Institute for European Legal History. Research Paper Series, No. 2016–11, pp. 1–8; L.M. Lloredo Alix: *La recepción de Rudolf von Jhering en Europa: un estudio histórico-comparado*, Revista Telemática de Filosofía del Derecho, 2014, No. 17, pp. 203–250.

[3] Translation by Rudolf Fried. It was published in the *Prawnik* [Lawyer] journal in 1877 (there is also a separate print). The subject of the article could be of interest to the contemporary Polish reader because Jhering rejected the position stressing the legal self-sufficiency of the nation and suggested that openness to influences of foreign legislations, including Roman law, was a kind of necessity for a nation. That article, therefore, contained a polemic against the position of the historical school, especially its German wing, highlighting the "principle of nationality".

[4] Translation by Wincenty Tarłowski. The article was printed in 1883 in two journals published in Lwów: *Prawnik* and *Urzędnik* [Official]. It is the Polish version of the booklet *Das Trinkgeld* (Brunswick: Druck und Verlag von George Westermann, 1882).

[5] The first translation (from the fourth German edition) by Antoni Matakiewicz, a judge of the district court in Niepołomice, was published in Lwów in 1875. The second one (from the tenth German edition) appeared in St. Petersburg in 1894 (the translator was hidden under the codename Bohdan K.).

[6] S. Wróblewski: *Zarys wykładu prawa rzymskiego. Historya stosunków wewnętrznych Rzymu i źródeł prawa. Losy prawa rzymskiego po śmierci Justyniana. Nauki ogólne rzymskiego prawa prywatnego*, Kraków: Nakładem Akademii Umiejętności, 1916, p. 210.

legal constructions taken from Roman law to the requirements of modern times. He presented quite a critical approach to the historical school oeuvre of the first half of the nineteenth century. While writing, e.g. on Friedrich von Savigny's monograph on possession (*Das Recht des Besitzes*, 1803), Wróblewski stressed that the work "reflects the Justinian law with such fidelity as if it was a binding statute, so as Glossators and humanists of the 16th century treated it, from which it differs by only one thing, namely the desire to polish legal constructions; doubtless, it was the result of unconscious 'tremblings of thought under the influence of the law of nature', which was officially emphatically rejected"[7]. According to Wróblewski, the qualities that occurred in the early works of Savigny could be seen in the entire achievements of the historical school from the first half of the nineteenth century on. In contrast, the development of the school in the second half of that century was a kind of reaction to the unilateral approach of the authors of the earlier generation, who focused on "pure Roman law", i.e. that Roman law which was contained in the codification of Justinian. Therefore, authors such as, for example, Bernhard Windscheid, stood in defence of existing law and took from that codification "only what was introduced to the new law"[8]. Due to that, a new theory was formed, which exceeded the limitations of focusing on Roman law exhibited in the Justinian code. Wróblewski named that theory "the philosophy of today's private law". Jhering played a role in its creation. The Polish scholar writes: "Although, not all [scholars] adopted the view of Jhering, who considered only utilitarian grounds — in his last writings — as directing, and deduced the essence of law in general, and even the content of the law in force, from teleology (teleological direction), yet the motto he promoted: 'durch das römische Recht, aber über dasselbe hinaus', was reflected in the critical assessment of the principles of Roman law and led to a desire to create new and better laws for Germany"[9]. It should be said that Wróblewski saw those elements of Jhering's theory which, as we shall see, were harshly criticized by Petrażycki, as of some value in the development of modern civil law[10]. In contrast, another professor at the Jagiel-

[7] *Ibidem*, p. 211.

[8] *Ibidem*, p. 212.

[9] My translation of "Jakkolwiek nie wszyscy przyjęli pogląd Jheringa, który tylko względy utylitarne uznawał — w ostatnich swych pismach — za kierujące i z celowości wywodził tak istotę prawa w ogóle, jak nawet treść prawa obowiązującego (kierunek teleologiczny), to przecież rzucone przez niego hasło: 'durch das römische Recht, aber über dasselbe hinaus' odbiło się w krytycznej ocenie zasad rzymskich i wytworzyło dążność do stworzenia dla Niemiec nowego, lepszego prawa"; *ibidem*, p. 213. Cf. R. von Jhering: *Znaczenie prawa rzymskiego dla świata nowożytnego (Przedruk z „Prawnika" z roku 1877)*, translated by R. Fried, Lwów: Nakładem Redakcji „Prawnik", 1877, p. 17; R. von Jhering: *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Erster Theil, Leipzig: Breitkopf und Härtel, 1866, p. 14. Wróblewski added that, after the adoption of the German Civil Code, the study of Roman law began to lose its importance at German universities, and scholars began to focus on the positive law. However, that tendency also led to negative consequences, namely the shift from a comparative approach and from the "philosophy of private law", which "created the new law, and although associated with Roman sources, it was of fundamental value for the theory of today's law and did not lose it when Roman law ceased to be valid" (in:) S. Wróblewski: *Zarys wykładu prawa rzymskiego…*, *op. cit.*, p. 214.

[10] It should be pointed out here that young Wróblewski defended a view somewhat different from the one he later presented. He defended Puchta's *Begrifffjurisprudenz* and believed that the teleological approach, character-

lonian University, Edmund Krzymuski, in his *Historja filozofji prawa do połowy XIX wieku (History of legal philosophy until the mid-nineteenth century*) did not even mention Jhering, while, at the end of the work, he named legal philosophers who, like Rudolf Stammler and Gustav Radbruch, wanted to revive the school of the law of nature[11].

Eugeniusz Jarra (1881–1973), to a certain extent a victorious rival of Petrażycki at the University of Warsaw, was a supporter of a rather eclectic concept of law combining psychological elements (as in Petrażycki's theory) with those taken from jusnaturalism. Moreover, he devoted many of his writings to the history of legal philosophy. Jarra wrote about Jhering that his concepts could not be attributed to any school. Although he was an eminent Romanist, he also dealt with legal philosophy, but his views were met with fierce and well-deserved criticism (Jarra mentioned the critical remarks of Petrażycki). As Jarra pointed out, the aim in Jhering's theory was a spur of human will, as well as a source of law. Teleology in regard to the law plays the same role as causality in the physical world. The concept of law is a system of social aims that require the existence of coercion for their implementation. The legal sentiment (*Rechtsgefühl*) — Jarra continues his analysis of Jhering's work — is not the basis of law, but it is created by law. Law is gained through a struggle by means of which its development is carried out[12]. Jarra is of the opinion that the whole concept of Jhering is based on false psychological premises. Namely, he holds that the legal sentiment is not derived from law, but it should be considered an integral component of the human psyche. The organization of society expresses that sentiment. This means that the legal sentiment is primary in relation to law, and not secondary. In addition, Jarra argues that recognition of the aim as the basis of law has no cognitive value, since the aim is inherently variable and undergoes historical transformations. Jarra is of the opinion that Jhering's recognition of struggle as a factor of legal development is a simple consequence of the theory of coercion, which was supported by the German scholar: "If law is a force, it is no wonder that it develops where the force prevails, i.e. in struggle"[13]. Meanwhile, as Jarra thinks, law cannot be seen as a struggle, but as an order: the order reflecting a particular

istic of Jhering, could be useful in *de lege ferenda* analyses, serving as a guide for the legislator, while the analysis of the law in force (dogmatic analysis) must be based on the clarification of the notions. He wrote: "The distinction between legal concepts can only be based on the difference in legal structure; the emphasis on the economic side in the theory of law can only lead to confusion, because it loses more in accuracy than it gains in the alleged broadening of views" (in:) S. Wróblewski: *Posiadanie na tle prawa rzymskiego. Osobne odbicie ze Sprawozdań Akademii Umiejętności Wydziału historyczno-filozoficznego z dnia 11 lipca 1898 r.*, Kraków: Drukarnia Uniwersytetu Jagiellońskiego, 1898, p. 3; cf. F. Zoll, Jr.: *Ś.P. Stanisław Wróblewski. Odbitka z zeszytu 1–1939 r. „Kwartalnika Prawa Prywatnego"*, Warsaw 1939, p. 2. In the early period of his activity, Wróblewski also criticised the merging of the concept of subject right (*subjektives Recht*) with the category of interest, inherent in the argumentation of Jhering and his followers; cf. S. Wróblewski: *Posiadanie na tle prawa rzymskiego*, Kraków: Akademia Umiejętności, 1899, pp. 11–13.

[11] Cf. E. Krzymuski: *Historja filozofji prawa do połowy XIX wieku*, Kraków 1923, pp. 135–136.

[12] E. Jarra: *Ogólna teorja prawa*, second edition, Warsaw 1922, pp. 164–165.

[13] "Jeśli prawo jest siłą, to nic dziwnego, że rozwija się tam, gdzie siła panuje, t.j. w walce", *ibidem*, p. 165.

state of views prevailing at a given place and time. According to Jarra, the legal psyche is a psyche of order and not of struggle. He admits that struggles for the realization of certain ideals, such as freedom of conscience and the abolition of servitude and serfdom, have certainly taken place in history (these examples were also given by Jhering). However, the legal psyche reaches the fore after struggles and "perpetuates the transformed state of affairs"[14]. It could be effective, however, only until the emergence of new ideals and a battle for their implementation. It should be emphasized, therefore, that Jarra considered Jhering's views as inaccurate both on a psychological and historical grounds and, thus, totally rejected them.

Ignacy Koschembahr-Łyskowski (1864–1945) — a professor of the universities in Freiburg, Lwów, and Warsaw — approved Jhering's view that legal institutions served economic purposes[15]. He was, therefore, convinced that Jhering was right, recognizing the importance of economic and social relations for law. However, he criticized Jhering's position, believing that combining law with force[16] leads to the acceptance of economic liberalism and *laissez-faire*. Koschembahr-Łyskowski was of the opinion that Jhering's theory took society only in a materialistic and mechanistic way, basing it on egoism, and the teleological dimension of this theory is only of a utilitarian character. The Polish lawyer objected to extreme *laissez-faire* because he believed that law had to ensure the ethical equilibrium both in economic and social relations, and it mediated in balancing contradictory interests. Law is not only the result of economic relations, but it also must influence them. According to Koschembahr-Łyskowski, strength, or "gravity" [*powaga*][17], is one of the elements of law, but not the only one and not — as Jhering assumed — the most important of them. The "gravity" of law stems precisely from the very fact that law balances interests. In addition, he argued that altruism, regardless of whether it was originally present in social life or occurred in the evolution of selfish motives, was altogether important for social life in general and for law in particular[18]. Therefore, solidarist

[14] *Ibidem*, p. 165.

[15] However, Koschembahr-Łyskowski was of the opinion that taking economic and social objectives into account must not by law lead to the abandonment of abstract legal principles. He considered these principles to be a guarantee of equality before law. Cf. I. Łyskowski (Koschembahr-Łyskowski), *Pandekta. Część ogólna*, third edition, Lwów: Towarzystwo Biblioteki Słuchaczów Prawa, 1911, pp. 5–8.

[16] Cf. R. von Jhering: *Der Zweck im Recht*, Band I, Leipzig: Breitkopf & Härtel, 1877, pp. 250–255. Jhering emphatically declares: "das Recht ist die Politik der Gewalt" ("the law is the policy of force"), *ibidem*, p. 255.

[17] It is a play on words: the Polish word *powaga* ("gravity") can be divided into *po-waga*, i.e. "after--balance".

[18] I. Koschembahr-Łyskowski: *Pojęcie prawa* (in:) *Księga pamiątkowa ku uczczeniu 250-tej rocznicy założenia Uniwersytetu lwowskiego przez króla Jana Kazimierza r. 1661*, Vol. 1, Lwów: Uniwersytet Lwowski, 1912, pp. 8–54; cf. I. Łyskowski (Koschembahr-Łyskowski): *Pandekta. Część ogólna…*, *op. cit.*, p. 16 ("Niewątpliwie siła wytwarza prawo i siła świadczy często o zdrowotności nie tylko jednostki, ale i społeczeństw. Słusznie pod tym względem występuje Ihering przeciw zapatrywaniom Savigny'ego i Puchty, którzy przyjmują, że prawo powstaje jak język drogą zwyczaju i bez walki. Ale siła jest tylko jednym z czynników, które razem wytwarzają prawo"; my translation: "Undoubtedly, power produces law and power often testifies to the soundness not only of individuals, but also of societies. In this respect, Ihering rightly opposes the views of Savigny and Puchta, who assume that law is created, as language, by the way of custom and without struggle. But strength is only one of the

elements, so popular in the early 20th century, can undoubtedly be found in the views of that author[19].

Leon Piniński (1857–1938), who was a professor of Roman law at the University of Lwów, devoted a biographical article to Jhering and Bernard Windscheid after the death of the two scholars in 1892. It was the only more extensive work presenting the output of the author of *Kampf um's Recht*[20]. Commenting on the concepts of Jhering, he considered accurate his position that the provisions of private law "are intended to protect only the legitimate interests and needs of the people and only they recognize the subjective right solely in the cases where there is an interest of this kind"[21]. As it was stressed by Koschembahr-Łyskowski, Piniński merged into one the two approaches to the notion of the subjective right: the view presented by Windscheid and based on the notion of "the power of a will" and the concept introduced by Jhering and emphasizing the category of interest. Thus, according to Piniński, the subjective right is the scope of freedom of action guaranteed to the individual for the purpose recognized as justified by objective law[22]. At the same time, he criticized Jhering and argued that if the point of view of the German scholar was to be accepted, "every legally protected interest of an individual should be considered a distinct subjective right. Due to this way of understanding of the subjective right, private law would be divided into small pieces and cease to be something concrete"[23]. In turn, Władysław Maliniak (1885–1941), who was

factors that together produce law"). It can be added on the margin that Koschembahr-Łyskowski rejected the typical concept of natural law, understanding it as a normative order superior to positive law, but at the same time he believed that, based on the historical evolution of the law in force, from the earliest to the latest times, it is possible to distinguish the ideal of law (the essence of law). According to the lawyer, the role of law is the same in every society, so it is possible to talk about the everlasting notion of law. Cf. J. Paygert: *O pojęciu istoty prawa. Rzecz o rozprawie prof. dr. Ignacego Koschembahr-Łyskowskiego. Odbitka z „Przeglądu prawa i administracyi"*, Lwów: Drukarnia Jakubowskiego i Sp., 1913, pp. 5–39 (the author approves the critique of Jhering's views presented by Koschembahr-Łyskowski, and also attacks Jhering's view that state power is the only source of law).

[19] Koschembahr-Łyskowski referred to the concepts of Léon Bourgeois (1851–1925), a French politician and theorist of solidarity. Cf. I. Koschembahr-Łyskowski: *Pojęcie prawa…*, p. 7.

[20] In this sketch, Piniński, also relying on his private correspondence with Jhering, pointed out that the German lawyer was not a modest man and most of all appreciated his works on possession. Cf. L. Piniński: *Dwaj wielcy prawnicy Niemiec Ihering i Winscheid. Osobne odbicie z „Przeglądu Polskiego" z m. grudnia 1892 r.*, Kraków 1893, pp. 4–17.

[21] L. Piniński: *Pojęcie i granice prawa własności według prawa rzymskiego* (in:) *Księga pamiątkowa Uniwersytetu Lwowskiego ku uczczeniu pięćsetnej rocznicy fundacyi Jagiellońskiej Uniwersytetu Krakowskiego*, Lwów: Nakładem Senatu Uniwersytetu Lwowskiego, 1900, p. 4. According to Jhering, law consisted of two elements: interests, such as the benefit or profit, which required to be protected by law, and legal protection (for example by way of action), which was of a formal nature. Jhering claimed that the first of them was the kernel (*Kern*) of law, and the other one was the shell (*Schale*) that protected it. In this way, he came up with the formulation of his general position that the law was to secure benefits, and rights are just legally protected interests ("Der Begriff des Rechts beruht auf der rechtlichen Sicherheit des Genusses; Rechte sind rechtlich geschützte Interessen"); cf. R. von Jhering: *Geist des römischen Rechts*, Teil III, Band 1, Leipzig: Breitkopf und Härtel, 1865, pp. 316–317.

[22] I. Łyskowski (Koschembahr-Łyskowski): *Pandekta. Część ogólna…*, *op. cit.*, pp. 85–86.

[23] L. Piniński: *Pojęcie i granice prawa własności…*, *op. cit.*, p. 5; L. Piniński: *Begriff und Grenzen des Eigenthumsrechts nach römischem Recht*, Vienna: Manz'sche k.u.k. Hof-Verlags- und Universitäts-Bechhandlung, 1902, pp. 2–5. Piniński also accepts the view of Jhering concerning the general prohibition of immissions (nuisance) for neighbouring lands. Therefore, he is of the opinion that the impact on neighbouring properties is the limit of the

a professor of the Free Polish University (Wolna Wszechnica Polska) in Warsaw, approvingly referred to the attitude of Jhering, Piniński, and Koschembahr-Łyskowski to Roman law. He also agreed with Jhering's position on teleology in law[24]. It should be pointed out that Fryderyk Zoll, Jr. (1865–1948), a civil law professor at the Jagiellonian University and an important figure of the Polish codification commission of private law in the interwar period, repeatedly pointed out that the teleological interpretation of law developed by Jhering in *Zweck im Recht* had a significant influence on his own attitude to the issue of understanding law[25].

3. CRITICISM OF JHERING'S VIEWS IN THE WORKS OF LEON PETRAŻYCKI

Leon Petrażycki (1867–1931), the most renowned Polish legal philosopher of the late nineteenth and the early twentieth centuries, was a professor of the universities in St. Petersburg and later in Warsaw. In his works, he presented a comprehensive critique of legal positivism, claiming that positivism — "official jurisprudence" — did not present a proper definition of law, confining itself to definitions that led

exercise of the ownership right. Finally, Piniński argues that ownership does not include the right to dispose freely of a thing; cf. L. Piniński: *Pojęcie i granice prawa własności…*, *op. cit.*, pp. 55–56; L. Piniński: *Begriff und Grenzen des Eigenthumsrechts…*, *op. cit.*, pp. 99–106. On this basis, he built a definition according to which property is "the only right to the economic use of a thing, the exclusive rights admittedly limited by the existing economic, social and state relations": L. Piniński: *Pojęcie i granice prawa własności…*, *op. cit.*, p. 58. Moreover, the lawyer adds that only such a concept of individual property could be protected against attack by the supporters of socialism; cf. L. Piniński: *Begriff und Grenzen des Eigenthumsrechts…*, *op. cit.*, pp. 112–118. It can, therefore, be concluded that Piniński leads from the Jheringian theory of interest but arrives at a concept of ownership that stresses social limitations of that right. Piniński, like Fryderyk Zoll, was a supporter of the approach that was then called the "socialization" of civil law; cf. F. Zoll, Jr.: *Napoleon — ustawodawca*, Kraków: Krakowska Spółka Wydawnicza, 1921, pp. 15–16; also cf.: O. Gierke: *Die soziale Aufgabe des Privatrechts. Vortrag gehalten am 5. April 1889 in der juristischen Gesellschaft zu Wien*, Berlin: Verlag von Julius Springer, 1889; T. Repgen: *Die soziale Aufgabe des Privatrechts: eine Grundfrage in Wissenschaft und Kodifikation am Ende des 19. Jahrhunderts*, Tübingen: Mohr Siebeck, 2001, pp. 51–58. A similar position concerning property rights was held by Ignacy Koschembahr-Łyskowski, who referred to the work of Piniński; cf. I. Łyskowski (Koschembahr-Łyskowski): *O pojęciu własności zarazem jako przyczynek do nauki o źródłach prawa. Odbitka z „Przeglądu prawa i administracyi", r. 1902*, Lwów: Drukarnia Ludowa, 1902, pp. 27–49, 74–86; I. Koschembahr-Łyskowski: *Pojęcie prawa…*, *op. cit.*, pp. 67–68. It should be mentioned that Piniński adopted Jhering's concept of the protection of possession, which will be discussed further. Cf. F. Zoll, Sr.: *Pandekta, czyli nauka rzymskiego prawa prywatnego z krótkiem uwzględnieniem historycznego rozwoju pojedynczych jego instytucji*, t. II, *Prawo rzeczowe*, Kraków: published by the author, 1898, pp. 6–7.

[24] Maliniak wrote: „Po ujawnieniu przez romanistę Iheringa roli kategorji celu w prawie, romanistyka polska, w osobach Pinińskiego i Łyskowskiego, posuwa sprawę ponownie o wielki krok naprzód. Badacze ci udowadniają w sposób wyłączający wszelkie wątpliwości, że materjalną treścią teleologji, znamionującej instytucje prawnicze, jest teleologja gospodarcza. Znamienne jest również, że punktem wyjścia wywodów zarówno Iheringa, jak Łyskowskiego i Pinińskiego jest właśnie prawo rzymskie": W. Maliniak: *Przyczynki do teorji zasadniczych zagadnień metodologji i filozofji prawa oraz prawa państwowego*, Warsaw 1917, p. 23.

[25] F. Zoll, Jr.: *Méthode d'interpretation en droit privé positif* (in:) *Recueil d'études sur les sources du droit enl'honeur de François Gény*, Tome II, Paris: Recueil Sirey, 1934, p. 434.

to a vicious circle[26]. In addition, he said, "the official jurisprudence tends to exclude from the realm of law whatever is outside the control and regulation of the state according to the official law at a certain level of culture"[27]. According to Petrażycki, legal scholars erroneously recognized that law referred only to the sphere external to the individual, and, therefore, they excluded psychological phenomena, which had a key role in his own theory[28].

Petrażycki argued with Rudolf Jhering's "theory of interest", which he considered a variant of utilitarian theory. He mainly referred to the following works of Jhering: *Geist des römischen Rechts* and *Der Zweck im Recht*. He pointed out that, due to that theory, jurisprudence "fell to the level of the defence of the pocket interests of owners, creditors, etc., and to an interpretation of law under which it would be easier to provide evidence and win lawsuits"[29]. He believed, moreover, that Jhering's position was superficial and had a "private-economic" character. In his opinion, it was necessary to move to a higher position, that of the economy of the entire society (*ekonomia społeczna*)[30]. In that way, Petrażycki denied a greater value not only of Jhering's work, but also of the entire nineteenth-century Romanist tradition, which in his opinion was of an excessively private-law and individualistic character (although, it must be emphasized, Petrażycki's legal ontology was undoubtedly based also on methodological individualism). According to the Polish legal philosopher, Jhering's extremely practical position could be useful, however, in the process of teaching law[31].

Petrażycki's view that one should recognize the superiority of "socio-economic" position is connected with the intellectual climate of the late nineteenth and the early twentieth centuries, which was the epoch in which various collectivist and corporativist theories were promoted. Petrażycki was himself a democrat and reformist in terms of political beliefs, thus he was definitely far from being a revolutionary socialist. After the revolution of 1905, for a short time he was a member of the Russian State Duma on behalf of the Constitutional-Democratic Party and during his parliamentary work opted for granting political rights to women. Simultaneously, however, he believed that in the future a "centralist" system, with a socialist

[26] Cf. L. Petrażycki: *Wstęp do nauki prawa i moralności. Podstawy psychologii emocjonalnej*, translated by J. Lande, Warsaw: Państwowe Wydawnictwo Naukowe, 1959, pp. 26–29.

[27] L. Petrażycki: *Teoria prawa i państwa w związku z teorią moralności*, J. Lande (ed.), Vol. I, Warsaw: Państwowe Wydawnictwo Naukowe, 1959, p. 357.

[28] *Ibidem*, Vol. I, p. 359.

[29] L. Petrażycki: *O ideale społecznym i odrodzeniu prawa naturalnego. Z dodatkiem: O gospodarstwie i prawie i o istocie i przesłankach ekonomji politycznej*, Warsaw: Druk Synów St. Niemiry, 1925, p. 11. On Petrażycki's criticism of the existing jurisprudence, see K. Opałek: *The Leon Petrażycki Theory of Law*, Theoria, A Swedish Journal of Philosophy and Psychology, Vol. XXVII, 1961, pp. 133–136.

[30] L. Petrażycki: *Prawo a sąd*, Warsaw: Towarzystwo imienia Leona Petrażyckiego, 1936, pp. 6–7, 13 (footnote); cf. L. Petrażycki, *O ideale społecznym i odrodzeniu prawa naturalnego…*, *op. cit.*, p. 63.

[31] L. Petrażycki (Л.И. Петражицкий): *Введение в науку политики права (1896–1897)* (in:) Л.И. Петражицкий: *Теория и политика права. Избранные труды*, Е.В. Тимошина (ed.), St. Petersburg: "Университетский издательский консорциум 'Юридическая книга'", 2010, p. 159.

character, would be shaped[32]. Collectivist elements were noticeable only in the socio-economic views of Petrażycki, in which, moreover, the remnants of feudalism were entirely rejected. Therefore, he demanded the abolition of *obshchina,* a rural community, characterized by the common ownership of land. Petrażycki's reformist worldview is particularly evident in his opinions concerning customary law. In the last years of the nineteenth century (and, thus, before Petrażycki's psychological theory of law was fully formulated), he argued that leaving certain spheres of social life to customary law was permissible only if the norms of customary law provided the security of economic activity and other social activities and enabled the fulfilment of functions essential for the state. If such a customary law does not exist or is insufficient, such detrimental effects as lawlessness, economic collapse, and demoralization occur. Therefore, the retreat of the state from regulating a specific sphere of social life must be negatively assessed[33]. Petrażycki added that a custom was of a fundamentally conservative nature, and that conservatism could still be exacerbated by religious sanctions[34]. In addition, Petrażycki appears as a supporter of the idea of progress, believing that progress extended exponentially[35].

In the work *O gospodarstwie i prawie i o istocie i przesłankach ekonomji politycznej* (*On economy and the law and of the nature and grounds of political economy*), Petrażycki criticised Jhering's views on the institution of the protection of possession. In *Über den Grund des Besitzschutzes* (1867), Jhering linked that protection with the institution of property, because he believed that, in the majority of cases, the owner who is also the possessor is benefited with this protection[36]. The claim for the protection of possession was expressed in order to simplify the evidence procedure, which was required in the case of a vindication claim which protected the property. Jhering noticed that sometimes the claim for the protection of possession was directed against the owner. As he pointed out, eliminating this deficiency could be done only by introducing burdensome evidence requirements which were specific to vindication claims. However, this would deprive the claim for the protection of possession of all its beneficiary features in the name of eliminating situations that are quite rare. Petrażycki claimed that Jhering's position concerning the protection of possession was ingenious, but it showed the weakness of his whole method, which consisted in finding the aim in the law. Jhering saw some proce-

[32] Cf. J. Kowalski: *Psychologiczna teoria prawa i państwa Leona Petrażyckiego*, Warsaw: Państwowe Wydawnictwo Naukowe, 1963, pp. 14–16, 144–146; L. Petrażycki: *Teoria prawa i państwa w związku z teorią moralności*, Vol. II, W. Leśniewski (ed.), Warsaw: Państwowe Wydawnictwo Naukowe, 1960, pp. 600–604; A. Habrat: *Ideał człowieka i społeczeństwa w teorii Leona Petrażyckiego*, Rzeszów: Wydawnictwo Uniwersytetu Rzeszowskiego, Rzeszów 2006, pp. 40–61.

[33] L. Petrażycki: *Zagadnienia prawa zwyczajowego*, translated by J. Sunderland, Warsaw: Nakładem Towarzystwa im. Leona Petrażyckiego, 1938, p. 23.

[34] *Ibidem*, p. 35.

[35] *Ibidem*, pp. 41–42.

[36] Cf. R. von Jhering: *Über den Grund des Besitzschutzes. Eine Revision der Lehre vom Besitz*, 2nd ed., Jena: Mauke's Verlag, 1869, pp. 45–72, 143–160.

dural simplifications as the "aim" of the institution, but, according to Petrażycki, they were of secondary importance. If shallow utilitarianism, which is characterized by the position of Jhering, is overcome, it turns out that the institution of the protection of possession has a very important psychological impact and it is essential for the prevention of violence and lawlessness. As Petrażycki emphasizes, the institution of the protection of possession exists not to protect some parties at the expense of others, but for the sake of the common good, because it is directed against general evils: arbitrariness and violence. Thanks to its existence, an owner who wants to get back his or her property by some violent means knows that doing so may result in the successful application of the claim for the protection of possession against the owner, and thus refrains from using such illegal means[37]. Petrażycki concludes that even if some positions suggested by the theory of interest, are justi-

[37] L. Petrażycki: *O gospodarstwie i prawie i o istocie i przesłankach ekonomji politycznej* (in:) L. Petrażycki: *O ideale społecznym i odrodzeniu prawa naturalnego…*, *op. cit.*, pp. 98–101. In the Polish civil law literature, Jhering's concept of possession was accepted in principle by Leon Piniński, mentioned above, while Stanisław Wróblewski presented a moderate criticism of it. Piniński considered possession a person's economic relation to a given thing, based on the view — accepted in legal practice and supported by the everyday experience — that the thing serves a certain person; cf. L. Piniński: *Der Thatbestand des Sachbesitzerwerbs nach gemeinem Recht. Eine zivilistische Untersuchung*, Band I, Leipzig: Duncker & Humblot, 1885, pp. 23–38; R. Longchamps de Bérier: *Leon hr. Piniński jako prawnik* (in:) S. Witkowski, R. Longchamps de Bérier: *Leon Piniński z okazji pięćdziesięciolecia doktoratu*, Lwów: Księgarnia Gubrynowicza i Syna, 1931, pp. 9–10. Wróblewski was of the opinion that, contrary to Jhering's position, possession was not always connected with property and consisted not so much of the authority over the thing, but the relationship towards other people who recognized this authority was its essence. He agreed with Jhering that possession was not dependent on the will of its holder (moreover, in the justification of that position, he went further than Jhering); cf. S. Wróblewski: *Posiadanie na tle prawa rzymskiego…*, *op. cit.*, pp. 22–45, 52–54, 77–86, 98; S. Wróblewski: *Posiadanie na tle prawa rzymskiego. Osobne odbicie ze Sprawozdań Akademii Umiejętności…*, *op. cit.*, pp. 1–2, 5–12; F. Zoll: *Ś.P. Stanisław Wróblewski…*, *op. cit.*, pp. 2–3. It is worth adding that, already in the second half of the 20th century, the theory of possession presented by Jhering was analysed by the outstanding Polish civil law specialist, Andrzej Stelmachowski (1925–2009). As Stelmachowski writes, this theory was a continuation of the achievements of the historical school, especially of Savigny (*Das Recht des Besitzes*, 1803). In that work, Savigny emphasized two elements of possession: protection of property and protection against arbitrariness (let us add that the latter was emphasized by Petrażycki). In turn, lawyers of the younger generation — especially Georg Friedrich Pucht and Eduard Gans — developed the subjectivist theory according to which the protection of possession was essential for the protection of the personality and the will of the holder (the subordination of things by the individual was considered necessary for the development of his or her personality). However, as Stelmachowski emphasizes, Jhering concentrated on the first of the elements pointed out in Savigny's theory and considered possession to be the "outpost of property" (*Vorwerk des Eigentums*), as well as the institution through which property was externalized. Jhering formulated this justification by referring to his general theory of "legally protected interests". At the same time, based on that theory, he strongly criticized the subjectivist theory (he emphasized that possession consisted only in the power — *corpus* — and not in the will of possession — *animus possidendi*, which was also stressed by Savigny). According to Stelmachowski, Jhering's conception was the culmination of the nineteenth-century "bourgeois" jurisprudence concerning ownership, and subsequent theories were merely modifications. He himself believed that possession was not the actual state, but "the simplest law" relating to things. Cf. A. Stelmachowski: *Istota i funkcja posiadania*, Warsaw: Wydawnictwo Prawnicze, 1958, pp. 11–15. Cf. also: F. Zoll Jr.: *Pojęcie posiadania w projekcie prawa rzeczowego. Odbitka z „Przeglądu Notarialnego"*, No. 8, 1937, pp. 2–3; L. Piniński: *Der Thatbestand des Sachbesitzerwerbs…*, Band I, pp. 13–18. In the same period, Jerzy Ignatowicz (1914–1997) believed that Jhering's reasoning was logically accurate, but a traditional concept of possession, derived from the output of Roman lawyers, was better suited to the needs of practice; cf. J. Ignatowicz: *Ochrona posiadania*, Warsaw: Wydawnictwo Prawnicze, 1963, pp. 67–69, 73–75; also cf. J. Ignatowicz: *Prawo rzeczowe*, 5th ed., Warsaw: Wydawnictwo Naukowe PWN, 1994, pp. 275–276. On the traditional, Roman notion of possession, see: M. Turošík: *Roman Law*, Banska Bystrica: Matej Bel Univer-

fied, the whole theory is very superficial. He writes that "the psychological effect of the applicable law depends on creating reasons to refrain from countless actions of positive nature […] as well as omissions […] harmful from the economic and other points of view, on sustaining and consolidating the respect and careful handling with a person, rights and the interests of others, with the given word and promise, etc."[38]. This position is only one step from the theory of rational legal policy, developed by Petrażycki in many of his later works.

Petrażycki rejected utilitarianism, which he attributed to Jhering's theory, not only because of his economic views. His attitude towards the theory of interest was also connected with the social ideal he supported. The thinker was convinced that morality and law would in the future be replaced by universal love. Referring to the ethics of Kant, he named the ideal of love the axiom of practical reason[39]. At the same time, he blamed utilitarianism, based on the notion of interest, for colonial expansion and the exploitation of one nation by another[40].

4. CONCLUDING REMARKS

At the turn of the century, the Polish specialists in Roman law knew and used the works of Jhering. However, the reception of Jhering's legal-philosophical concepts was diverse. Some scholars — like Leon Piniński and Władysław Maliniak — believed that the theory of interest served to establish better connections between civil law and economic reality. Others, in turn, presented some criticism concerning various elements of those concepts. Eugeniusz Jarra claimed, e.g. that Jhering improperly presented the issue of legal psyche, and he also rejected the idea of struggle as the main factor of legal development. However, the far-reaching critique of Jhering's ideas is contained in the writings of Leon Petrażycki who emphasized that his theory

sity in Banska Bystrica, 2013, pp. 47–50; W. Dajczak, T. Giaro, R. Longchamps de Bérier: *Prawo rzymskie. U podstaw prawa prywatnego*, second edition, Warsaw: Wydawnictwo Naukowe PWN, 2014, pp. 376–386.

[38] L. Petrażycki: *O gospodarstwie i prawie i o istocie i przesłankach…*, *op. cit.*, p. 102; cf. J. Ignatowicz: *Ochrona posiadania…*, *op. cit.*, p. 18 (the author pointed out that Petrażycki's criticism of Jhering's position was exaggerated). It is worth noting that Fryderyk Zoll, Jr. (1834–1917) and Kazimierz Przybyłowski (1900–1987), partly arguing with Jhering, described the origin of possession similarly to Petrażycki and emphasized that counteracting arbitrariness was the basic justification for this institution. Cf. F. Zoll, Sr.: *Pandekta…*, Vol. II, pp. 7–8. Przybyłowski — the author of the most extensive works devoted to possession in the pre-war legal literature in Poland — wrote that "even a primitive sense of righteousness or justice" took the viewpoint of the person deprived of things; cf. K. Przybyłowski: *Podstawowe zagadnienia z zakresu ochrony posiadania*, Lwów: published by the author, 1929, pp. 56–57. Simultaneously, Fryderyk Zoll, Jr., also added — relying on the concept of the Austrian lawyer, Josef Krainz (1821–1875) — that the protection of possession was appropriate for shaping the role of parties in court proceedings; cf. F. Zoll, Jr., A. Szpunar: *Prawo cywilne w zarysie*, t. 2, *Prawo rzeczowe*, Kraków: Księgarnia Powszechna, 1947, pp. 38–39; A. Stelmachowski: *Istota i funkcja posiadania…*, *op. cit.*, p. 15.

[39] Cf. L. Petrażycki: *Wstęp do nauki polityki prawa*, W. Leśniewski (ed.), Warsaw: Państwowe Wydawnictwo Naukowe, 1968, p. 25.

[40] Cf. L. Petrażycki: *Prawo a sąd…*, *op. cit.*, p. 7.

was based on short-sighted utilitarianism. Moreover, that argument was presented not only by Petrażycki, but also by Ignacy Koschembahr-Łyskowski. In my opinion, the popularity of some solidarist concepts among Polish intellectual elites of that time was one of the reasons of the diverse reception of Jhering's work. For the supporters of solidarist or corporativist ideas, the work of Jhering may seem too individualistic in the attitude. Moreover, Petrażycki's critique was related to his ideal of love. That ideal had indeed much in common with the ideas that marked the intellectual climate of that-time Russia, where Petrażycki lived and worked. The ideas of Leo Tolstoy could be a good example[41]. Simultaneously, two Polish translations of *Kampf um's Recht* show that Jhering's pamphlet was also seen as a manifesto of freedom[42].

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[41] However, there is a big difference between the views of Petrażycki and those of Tolstoy concerning law. Tolstoy, unlike Petrażycki, recognized law as an instrument of oppression, and therefore, he should be considered a representative of legal nihilism: A. Kojder: *Moc (nie) jest prawem (Spór Tołstoja z Petrażyckim o istotę i rolę prawa)* (in:) A. Kojder: *Godność i siła prawa. Szkice socjologicznoprawne*, Warsaw: Oficyna Naukowa, 2001, pp. 74–81.

[42] Cf. A. Matakiewicz: *Przedmowa tłómacza* [sic!] (in:) R. von Jhering: *Walka o prawo*, Lwów: Drukarnia J. Dobrzańskiego i K. Gromana, 1875, p. V.

Kojder A.: *Moc (nie) jest prawem (Spór Tołstoja z Petrażyckim o istotę i rolę prawa)* (in:) A. Kojder: *Godność i siła prawa. Szkice socjologiczno-prawne*, Warsaw: Oficyna Naukowa, 2001.

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PIOTR SZYMANIEC

CRITICISM OF RUDOLF VON JHERING'S CONCEPTS IN LEON PETRAŻYCKI'S PHILOSOPHY OF LAW. REMARKS ON THE RECEPTION OF JHERING'S WORK IN THE POLISH LEGAL THOUGHT IN THE SECOND HALF OF THE NINETEENTH AND THE EARLY TWENTIETH CENTURIES

S u m m a r y

The aim of the present study is to show the impact of Rudolf von Jhering on the Polish jurisprudence of the second half of the nineteenth and the early twentieth centuries, including especially the relationship between the concepts of the German lawyer and the theories of Leon Petrażycki. The author points out that the reception of Jhering's legal-philosophical concepts was diverse. Some scholars — like Leon Piniński and Władysław Maliniak — were of the opinion that the theory of interest served to establish better connections between civil law and economic reality. However, the far-reaching critique of Jhering's ideas is contained in the writings of Leon Petrażycki who believed that Jhering's theory was based on short-sighted utilitarianism. Moreover, that argument was emphasized not only by Petrażycki but also by Ignacy Koschembahr-Łyskowski. In the author's opinion, the popularity of some solidarist concepts among Polish intellectual elites of that time was one of the reasons of the diverse reception of Jhering's work.