SOCIOLOGICAL JURISPRUDENCE: ROSCOE POUND'S DISCUSSION ON LEGAL INTERESTS AND JURAL POSTULATES

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Introduction

Having started to introduce the vast body of theories that make up the Sociological Jurisprudence in the last issue of Mizan Law Review, what emerges is that the discussion is far from complete. The previous notes referred generally to the "vital" links between Law and Society and Law within Society. Although the general role of society in law-making underlies most of the theories under sociological jurisprudence, this is hardly the whole picture about the school of thought.

This school is perhaps one which covers some of the biggest variety of different approaches but ultimately, the name most associated with this type of jurisprudence is that of Dean Roscoe Pound. At the time of the theory's development, Pound identified that sociological jurisprudence tended to either identify itself with the positivist type of jurisprudence insisting on a singularly mechanical interpretive approach. Others presented the ideas of sociological jurisprudence from an anthropological-ethnological stage which is also interpretive but instead of concentrating on the mechanisms of social forces like the first group, they rather are more concerned with ethnological interpretation – making comparative studies of primitive institutions or generalising jural materials gathered by "a purely descriptive social science."[1]

According to Pound, this leads to the "unhappy tendency" that is commonly identifiable in a lot of the older jurisprudential theory of insisting upon one approach or one method of investigation or interpretation. Pound's primary concern therefore was to advance a more unified approach blending the methodological and normative precepts which is a feature of his work as well as

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[1] R. Pound (1912) "The Scope and Purpose of Sociological Jurisprudence" 25 *Harvard Law Review* p. 489.

focusing more on the way law develops in society rather than analysis and interpretation of legal texts. In Pound's words: "*…in the past century, we studied the law from within. The jurists of today are studying it from without*".[2]

What this entails is a complicated and 6-tiered programme that Pound undertook in 1912.[3] The approach which he identified as vital (for the modern social jurist) to the question of sociological jurisprudence have the following elements:

a) Studying the actual/real effects of the legal institutions and doctrines;
b) Sociological studies of the preparation of legislation particularly comparative legislation;
c) Study of means of making legal rules effective;
d) Sociological legal history considering effects of legal doctrines that existed in the past;
e) Advocacy of reasonable and just solutions of legal cases (a realist approach);
f) Making effort more effective in achieving the purpose of law.

This somewhat wide list of tasks for the modern sociological jurist is a perfect example of how Pound tended to mix methodological as well as normative approaches to create his new theory. He looked at legal history, surveyed in detail a huge body of legal philosophy, and also discussed real legal problems. His 5 volumes of Jurisprudence provide a vast body of knowledge about a great many things from Comte to Ehrlich, the code of Hammurabi or the Anglo Saxon dooms.[4] In carrying out these studies, Pound reached the conclusion that his sociological jurisprudence would focus more on how law develops due to the link between law and society rather than an analysis and interpretation of statutes and cases.

To understand his actual theory, one need not be distracted by the wealth of information to be found in more than half a century's worth of academic work. Pound's actual contribution to the school of sociological jurisprudence indeed lies in his discussion on "legal interests" and "jural postulates".

1. Legal Interests

According to Pound, there are three categories of legal interests, namely, individual, public and social interests. *Individual interests* are "claims or demands or desires involved immediately in the individual life and asserted in

[2] R. Pound (1921) *The Spirit of the Common Law*, Boston: Beacon Press p. 212.
[3] *Id*. footnote 1 at 514-516.
[4] R. Pound (1959) *Jurisprudence*, St Paul, Minnesota: West Publishing Company.

title of that life".[5] *Individual interests* are asserted for the titles of individual life. What this logically leads to is the fact that as these interests by and large only involve the individual, the interests tend to fall into the scope of private law although in the actual balancing the interests this is a generalisation that may not be always true.

Public Interests are "claims or demands or desires involved in life in a politically organised society and are asserted in title of that organisation. They are commonly treated as the claims of a politically organised society thought of as a legal entity".[6] These types of interests are asserted for or in the title of politically organised society. Political interests can be generalised as falling within the scope of [public law which includes] criminal law although there is clearly an overlap with individual interests.

Social Interests were originally included by Pound as a distinct and vital set of interests whereby they were described as "claims or demands or desires involved in the social life in civilised society and asserted in title of that life. It is not uncommon to treat them as claims of the social group as such".[7] These interests have been regularly tied to the concept of security. As such, one vital part of security is for society to enjoy an organised legal system within the political organisation which could arguably also fall within the public interests as political organisation also requires the existence of some form of legal control which can only be provided by the legal system. This issue does rather obscure the difference between public and social interests and Pound himself seems to point out this issue.[8]

The distinction between the three types of interests is made so that they may be balanced against each other, which is the aim of sociological jurisprudence. However, Pound did not really emphasise these interests as being wholly distinct from each other. As described above, there is a level of differentiation while the overlap between the interests is also apparent because they are ultimately three perspectives of a single set of interests which co-exist in the context of unity and variation. For example, in the exercise of paying taxes – while this may very well appear to be an important activity for the public life (as they are clearly claims of a politically organised society to remain politically organised), they are also vital for the social interests as it is through taxes that the security both social and physical can be assured in a society. However, Pound's arguments on various issues would extend to highlight that the payment of taxes is essentially as much an individual interest (although he insists that

[5] R. Pound (1943) "A Survey of Social Interests" 57 *Harvard Law Review*, 99. 1-2.
[6] *Ibid.*
[7] *Ibid.*
[8] *Id.* footnote 4.

individual interests are never directly the source of new taxes[9]) as it is within the individual interests to contribute to and benefit from public resources. Ultimately, the public, social or individual interests are different ways of looking at the same thing. For further clarification on this issue, see Pound's discussion on Corruption.[10]

From the above arguments, the next question that arises is whether an issue which falls within private or individual interest may also be viewed from public or social perspectives.[11] This question arises because it may be convincing to argue that social and public interests overlap, and since the individual belongs to the politically organised society, the political and social interests can easily be brought down to the individual level. Yet, it is difficult to assume that every individual interest will be relevant within the perspective of public or social interests. While certain issues such as protection of individual property rights can be seen as socially significant which also require public response (laws granting private tenure rights), some private issues may preferably be dealt with at an individual level without taking it up to the public level.

Although Pound believes that weightier interests have the tendency to intrinsically prevail, he is sceptical "as to the possibility of an absolute judgement." He is in favour of harmony and balance which targets at securing interests.[12] According to Pound, the previous century gave priority to general security, and he states that the present century "has shown many signs of preferring individual and social life."[13]

Another vital issue dealing with interests deals with when the interests come into existence in relation to when the law comes into existence.[14] Oftentimes, it is assumed that the interests are created before the laws which protect them therefore the classification of the individual, social and public interests as "legal interests" may seem premature. To follow up on the above example of legal tenure and private property, the claim on private property is the source of the legislation which seeks to give security for the tenant over certain property rights. In fact one may observe that a number of laws come about as a result of

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[9] R. Pound (1942) *Social Control through Law*, New Haven: Yale University. Press, p.142.

[10] *Id*. footnote no. 5.

[11] I. McLeod (2007) *Legal Theory*, 4th Ed. Palgrave Macmillan Law Masters, NY, P. 153f.

[12] R. Pound (1922), *An Introduction to the Philosophy of Law*, Yale University Press [1954, 1982], pp. 45-46.

[13] *Id*, p. 46.

[14] M. Freeman and D. Lloyd (2001) *Lloyd's Introduction to Jurisprudence*, 7th Ed. Sweet & Maxwell.

claims based on developing interests. This adds to Pound's approach to legal theory in the sense that he sets out to study the development and reform of law rather than interpretation and analysis of existing statues and cases – therefore he studies the law in action.

Moreover, Pound deals with the issue of prioritisation and balancing of interest, and he underlines that it is interests which are essentially "on the same" plane that need to be compared. Nevertheless, there will be conflicts within the various categories of interests which exist on the same plane and balancing and prioritising these interests and resolving the conflicts is one of the most important segments of sociological jurisprudential theory as can be recalled from the discussion of Jhering's discussion on balancing of interests.[15] For this part of the discussion, Pound turns to the core concepts of "jural postulates" to explain how this process of balancing, comparing, prioritising or resolving conflicts between interests occurs.

2. Jural Postulates

Pound introduces the concept of "jural postulates" as the method by which interest may be tested and evaluated so that the conflicts between the various interests may be resolved. Jural postulates presuppose legal reasoning about rights and obligations at the various levels and involve what human beings must be able to (reasonably) assume in a civilised society. According to Pound, these assumptions may vary from one legal system to another based on ethno-cultural lines and can even be different within the same legal system while others are quite similar in all societies.

Pound seems to have formulated some jural postulates by generalising some values protected by existing laws within the American Legal system and suggests that these do not need to be tested against objective morality as they fit in with the "functions of law"[16] within the specific reality. Pound clarified that for the American Legal System's approach to property, possessions and legal transactions the postulates include[17]:

- People must be able to assume that others will not be intentionally aggressive;
- People must be able to assume that they can control things that they have discovered, created or legitimately acquired;
- People must be able to assume that other people will honour reasonable expectations which they create and undertakings which they give, as

[15] E. Nalbandian (2010) "Sociological Jurisprudence – General Introduction to Concepts" Vol. 4 *Mizan Law Review*, No. 2.
[16] J. W. Harris (1997) *Legal Philosophies*, 2nd Ed. London: Lexis Nexis Butterworths
[17] *Id*. Footnote 11.

well as making restitution in respect to unjust enrichment which they could not have reasonably expected to receive (good faith in dealings);

- People must be able to assume that other people will act with due care not to create unreasonable risk of injury to others;
- People must be able to assume that other people will control things which they maintain on their land and which are like to escape and cause damage.

Pound clearly indicated in the 1950's that these would be jural postulates that are quite specific to the country and to the issues under consideration, and he generally notes that the legal reasoning that goes towards forming the postulates must be incremental. In other words, new claims will be recognised if similar claims have already been recognised. Moreover, he underlined that the postulates change as they are relative to the social evolution stages in a particular society.

Pound's approach thus aspires beyond considering the law as it is. The latter view does not go into issues of suggestions for changes in judgements and law reform but confines itself to the tasks of analysing and interpreting the texts. Pound, however, states that the competing interests have to be balanced against each other considering the legal assumptions that can be held by a reasonable person in society. This, according to Pound is meant "*…to provide as much as society can of the total of people's reasonable expectation in life in civilised society within the minimum of friction and waste.*"[18]

Pound is quite clear in rejecting the Benthamite felicific calculus in the balancing of interests. But in his discussion of the postulates, it seems as though Pound accepts that the interests which are being claimed are good. In trying to achieve as much of the claims/expectations with the minimum of friction and waste, he is not only reactive and does not only respond to claims which are made. He suggests that the balancing process is a form of social engineering in which the role of the law is to "provide as much as society can." This could suggest a level of pro-activity in providing the interest before the claims have been made based on identifying the interests. This is due to the fact that, in identifying the jural postulates, a reasonable person in the position of power can recognise the areas of deficiencies even before the claims have been made and using the position can plan to fulfil the interests even before society or individual have made demands. This part of Pound's theory relates to the proactive development of laws and reforms.

The last issue to be clarified is who does the balancing of the interests? It is clear that during legislation, the law-maker will have a significant role in this.

[18] R. Pound (1954) "The Role of the Will in Law" 68 *Harvard law Review* 19.

However, where two existing interests conflict with each other, Pound suggests that a judge with trained intuition can be trusted to reach the best resolution which actually echoes the theories being developed in the overlapping time periods by scholars.

3. Some Critical Reflections

Unlike many jurisprudential theories, Pound's theories tend to appeal to the more pragmatic and realist students of legal theories. There is the implicit and very rarely expressed criticism against Jurisprudence as a subject – the idea that legal theories are 'theoretical' and therefore quite artificial, having little bearing on reality and suggesting wholesale changes that are unrealistic. Pound's theory on the other hand sets itself up as the opposite of a theory. It is suggesting that it will look at the law as it is, and then addresses the issue of how it will change and grow based on social wants, needs and demands pragmatically and relatively. However, the question remains that if the law is the way Pound describes, then why is there a need to do such a detailed socio-legal research to problems that will arise and be dealt with on a case by case basis, one at a time?

Another issue which may easily be picked up as a criticism could be that Pound highlights the difference between the law in books and the law in action. Actually, Pound has only substantively paid little detailed attention to this "living law" leaving it quite theoretical which seems to go against the spirit of his jurisprudential approach. Ehrlich, on the other hand, was preoccupied by this issue and went into great detail of the "living law" almost to the exclusion of all else. Perhaps, in this author's humble opinion, the happy medium between the two authors is what needs to emerge for a proper understanding of the issue.

The following words from Roscoe Pound clearly indicate his view that the function of law is to fulfil individual, social and public interests as well as providing social control:

> For the purpose of understanding the law of today, I am content to think of law as a social institution to satisfy social wants – the claims and demands involved in the existence of civilized society – by giving effect to as much as we need with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society. For present purposes I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence – in short, a continually more efficacious social engineering.[19]

[19] *Id*. Footnote 4

There seems to be little distinction provided in the discussion between the functions and the effects of law. While one can easily argue that law and other factors can be seen as factors towards social control, the question that can arise is whether social control is a function of law or rather the result. In other words, in accepting that social control is a function of law, is the reader/writer looking at the effects and using a backward reasoning process, assuming the results that emerge were the cause of the actual reason for the law to have been made as it was.

Secondly, arguing from a Marxist or even Feminist perspective, one could take a more critical stance of what the law is and argue that law is one of the tools used to create and secure inequality, discrimination in conferring privileges and wealth. In line with this thinking, one may argue that the law in fact does not necessarily function to provide an ever-growing base for the gratification of individual wants and needs.

Conclusion

Notes on jurisprudence usually highlight strong critiques and some of the weaknesses of each theory. Although the preceding paragraphs are no different, one cannot discount the huge contribution that Pound has made in the 20th century in the field of law and legal theory. As a result of Pound's significant contribution during his long and illustrious career, jurisprudence has benefited immensely from the multitudes of his publications, and from the concepts and the ideas he put forward for more than 50 years. Roscoe Pound has indeed made the 20th Century version of Jurisprudence more pragmatic. And generally, he has provided us with a new set of tools that avail the bulk of approaches that have since become commonplace in modern jurisprudence.[20] ■

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[20] K. Llewellyn (1960) Book Review, University of Chicago Law Review, P. 175

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