Volume 9, April 2020 ISSN 2581-5504

"Roscoe Pound's Theory: Relevancy & Applicability in Modern World"

***Prithivi Raj**
Rajiv Gandhi National University of Law, Punjab

****Murtaza S. Noorani**
Savitri Bai Phule Pune University, Pune

ABSTRACT

Roscoe Pound philosophy of law, however, although well-known, widely debated, and greatly influential within the legal profession, has been little discussed in philosophical literature, the neglect of Pound's legal philosophy in philosophical circles is unfortunate for his philosophy has its origin in traditions philosophers are singularly equipped to evaluate. Pound's views on the proper goal of a legal system lean heavily on William Jame's pragmatism; his theory of judicial decision borrows from Bergson's intuitionism; his tendency to see legal history in terms of stages of development is inherited from Kohler's neo-Hegelianism; his emphasis on man's ability to shape the law to meet the needs of the time - Pound's notion of social engineering - is influenced by Ihering's utilitarianism. In this research paper we will explain and critically examine three crucial aspects of Pound's legal philosophy: his views on the goal of a legal system, his social engineering interpretation of legal history, and his theory of judicial interpretation. I will argue that the Pound assigns to a legal system is unacceptable on moral grounds, that his social engineering interpretation of legal history is both factually unsupported and based upon a confused theory of historical truth, and that his theory of judicial interpretation rests upon a dubious metaphysics and epistemology.

INTRODUCTION

The proper goal of a legal system, according to Pound is the satisfaction of demands, desires, and claims. These demands, desires, and claims Pound calls "interests". It should be emphasized that these interests are not interests people ought to have; rather they are the interests people actually have, i.e. they are de facto interests. Pound does not believe there is any standard for determining whether one interest is more valuable than another: "Philosophers have devoted much ingenuity to the discovery of some method of getting at the intrinsic importance of various interests, so that absolute formula may be readied in accordance wherewith it may be assured that the weightier interests intrinsically shall prevail. But I am skeptical as to the possibility of an absolute judgment"[1]. How is one to find out what interests people actually have? One must take an inventory of the interests that are either recognized by the legal system or "pressing for recognition" upon the legal system[2]. Pound has, indeed, attempted to do this and to classify these interests in a systematic and detailed

[1] Roscoe Pound, An Introduction To The Philosophy Of Law, New Häven: Yale Uni Versity Press, 1954, Pp. 45-46.
[2] Roscoe Pound, Jurisprudence, St. Paul: West Publishing Co., 1959, Iii, P. 22.

Volume 9, April 2020 ISSN 2581-5504

manner[3]. According to Pound, once we have this inventory we must determine the interests which are to be given legal effect, for it is clear that all interests cannot be recognized by a legal system. Thus Pound has maintained: "It is obvious that he [the judge] cannot expect to secure every claim made or demand asserted by everybody or even a selected number of claims to their full extent. Nor can the selection be made arbitrarily"[4]. The selection is to be made on the following basis: At all times satisfy the interests in the inventory as much as possible with the least disturbance to the inventory as a whole[5]. This fulfilling, balancing, and harmonizing of interests by the legal system Pound has called "social engineering". Unfortunately this idea has often been misunderstood. Thus it must be pointed out that Pound is not suggesting that the judge should give more weight to interests that are underdeveloped or scarce in a Community in order to, as it were, redress the balance. JOHN WU seems to interpret Pound in this way: "In a backward nation, social interests in general progress are to be appraised at a comparatively higher value. To a highly cultured but morally decadent nation, an emphasis upon social interests in general morals... is probably the best antidote. In a country where industrialism threatens to stifle the human element altogether . . . it would not be a bad policy to take special account of social interests in individual life and in cultural progress".[6] This, however, is not Pound's view. To use one of WU's examples, in a morally decadent Community the few interests in moral improvement that may be "pressing on the legal System" for recognition will be given legal effect only in some cases. If these moral interests conflict radically with the vast majority of other interests so that by giving them legal effect the majority of interests cannot be satisfied, then far from giving these moral interests more weight, they may not be given legal effect at all. Secondly, it is important to realize that Pound. is perfectly aware that conflicts of interests occur; indeed he provides a way for dealing with them. Grossman is wrong, therefore, when he argues that conflicts of interests always pose a problem which Pound 's theory cannot handle: "Plaintiff demands X and half of society demands the same; defendant, with other half on his side, demands not X. Sharpen your tools as you may, you cannot fully secure X and not X"[7]'. Since Pound denies any absolute measure of value, Grossman argues, Pound's theory cannot deal with such a conflict. But according to Pound given a conflict of interests, all one needs to do to resolve it is to determine the degree to which the interests in the inventory would be satisfied and the amount of disturbance there would be to the inventory as a whole if either interest were to be given legal effect[8].

[3] Roscoe Pound, "A Survey Of Social Interests," Harvard Law Review, 57, 1943, Pp. 1-39; Pound, Jurisprudence, Iii, Pp. 5-324.
[4] Roscoe Pound, Contemporary Juristic Theory, Ward Ritchie Press, 1940,
[5] Ibid. Pp. 75-76; Pound, Jurisprudence, Iii, P. 334
[6] John Wu, "The Juristic Philosophy Of Roscoe Pound," Illinois Law Review, 18, 1924, Pp. 299-300.
[7] W. L. Grossman, "The Legal Philosophy Of Roscoe Pound," Yale Law Journal, 44, 1935, P. 6
[8] We Are Not Considering The Factual Question Of How One Is To Determine Whether The Satisfying Of One Interest Over Another Does Bring About The Most Satisfaction With The Least Disturbance To The Interests In The Inventory

Volume 9, April 2020 ISSN 2581-5504

What problems are there, then, with Pound.'s view of the proper goal of a legal System? First of all, there is the question of precisely what Pound.'s goal amounts to. Pound seems to refer to two different things when he speaks of satisfying interests:

1) The number of interests that are satisfied;
2) The degree to which each interest is satisfied.

It is important to notice that (1) and (2) can vary independently: it is possible to have many interests satisfied to a small extent or fewer interests satisfied to a greater extent. Suppose that there were only two possible courses of action open to the legal system in a given case. One course of action would bring about a small amount of satisfaction to many interests; the other course of action would bring about a greater amount of satisfaction to fewer interests. Which course of action, according to Pound brings about as much satisfaction as possible? Unfortunately Pound never really answers this crucial question. Pound may well mean by "as much satisfaction as possible" merely "the greatest amount of satisfaction". If this is what Pound means, then these two courses of action might indeed bring about the same amount of satisfaction. If this is what Pound means and if these two courses of action do bring about the same amount of satisfaction, then there would be no way of deciding between the two on Pound's theory. But, as we shall see in a moment, there may be good ethical reasons for choosing one course of action over the other. It is not completely clear either what Pound means by "the least disturbance to the inventory of interests as a whole". One may reasonably suppose, however, that Pound means something like "the least modification of interests already on the inventory and the least creation of new interests". But, as we shall see in a moment, there may be good ethical reasons why the legal system should endeavor to change old interests and create new ones. Whatever Pound might mean by "least disturbance", he does believe that the prevention of disturbance to the inventory of interests is part of the goal of a legal system. Now Pound sometimes speaks as if the degree of disturbance to the inventory of interests is independent of the satisfaction of interests. If it is independent, then presumably the amount of satisfaction could vary independently of the degree of disturbance. One could bring about a great amount of satisfaction with a great amount of satisfaction with a more moderate amount of disturbance. Suppose that there were only two courses of action open to the legal System. One course of action would bring about more satisfaction than the other but it would also bring about more disturbance than the other. According to Pound 's view which course of action should the legal system take? Again Pound's Statement gives us little guidance. Pound never specifies whether satisfaction or lack of disturbance is more important.

WHAT DOES THE THEORY MEAN IN TODAY'S TIMES WITH A GLIMPSE IN THE INTERNATIONAL ARENA

The basic aim in the juristic philosophy of Roscoe Pound appears to be the balancing of security of society and the individual life.'[9] Viewing a developed body of legal precepts,

[9] Pound, A Theory Of Social Interests (I920) I5 Am. Sociol. Soc. Pub. I6, I7.

Volume 9, April 2020 ISSN 2581-5504

which seem to be the most common instruments used in striking the balance thought to be desirable, Pound finds two characteristic elements, an imperative (enacted) element and a traditional (habitual or customary) element.[10] Of course, these elements cannot be separated into mutually exclusive categories at any particular time or place. There is constant interplay between them, the traditional element becoming imperative through the transforming medium of legislation, and the imperative being incorporated into the body of the common law through the transforming medium of judicial decision. Coming to the more all-embracing view of jurisprudence, the philosophical jurist has long insisted upon a third element in law, the ideal element. Pound has defined it as a body of received ideals "of the end of law, and hence of what legal precepts should be and how they should be applied." [11] In the nineteenth century the significant question was which of these three elements commanded an exclusive significance. From Pound comes the comforting answer that all three are significant and that no adequate discussion of basic juristic problems is possible unless account be taken of the precept element, the traditional element (which in practice amounts to the traditional art of the lawyer's craft-the authoritative traditional technique of finding the grounds of decision in the mass of precepts), and the body of received ideals with regard to the end and purpose to be served by the legal order.[12] In dealing with the precept element in law, Roscoe Pound has analysed and classified the varied types of legal precepts as follows: i.e. Rules (in the narrower sense)-precepts attaching a definite detailed legal consequence to a definite, detailed factual situation. Principles-authoritative points of departure for legal reasoning, employed continually and legitimately where cases are not covered or are not fully or obviously covered by rules in the narrower sense.[13] Conceptions-authoritative categories to which types or classes of transactions, cases, or situations are referred, in consequence of which a series of rules, principles and standards become applicable.[14] Doctrines-systematic joining of rules, principles, and conceptions with respect to particular situations or types of cases or fields of the legal order, in logically interdependent schemes, whereby reasoning may proceed on the basis of the scheme and its logical implications.[15] Standards-general limits of permissible conduct to be applied according to the circumstances of each case.[16] While in rules Pound finds "the bone and sinew of the legal order",[17] it is through the standard that modern law chiefly realizes a desirable individualization of application, particularly in the province of law governing conduct and the control of enterprises.[18] Such standards are typified in the law of negligence by "the reasonable, prudent man"; in the field of public utilities by the standard of

[10] Pound, The Spirit Of The Common Law (I92i) I73-I75.
[11] Pound, The Ideal Element In American Judicial Decision (I930i) 45 Harv. L. Rev. I36, I47-I48. See Also Pound, The Ideal And The Actual Ins Law- Forty Years After (933) I Geo. Wash. L. Rev. 43i, 437.
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Pound, Hierarchy Of Sources And Forms In Different Systems Of Law (I933) 7 Tulane L. Rev. 475, 482-486. The Hierarchy (Minus "Doctrines") First Appeared In Pound, An Introduction To The Philosophy Of Law (I922) Ii5-I20.
[17] Pound, Hierarchy Of Sources And Forms In Different Systems Of Law (1933) 7 Tulane L. Rev. 475, 486.
[18] Id. At 485.

"reasonable service and reasonable facilities"; in relations of trust by the "fair conduct" of the fiduciary. Examining the status of the ideal element in law, Dean Pound finds that the first ideal of the legal order is the simple ideal of keeping the peace. Successively the ideal of the legal order has been the maintaining of the social status quo (evolved by Greek philosophers), re- version to the ideal of keeping the peace (the Dark Ages), re-adoption of the ideal of maintaining the social status (the Middle Ages), and the ideal which prevailed through the nineteenth century, i.e., the ideal of a maximum of free individual self-assertion as the greatest good (Post-Reformation-Kantian). Today, we are told, that ideal is yielding as a result of the persistent criticism of received ideals by the social-philosophical and sociological schools.[19] One of the attempts to formulate a new ideal as to the end of law Pound finds in an endeavour to substitute an idea of cooperation for the once dominant idea of free competition.[20] Another attempt to formulate a new ideal lies in the conception of law in terms of social engineering.[21] When Pound conceives of law as social engineering, he is regarding law and its administration as a part of a much wider process of social ordering, functioning through courts and administrative agencies with the aid of legal precepts serving as partial guides. This task of social ordering presupposes a sincere effort to avoid, or at least to ameliorate, collisions resulting from the conflict of interests. All the varied activities of the legal order-the efforts of courts, administrators, legislatures, jurists-are to be directed toward the adjustment of relations, the compromise of conflicting claims, the securing of interests by determining boundaries wherein each may be asserted with a minimum of friction, and the finding of means whereby a greater number of claims may be satisfied with a sacrifice of fewer.[22] If law is viewed as social engineering, its end is conceived to be the satisfaction of all demands and the securing of all interests with a minimum of conflict so that the means of satisfaction may have the widest possible distribution.[23] A perplexing problem which has received much consideration from Roscoe Pound is the relation of law and morals.[24] Sweeping through history he finds that in the earliest stage (preceding lawyer's law) law and morals were identified; when strict law (lawyer's law) became dominant, law and morals were sharply differentiated. In the age dominated by natural law and equity a standard of rationalistic morality was made to comprehend not only conduct in general but the formulated legal precept as well, whereas in the nineteenth century, an age of legal maturity, law and morals were usually contrasted, the dominant an analytical jurist of the time contending that morals were within the province of the legislator and outside the province of the jurist.

[19] Pound, The End Of Law As Developed In Juristic Thought (1914) 27 Harv. L. Rev. 605. See Also Pound, The End Of Law As Developed In Legal Rules And Doc- Trines (1914) 27 Harv. L. Rerv. I95

[20] It Was This Ideal Which Seemed, In The Main, To Inspire The Legislation Of N. R. A. Days Toward Relaxation Of The Rigid Operation Of The Anti-Trust Laws To The End That Cooperation Rather Than Competition Stood As The Ideal To Be Encouraged. See Reuschlein, Aluminum And Monopoly: A Phase Of An Unsolved Problem (I939) 87 U. Of Pa. L. Rev. 509, 5ii, N. 9

[21] Pound, An Engineertng Interpretation In Interpretations Of Legal His- Tory (I923) 14i-I65. 26. The Attitudes

[22] Ibid.

[23] Ibid.

[24] The Attitudes Of Three Traditional Schools Of Jurisprudence, Analytical, Historical, Philosophical, Is Developed In His Law And Morals (2d Ed. I926).

Volume 9, April 2020 ISSN 2581-5504

SOCIAL PRESPECTIVE OF POUND'S THEORY

Two other contributions of Pound were partly derived from the philosophy of Hegel and his follower, Josef Kohler. Hegel's philosophy, which was developed into a most mystical production of the human mind, contained some simple ideas that were quite congenial to nineteenth century American habits of thought. Hegel believed in a gregarious civilized society and in cultural progress, and so do, or did, most of Pound's fellow-countrymen. From Professor Kohler, Pound received the suggestion for his "jural postulates of civilization," a statement of some basic presuppositions of men living in a civilized society. One ex- ample is: "Jural Postulate I. In civilized society men must be able to assume that others will commit no intentional aggressions upon them.'"[25] The others in his original list of 1919 are, perhaps, no more startling; when we come to the two new ones, which were more recently formulated, apparently in response to Professor Julius Stone's criticism that the earlier postulates were static, "we find Pound's novel statement of what the era of socialization of law has brought forth:

(1) Everyone is entitled to assume that the burdens incident to life in society will be borne by society.

(2) Everyone is entitled to assume that at least a standard human life will be assured him; not merely equal opportunities of providing or attaining it, but immediate material satisfactions."[26]

The Jural postulates, in common with some other social-ethical principles of the present century, have much to say about expectations, claims, or "rights" and little or nothing about who is to be responsible for satisfying them. The other contribution that seems to have been suggested by Hegel is Pound's five stages of legal history, of Roman-civil and Anglo-American law. The first stage begins with ancient primitive law, with lose control and a tightly drawn tariff of prices for various injuries, to be paid in lieu of resort to vengeance. Next came the strict common law actions, followed by a looser body of precepts known as "equity" or "natural law." The maturity of law tried to tighten up these looser concepts until the turn of the century, when a further iconoclastic period began, the "socialization of law." The next stage, he suggests, may be a law of the world. The five stages represent the evolution of law characterized by reference to the end of law as, developed in legal rules and doctrines. Even though some characteristics of, early stages survive in the later ones, and the boundaries between stages are not sharply marked in time, the scheme has long seemed to me a useful summary of ideological-legal history. It bears some traces of the rational unfolding called for by the Hegelian dialetic, in its succession of loose and strict periods. Its function is descriptive rather than normative. It is, I believe, no less "scientific" than the dialectical materialism of the Marxists. Pound is not, and never was, a "radical" in any respectable sense

[25] 4. Iii, At 1-373. I Have Discussed Pound's Theory Of Social Interests At Some Length In Interpretations Of Modern Legal Philosophies, 558 (Sayre Ed. 1947), And In Jurisprudence: Men And Ideas Of The Law 518-27 (1953).

[26] Roscoe Pound On Jurisprudence Author(S): Edwin W. Patterson Source: Columbia Law Review, Vol. 60, No. 8 (Dec., 1960), Pp. 1124-1132 Published By: Columbia Law Review Association, Inc. Stable Url: Https://Www.Jstor.Org/Stable/1120350 Accessed: 18-11-2019 15:17 Utc

of the word. He was no more radical, even in his thirties, than any man who is deeply interested in truth, in justice, in a civilized legal order. One of -his earliest expressions of ethical idealism[27] was his essay, "The Decadence of Equity," delivered in 1903 as an address to a state bar association audience and later published in the Columbia Law Review.[28] His theme was that the "fusion"' of law and equity under modern codes of procedure had squeezed out much of the ethical idealism of equity. In 1906 his address, "The Causes of Popular Dissatisfaction with the Administration of Justice," so shocked the conservative leaders at the annual meeting of the American Bar Association that a motion to print and distribute 4,000 copies was with- drawn.[29] In this same year Pound was Chairman of the Republican Convention of Lancaster County, and throughout his life he has been "normally" a Republican.[30] In 1919 he supported Professor Felix Frankfurter's critical comments on the Sacco Vanetti case[31], and in the same year he wrote Holmes that many of the Harvard alumni thought his writing was "a cover for socialism."[32] By 1931 he was attacking the group of law teachers and writers who were known as the "American legal realists,"[33] some of whom thought they were followers of Pound. In 1950 he delivered a severe criticism of the "service state" before a section of the American Bar Association in Washington.

POLITICAL PRESPECTIVE OF POUND'S THEORY

It is not completely clear either what Pound means by "the least disturbance to the inventory of interests as a whole". One may reasonably suppose, however, that Pound means something like "the least modification of interests already on the inventory and the least creation of new interests". But, as we shall see in a moment, there may be good ethical reasons why the legal system should endeavour to change old interests and create new ones. Whatever Pound might mean by "least disturbance", he does believe that the prevention of disturbance to the inventory of interests is part of the goal of a legal system. Now Pound sometimes speaks as if the degree of disturbance to the inventory of interests is independent of the satisfaction of interests. If it is independent, then presumably the amount of satisfaction could vary independently of the degree of disturbance. One could bring about a great amount of satisfaction with a great amount of disturbance or a more moderate amount of satisfaction with a more moderate amount of disturbance. Suppose that there were only two courses of action open to the legal System. One course of action would bring about more satisfaction than the other but it would also bring about more disturbance than the other. According to Pound's view which course of action should the legal system take? Again Pound's Statement gives us little guidance. Pound never specifies whether satisfaction or lack of disturbance is more important. Secondly, there is a problem with Pound's method of determining what

[27] In Speaking Of Pound, One Frequently Needs To Use "Ideal" As Referring Simply To Ideas, Rather Than To Lofty Ethical Standards; Here The Latter Meaning Is Appropriate.
[28] Pound, The Decadence Of Equity, 5 Colum. L. Rev. 20 (1905).
[29] See The Late John H. Wigmore's Account Of This Event In Sayre, Op. Cit. Supra Note 4, At 146-51
[30] See The Late John H. Wigmore's Account Of This Event In Sayre, Op. Cit. Supra Note 4, At 102-105
[31] Ibid.
[32] Id. At 275
[33] Pound, A Call For A Realist Jurisprudence, 44 Harv. L. Rev. 697 (1931). He Gives A Good Program For "Constructive Legal Realism" In I, At 285-86

Volume 9, April 2020 ISSN 2581-5504

interests are in the inventory. It will be recalled that an inventory must be taken of those interests recognized by the legal system and those pressing on the legal system for recognition. It has been pointed out by critics of Pound that the interests which are recognized by a legal system and which press for recognition are usually those of "vocally organized groups[34], i.e. groups or factions having enough power to push or promote their desires the Interests which are not backed up with Organization and power will not be counted in the inventory. If this is true, then Pound's way of finding out what people's interests are is indeed inadequate. It will not do merely to find out what interests are recognized or are pressing on the legal system for recognition. But could not Pound's method of finding out what peoples' interests are be easily improved? One could find out what interests people have by finding out what interests are recognized by the legal System and what interests would be pressed on the legal system for recognition if they had the proper backing and Organization. But this procedure would work only in a free society where interests of all kinds can be pressed on the legal system for recognition with impunity. In dictatorships there may be a large class of interests which are subject to legal sanction. Under this kind of government the question is not one of backing and Organization[35]. Pound has on occasion objected to an authoritarian system of law - what he has referred to as the "service State". But his objection has been on different grounds. He seems to identify the service State. But his objection has been on different grounds. He seems to identify the service State procedure that attempts to give to the individual's life a "maximum satisfaction of the whole scale of human wants by a maximum of power by public officials over him"[36]. Pound objects to such a system on the grounds that it is impractical. This criticism, however, does not touch upon the problem we are raising, i.e. the problem of a system of law under which a large class of interests are neither recognized by the legal system nor pressing on the legal system for recognition because the legal system declares them subject to legal sanction. It might be suggested that all interests should be on the inventory - not merely those that are recognized by the legal system or those that would press on the legal system for recognition if they had proper backing and Organization. The legal system, it might be argued, should bring about the most satisfaction with the least disturbance of all interests. This modification of Pound's theory would indeed meet the objections raised above and would be in keeping with much of Pound's thought. But it would change Pound's fundamental procedure for making an inventory of interests. At best, then, Pound's theory before modification is plausible only for those Systems of law in which all interests can press against the legal system for recognition with impunity and in which all interests do press against the legal system for recognition U'K Pound's theory is not really acceptable, however, even in this case. It is hard to believe that a legal system in which all interests could and would press against it for recognition should try to bring about as much satisfaction as possible with the least disturbances to these interests. Surely some human interests are immoral and evil and should be given no legal consideration. Indeed, these

[34] See Felix Cohen, Ethical Systems And Legal Ideals, Ithaca: Great Seal Book
[35] Cf., Grossman, Op. Cit.; J. Stone, "A Critique Of Pound's Theory Of Justice," Iowa Law Review, 20, 1935, Pp. 531-550; E. V. Walter, "Legal Ecology Of Roscoe Pound," Miami Law Quarterly, 4, 1950, Pp. 178-207
[36] R. Pound, New Paths Of The Law, University Of Nebraska Press, 1950, P. 50.

interests are just the interests that a legal system should not try to satisfy. One does not have to be sympathetic with natural law theory to sympathize with a natural law critic of Pound who argued : “Demands of humankind are many and diverse, good and bad, moral and immoral, and it is difficult to perceive how the magic of pragmatism can make them all good.”[37] Pound has passed on to his reward. It is to be hoped that the "white flame of progress,"which he ignited in St. Paul on August 29, I906, will continue to lead us onward and upward in the attainment of a more effective administration of justice between man and man and man and government. Only then will our culture survive.

STRUCTURE OF POUND’S THEORY

In dealing with the precept element in law, Roscoe Pound has analyzed and classified the varied types of legal precepts as follows:

a) Rules (in the narrower sense)-precepts attaching a definite de- tailed legal consequence to a definite, detailed factual situation.
b) Principles-authoritative points of departure for legal reason- ing, employed continually and legitimately where cases are not covered or are not fully or obviously covered by rules in the narrower sense.
c) Conceptions-authoritative categories to which types or classes of transactions, cases, or situations are referred, in consequence of which a series of rules, principles and standards become applicable.
d) Doctrines-systematic joining of rules, principles, and conceptions with respect to particular situations or types of cases or fields of the legal order, in logically interdependent schemes, whereby reasoning may proceed on the basis of the scheme and its logical implications.
e) Standards-general limits of permissible conduct to be applied according to the circumstances of each case.[38]

One of the attempts to formulate a new ideal as to the end of law Pound finds in an endeavor to substitute an idea of cooperation for the once dominant idea of free competition.[39] Another attempt to formulate a new ideal lies in the conception of law in terms of social engineering.[40] When Pound conceives of law as social engineering, he is regarding law and its administration as a part of a much wider process of social ordering, functioning through courts and administrative agencies with the aid of legal precepts serving as partial guides. This task of social ordering presupposes a sincere effort to avoid, or at least to ameliorate, collisions resulting from the conflict of interests. All the varied activities of the legal order-

[37] W. B. Kennedy, "Pragmatism As A Philosophy Of Law," Marquette Law Review, 9. 1925, P. 75

[38] Pound, Hierarchy Of Sources And Forms In Different Systems Of Law (I933) 7 Tulane L. Rev. 475, 482-486. The Hierarchy (Minus "Doctrines") First Appeared In Pound, An Introducrion To The Philosophy Of Law (I922) Ii5-I20

[39] It Was This Ideal Which Seemed, In The Main, To Inspire The Legislation Of N. R. A. Days Toward Relaxation Of The Rigid Operation Of The Anti-Trust Laws To The End That Cooperation Rather Than Competition Stood As The Ideal To Be Encouraged. See Reuschlein, Aluminum And Monopoly: A Phase Of An Unsolved Problem (I939) 87 U. Of Pa. L. Rev. 509, 5ii, N. 9.

[40] Pound, An Engineertng Interpretation In Interpretations Of Legal His- Tory (I923) 14i-I65.

Volume 9, April 2020 ISSN 2581-5504

the efforts of courts, administrators, legislatures, jurists-are to be directed toward the adjustment of relations, the compromise of conflicting claims, the securing of interests by determining boundaries wherein each may be asserted with a minimum of friction, and the finding of means whereby a greater number of claims may be satisfied with a sacrifice of fewer. If law is viewed as social engineering, its end is conceived to be the satisfaction of all demands and the securing of all interests with a minimum of conflict so that the means of satisfaction may have the widest possible distribution. A perplexing problem which has received much consideration from Roscoe Pound is the relation of law and morals.[41] Sweeping through history he finds that in the earliest stage (preceding lawyer's law) law and morals were identified; when strict law (lawyer's law) became dominant, law and morals were sharply differentiated. In the age dominated by natural law and equity a standard of rationalistic morality was made to comprehend not only conduct in general but the formulated legal precept as well, whereas in the nineteenth century, an age of legal maturity, law and morals were usually contrasted, the dominant analytical jurist of the time contending that morals were within the province of the legislator and outside the province of the jurist. In the contemporary attitude of his own sociological school Pound finds much to suggest a revival of the natural law jurist's attitude with its attendant subordination of jurisprudence to ethics. The desired relationship between morals and law he defines as a situation wherein morals are regarded as an evaluation of interests and law as a delimitation of interests in accordance with such a valuation.[42] But in this attitude is the fundamental weakness of Pound's creed. For unless the immutability of certain principles is admitted, such as the right to life and property-a philosophy results which is only half moral, and that means immoral. It is perfectly possible to admit the immutability of certain fixed principles and adjust our economy to necessary changes; that is the happy and peculiar genius of "natural law with a changing content." There is something faintly suggestive of the Victorian compromise in Pound's unwillingness to admit the complete identification of law with morals. Such a compromise as Pound suggests is dangerous. Admittedly, it may not be dangerous in Pound's own hands, but in the hands of men less scrupulous than he and less deft than Holmes, the possibilities are alarming.[43]

[41] The Attitudes Of Three Traditional Schools Of Jurisprudence, Analytical, Historical, Philosophical, Is Developed In His Law And Morals (2d Ed. I926).

[42] Pound's View Of The Relationship Of Law To Morals Is Essentially That Of John F. Dillon Who Wrote: "Theoretically, And For Many Purposes Practically, Lawyers Must Discriminate Law From Morality, And Define And Keep Separate And Distinct Their Respec- Tive Provinces. But These Provinces Always Adjoin Each Other; And Ethical Considerations Can No More Be Excluded From The Administration Of Justice, Which Is The End And Pur- Pose Of All Civil Laws, Than One Can Exclude The Vital Air From His Room And Live." Dillon, Laws And Jurisprudence Of England And America (1895) 17.

[43] Pound Himself Has Given It That "Happily, Men Seldom Practice Exactly What They Preach. Yet What They Preach Has No Little Effect On What They Practice." Pound, Contemporary Juristic Theory (1940) 9. For An Able Development Of The Thesis That Complete Identity Of The Legal With The Moral, That Certain Broad Absolutes And Immutable Are Basic To The Security Of Democracy, See Lucey, Jurisprudence Anid The Future Social Order (I94i), I6 Social Science 21i, Who Says, At 2i6, "There Is No Use Talking About Fundamental Rights From A Positivistic Or Pragmatic Point Of View Because There Are No Fundamentals Or Permanents, Not To Mention Inalienables, Where There Are No Absolute Values,-Where The Important Of Today Can Be The Unimportant Of Tomorrow."

Volume 9, April 2020 ISSN 2581-5504

The question as to whether law is or ought to be certain, in whole or in part, has provoked much heated discussion in recent years.[44] Pound divides the domain of the legal order into two zones. In the one, certainty, which is attendant upon rules, will be the dominant legal characteristic, while in the other discretion and flexibility should prevail. Certainty is held to be highly desirable and readily possible in the fields of property law (inheritance and succession, interests in property, conveyancing) and the law of commercial transactions, but flexibility is indispensable in the field of law which deals with the more intimate problems of human conduct (e. g. domestic relations, torts). To substantiate his contention Pound cites the success with which codes and uniform state laws have achieved their purpose in the law of property, the law of succession, and commercial law; whereas they have achieved little or nothing in the law of torts. Administrative tribunals which have been constructed to individualize the application of law deal with cases involving the moral quality of individual con- duct in various enterprises rather than with matters of property and commercial law.

Pound and Jhering agree that the sanction of a right lies not in the right itself, but rather in what is behind the right, i. e., the interest which gives rise to the social demand for the enforcement of the right. It is important to note that social interest not only can dictate the enforcement of a right, but it can also delimit or even abridge the right. Whether the social interest demands enforcement or delimitation must depend upon the peculiar conditions of a particular society at a given time and place. So viewed, it becomes the primary function of law to guard the public against arbitrary action in the exercise of power-whether that power be political, religious, cultural or economic. The significant question is: where should the line be drawn between the reasonable and the arbitrary exercise of power? Pound creates this test: does it secure the greatest number of interests with the least possible sacrifice of other interests? In Pound's own words: "An interest is a demand or desire which human beings either individually or in groups seek to satisfy, of which, there- fore, the ordering of human relations civilized society must take account.
In Pound's own words:

“An interest is a demand or desire which human beings either individually or in groups seek to satisfy, of which, there- fore, the ordering of human relations civilized society must take account.

a) The law does not create interests.
b) It classifies them and recognizes a larger or smaller number;
c) It defines the extent to which it will give effect to those which it recognizes, in view of
d) Other interests,
e) The possibilities of effectively securing them through law;

[44] See Frank, Law And The Modern Mind (1930) 207-2i6, 289-

f) It devises means for securing them when recognized and within the determined limits."[45]

JUDICIARY VIS-À-VIS POUND'S THEORY

His views with regard to the general direction which reform of judicial procedure should take are best summarized in his four canons.

1) Legal procedure is a means, not an end; it must be made subsidiary in the substantive law as a means of making that law effective in action. That procedure is best which most completely realizes the substantive law in the actual administration of justice.
2) There should be no such thing as an individual procedural right-i. e., a recognized absolute claim to a procedural advantage merely as such.
3) The ideal of mechanical disposition of one narrow issue or of one simple application for a specific remedy should be re- placed by an ideal of complete disposition of entire controversies in one proceeding in which all the remedies of the legal system are available in order to give full effect to the substantive rights of the parties.
4) The ideal of appellate procedure should be not a separate proceeding in a distinct tribunal but an application for rehearing, new trial, vacation or modification, as the case may require, made in the same cause before another branch of the same tribunal."[46]

THE BALANCING OF INTERESTS

More fundamental in his philosophy than Pound's insistence upon zones in the law, a zone of certainty and a zone of discretion, is his recognition that in every justiciable dispute involving a right, the claims of the litigants are grounded upon the interests which the parties and the state have in the dispute. That is the point of departure of Pound's juristic technique, and it is against this fundamental back- ground that the division into the rule-certain and the

[45] Pound, Outlines Of Lectures On Jurisprudence (4th Ed. I928) 6o.

[46] . Pound, Appellate Procedure In Civil Cases (I94i) ; Organization Of Courts (I940); The Canons Of Procedural Reform (I926) I2 A. B. A. J. 54i, 543- 545. See Also Cooperation In Enforcement Of Law (I93i) I7 A. B. A. J. 9; Review Of Charles E. Clark, Handbook Of The Law Of Code Pleading (I928) 38 Yale L. J. I27; Senator Walsh On Rule Making Power On The Law Side Of Federal Prac- Tice (I927) I3 A. B. A. J. 84; Regulating Procedural Details By Rules Of Court (1927) I3 A. B. A. J. (Pt. 2) I2; Organization Of Courts (I927) Ii J. Am. Jud. Soc. 69; Rule-Making Power Of The Courts (I926) I2 A. B. A. J. 599, (927) I63 L. T. I44, Io J. Am. Jud. Soc. Ii3; Vesting In The Courts The Power To Make Rules Relat- Ing To Pleading And Practice (I9i6) 2 A. B. A. J. 46; Regulation Of Judicial Procedure By Rules Of Court (I9i5) Io Ill. L. Rev. I36; Organization Of Courts (With Scott And Frankfurter) (9ig5) 3 New Repub. 6o; Defective Judicial Procedure (With Scott And Frankfurter) (09i5) 3 New Repub. 252; Organization Of Courts (I914) Minn. Bar Ass'n Proc. I69, 22 Phila. Leg. Intell. Iv; Cardinal Principles To Be Observed In Reforming Procedure (I9i2) 75 Cent. L. J. I50; Reform In Procedure (I9ii) 72 Cent. L. J. I58; Some Principles Of Procedural Reform (I9io) 4 Ill. L. Rev. 49i; Grundsatze Der Prozessreform (Deutsch Von A. Mendelssohn-Bartholdy) (I9io) 2 Reinische Zeitschrimt Fur Zivil-Und Prozessrecht 498; A Practical Program Of Procedural Reform (I9io) 22 Green Bag 438, (I910) Ill. Bar Ass'n Proc. 373; The Etiquette Of Justice (I1o8) 3 Neb. Bar Ass'n Rep. 23i; The Causes Of Popular Dissatisfaction With The Administration Of Justice (Igo6) 40 Am. L. Rev. 729, I4 Am. Lawyer 445, 29 A. B. A. Rep. 395; A Bibliography Of Procedural Re- Form, Including Organizatiton Of Courts (I920) 5 Mass. L. Quar. 332, (I9i7) Ii Ill. L. Rev. 45i; The German Movement For Reform In Legal Administration And Pro- Cedure (With Full Bibliography) (I908) I Bull. Comp. Law Bureau A. B.

discretionary fields is to be made. The eminent critic who spoke of slot-machine theories spoke from an incomplete understanding of the theory as a whole. To denounce Pound's argument for certainty in some fields of the law without taking cognizance of the initial operation in the judg- ing process, the weighing of interests, is to caricature his philosophy quite unjustly. It is to label Pound's appeal for certainty an appeal for certitude when it is not that at all.[47] The first operation in the adjudication of any case is the process of evaluating interests in terms of the greatest social good. It is true that where interests of property are dominant upon both sides of the dispute, experience has taught us that the social good invariably requires certainty. But where interests of property and interests of human life and liberty clash, under Pound's theory, if the protective certainty which ordinarily attaches to interests of property must give way to flexibility and discretion in order to effect justice, no violence whatever is done to any fixed legal formula. It is true that black may not always be too clearly separated from white, but it comes with ill grace from those who glory in legal flux to pronounce a scheme of classification useless merely because it is not absolutely rigid or because a specific rule may not work in every situation.[48]

In Re Anderson[49] involved a complaint against violation of an ordinance of the city of Omaha, enacted pursuant to an enabling statute, which prohibited the circulation and distribution of printed dodgers, handbills and circulars upon the sidewalks and in other public places. The ordinance was challenged as unconstitutional because in contravention of Section 5, Article i of the state constitution, providing that "every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty."[50]

The court sustained the constitutionality of the ordinance as a legitimate police regulation "intended to further the public health and safety by pre- venting the accumulation of large quantities of waste paper which might occasion danger from fire, choke up and obstruct gutters and catch-basins, and keep the street in an unclean and filthy condition." The commissioner here weighed the individual's interest in his claim to a right of free speech against the public interest in health and safety; the balance decidedly favoured the public interest. This technique of balancing the conflicting individual and public interests is implicit in virtually every decision under the police power. Pound states: "In all matters within the police power some compromise between the exigencies of public health and safety and the free exercise of their rights by individuals must be reached[51]

[47] . Pound Would Subscribe Whole-Heartedly To Mr. Justice Holmes' Observation That "Certitude Is Not The Test Of Certainty. We Have Been Cock-Sure Of Many Things That Were Not So." Holmes, Natural Law (I9i8) 32 Harv. L. Rev. 40, Reprinted In Collected Legal Papers (1921) 3i0, 31i, The Dissenting Opinions Of Mr. Jus- Tice Holmes (Lief Ed. I929) Xiii, Xiv; And To His Other Observation "Delusive Exact- Ness Is A Source Of Fallacy Throughout The Law." Truax V. Corrigan (Dissenting Opin- Ion), 257 U. S. 3i2, 342 (I92i).

[48] Roscoe Pound. The Judge Author(S): Harold Gill Reuschlein Source: University Of Pennsylvania Law Review And American Law Register, Vol. 90, No. 3 (Jan., 1942), Pp. 292-329 Published By: The University Of Pennsylvania Law Review Stable Url: Https://Www.Jstor.Org/Stable/3308724 Accessed: 18-11-2019 15:17 Utc

[49] 69 Neb. 686, 96 N. W. I49 (0903).

[50] Ibid.

[51]Id. At 689, 96 N. W. At 150. It Is Interesting To Compare The Results Of The Balancing Of Interests By The Supreme Court Of The United States (Whose Result Was So Different From That Which Pound Reached) In

Volume 9, April 2020 ISSN 2581-5504

In Sturdevant v. Farmers and Merchants Bank,[52] one Ross, who was about to bring an action of replevin against Sturdevant Broth applied to Wood, a lawyer and a director, though having nothing to do with the active management, of the defendant bank, to furnish surety upon undertaking an accommodation. Wood referred him to Armstrong, cashier at the bank, who took an indemnity bond running to the bank and executed the required undertaking in the bank's name, signing it "Farmers and Merchants Bank of Rushville, by W. D. Armstrong, cashier." The sheriff accepted this undertaking and de- livered the property to Ross. The trial resulted adversely to Ross. The property having been sold and the alternative judgment for its value being unsatisfied, suit was brought on the undertaking. The district court gave judgment for the defendant bank, and this Pound affirmed. He argued that the cashier was powerless to obligate the bank on an undertaking in replevin where the bank had no interest; that where an obligation is so clearly ultra vires that no one can be misled, no estoppel arises;' and that a bank will only be estopped where it has acquired and retains property by virtue of the contract. The technique of balancing interests is evident, and the interest of depositors and stockholders is found to outweigh the interest of the party accommodated: "Where so extravagant a liability is incurred without benefit and as a mere accommodation, the interests of depositors and stock- holders have to be taken into account. It would be highly impolitic to permit the money of depositors, placed in a bank on the faith of its capital, to be imperilled by sanctioning such transactions. If the act is of a nature which public policy, or the very nature of the corporation, prohibits it from doing, there could be no ratification." [53]

CONCLUSION

One cannot turn to the judicial opinions of Roscoe Pound and clearly read in them the tenets of his Sociological Jurisprudence as one finds them expounded in his later juristic writings. But one may discover in the opinions the way in which he took problems as they came before him for adjudication and in their solution experimented with techniques which later he was to formulate for the guidance of others: the techniques of weighing and evaluating interests, of subordinating procedure to substance, of assessing the conflicting demands for rule and discretion, for certainty and flux in the legal order, of taking cognizance of social and economic conditions, of utilizing the good in other legal systems and of drawing upon the resources of history. The cases which came before him were of little consequence as celebrated controversies of the law, but in each case he attempted to effect justice by a thorough study of the problem. He was a good judge. To him every problem was sufficiently important to merit the best that he could give. Since Pound graced the bench, the tasks and problems of the judicial office have multiplied; the transition from an agricultural to an industrial economy has been accelerated. Litigation in Nebraska has been profoundly

Schneider V. State, 308 U. S. I47 (Ig39), The Effect Of Which Has Been To Unsettle Judicial Opinion In All Those States Where Anti-Littering Ordinances Have Been Sustained With Little Hesitance As Valid Exer- Cises Of Police Power. See, Among The More Interesting Comments Upon Schneicder V. State, (I940) 53 Harv. L. Rev. 487; (1940) 40 Col. L. Rev. 53i; (I940) 28 Geo. L. J. 649, 702; (I940) 24 Minn. L. Rev. 570

[52] 3. 62 Neb. 472, 87 N. W. I56 (I

[53] 4. Id. At 475-6, 87 N. W. At I58. For Another Illustration Of The Judicial Interest- Balancing Technique As Employed By Pound On The Bench, See Dodge County V. Diers, 69 Neb, 36i, 95 N. W. 6o2 (I903).

Volume 9, April 2020 ISSN 2581-5504

changed by such intrusions as the automobile.'[54] Yet, for Pound, whether consciously or quite by accident, his years upon the bench served as an experimental laboratory for the philosophy, the method and the dynamic which he was later to recommend to all who follow the lawyer's craft. He, like the judges of the formative era of our law, did not believe that it was "psychologically impossible to decide objectively and impartially." [55] It is the writer's belief that Roscoe Pound, as a judge, visibly demonstrated the virtues of his philosophy. But Pound worked upon simple materials and his court sat in a society not far removed from the pioneer. It is to be remembered that, when, in later life, Roscoe Pound speaks of the relationship between law and morals, he deals with them as two separate and distinct discipline. He does not morals as a body of precepts or principles which controls all human activity of which law is but a phase. While he tells us that morals suggest to law the ends it should pursue, apparently morals do not control law in the pursuit of those ends.[56]That is dangerous doc- trine, for what is not moral is, at best, unmoral.

[54] This Pound Appreciates. See The Judicial Office Today (I939) 25 A. B. A. J. 73i

[55] The Judges Of The Formative Era Of Our Law Did Great Things Because They Believed They Could Do Great Things. They Did Not Hold It Psychologically Impossible To Decide Objectively And Impartially. They Did Not Conceive That They Were Of Necessity Only The Mouth Pieces Of An Economically Or Socially Dominant Class Nor That In The Nature Of Things Valid Judgments Were Impossible, Justice Was A Superstition Or Pious Fiction, And Reason A Camouflage For Prejudice." Id. At 737

[56] Law And Morals (2d Ed. I926) Io6. Recently Roscoe Pound Has Put It: "If As Lawyers Must, We Look At Law, In All Of Its Senses, Functionally With Respect To Its End, As That End Is At Bottom The End Of Social Control, Our Science Of Law Cannot Be Self-Sufficient. Ethics Has To Do With Another Great Agency Of Social Control Covering Much Of The Ground Covered By The Legal Order And Having Much To Tell Us As To What Legal Precepts Ought To Be And Ought To Bring About." (Italics Added). My Philos- Ophy Of Law: Credos Of Sixteen American Scholars (I94i) 252. Why Not "All" Instead Of "Much"? In His Contemporary Juristic Theory (1940) 43, Pound Says "Good And Bad Are Irrelevant To Questions Of Physics. They Go To The Root Of Many Things In The Social Sciences." (Italics Added). Do They Not Go To The Root Of All Things In The Social Sciences? Even Though There Be Things "Indifferent" In The Social Sciences, They Will Not In Any Wise Suffer Because Judged Against Objective Standards Of "Good" And "Bad".