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The Fundamental Precepts of Sociological Jurisprudence: An Introduction

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Abstract
Sociological jurisprudence refers to the study of law in relation to the problems of society. It came about as a result of certain European jurists deliberating upon law alongside other social sciences. This same jurisprudence would be exported to America under the moniker of legal realism, which is a study of the law as a means of its practical impact in society as a whole. This new jurisprudence came into being by Oliver Wendell Holmes Jr. and was further deliberated upon by the likes of Roscoe Pound and Karl Llewellyn. However, in the latter half of the 20th century, sociological jurisprudence was a study of critique by numerous scholars and jurists and was thus overshadowed as a result of the emergence of newer jurists such as H.L.A Hart, Denning, Ronald Dworkin amongst others. This era also saw the reemergence of the classical debate between positivism and naturalism on a new lens as well. In the current era, it is hard to say whether sociological jurisprudence shall ever make a comeback. However, it is still entirely possible that some new proponent comes along and brings it back to mainstream jurisprudence in new lines. The methodology used in this paper is doctrinal.

Keywords: Jurisprudence, Sociological Jurisprudence, American Legal Realism, Roscoe Pound, Oliver Wendell Holmes Jr., Karl Llewellyn

Introduction

One of the most famous schools of jurisprudence was sociological jurisprudence which was mainly mainstream during the late 19th and first 20th centuries. Like all schools of thought, it had its founder, proponents and criticizers. Originally, a discipline that emerged as a result of scholarship by European jurists, it also made its way into America as legal realism due to the efforts of the likes of Oliver Wendell Holmes Jr., Roscoe Pound and Karl Llewellyn amongst others. However, in the current era, it is no longer part of the Wmainstream jurisprudence. This paper shall thus ascertain the reason as to why sociological jurisprudence is no longer part of the big scholarly debate today.

This article thus discusses the origin and impact of sociological jurisprudence; its highest contributors in Europe; its counterpart in legal realism in America; the proponents thereto; whether it is a sustainable theory and whether sociological jurisprudence exists today;

Origin

Sociological jurisprudence quite simply refers to the study of law in relation to the problems of society. Law is studied alongside the social sciences so as to make sure that the law becomes an effective instrument of social control to harmonize the conflicting interests of the members of society. “Thus, sociological jurisprudence introduces two components into its definition of law. On the one hand, law is a means of alleviating conflict through the imposition of organized force. On the other, law functions to secure the realization of as many individual interests as possible” (Masotti and Weinstein, 1969). It treats law as a social institution that reacts to the customs, beliefs and values of a society. It has its many proponents, contributors, critics and of course a founding father just like any other legal theory.

The story of sociological jurisprudence begins with Montesquieu, a famous French judge who expounded the theory that law systemically grows and develops due to being interrelated with the

social and physical environment in his treatise, L'Esprit des Lois (The Spirt of the Laws) (Gardner, 1961). Afterwards came, Rudolph Von Jhering, a German jurist who rebelled against the trending research on the nature of law and instead focused his endeavors on the function of law as he called it. He put more emphasis on the function and end of the law rather than its nature. He was more concerned with the law's social purpose and asserted that law should be harmonised variable social conditions. He also theorised that the protection of individual's rights is dictated solely by social considerations. Natural rights are therefore nothing more than social interests which are legally protected. Thus, the individual's welfare not an end in itself but is only recognised insofar as it contributes in securing society's welfare (Gardner, 1961). This is also reflected in his treatise, the Spirt of the Roman Law. Jhering therefore reached the conclusion that what we refer to as a legal right is nothing more than a legally protected interest. He discusses that every "that every rule of law owes its origin to some practical motive. Every act is an act done for a purpose" (Gardner, 1961). To him, the purpose of law was to secure the social conditions of society. Law must adapt itself to the constantly changing conditions of civilization, and it is the duty of society, from time to time, to shape the law in conformity to new conditions (Bodenheimer, 1981). Now we move onto Rudolph Stammler, another German jurist who discussed the universal validity of law (Huski, 1924). He considered the relations between ethics and law. He argued that the State should study social phenomenon in order to use its findings to attain proper just law (Gardner, 1961). Then came Joseph Kohler, another German jurist who held that "law is a product of the culture of a people in the past, and of the attempt to adjust it to the culture of the present, in which a conscious effort may be prominent" (Borchard, 1912). We should also not forget the efforts of Ludwig Gumplowicz, a Polish jurist. "He erected a sociological foundation for the positivistic theory that law is essentially an exercise of state power. He taught that the chief moving force in history was the struggle of different races for supremacy and power" (Bodenheimer, 1981). "In this struggle the stronger race subjugates the weaker race and sets up an organization for the stabilization and perpetuation of its dominion" (Bodenheimer, 1981). To him, "the guiding idea of law is the maintenance and perpetuation of political, social and economic equality. There exists no law which is not an expression of inequality" (Bodenheimer, 1981). In this respect, law is a true reflection of state power, which also aims only at the regulation of the coexistence of unequal racial and social groups through the sovereignty of the stronger group over the weaker" (Bodenheimer, 1981). Max Weber's contribution to this jurisprudence cannot be forgotten either. Bodenheimer writes that he was a pioneer of legal sociology in Germany. He further observes that "one of his most interesting contributions to legal theory is his elaboration of the distinction between irrational and rational methods of lawmaking and his detailed analysis of these two methods from a historical and sociological point of view" (Bodenheimer, 1981). In this respect, the work of Eugen Ehrlich also deserves mention. Ehrlich, an Austrian legal scholar and sociologist observed that legal development does not occur due to legislation or due to precedent or due to any juristic science, but rather legal development occurs due to changes in society itself (Bodenheimer, 1981). Leon Petrazycki, a Russian legal scholar and jurist discusses the psychological element in law. He opined that legal phenomena consist of unique psychic processes which may be observed only through the use of the introspective method (Bodenheimer, 1981).

American Legal Realism

Then, we turn to America, where pragmaticism originated and developed. Pragmaticism sought that each and every philosophical precept be scientifically experimented so as to test its usefulness and validity in terms of social progress. If the precept in question did not contribute to any form of social progress, then it was worth nothing. This theory was "initiated by Charles Peirce, developed and popularized by William James, and brought to completion by John Dewey" (McManaman, 1967). Naturally, this new school of philosophy made its way into jurisprudence via Oliver Wendell Holmes Jr (Patterson, 1947). Holmes was one of the greatest American judges and jurists. Being influenced by the school of thought known as pragmaticism, he became the founding father of American Legal Realism. He proposed that law was the result of the judicial behaviour of judges who took into account external factors such as public policies, morality etc. rather than relying on established law such as

statute and precedent etc. (Ibn Munir, 2023). Roscoe Pound was also another famous America jurist who advocated this same viewpoint. He in particular advocated his theory of social engineering, where he discussed how law is actually the result of giving effect to the interest of a larger dominant social stakeholder at the cost of the smaller social stakeholder (McManaman, 1967). He also believed that justice could be achieved with or without law (Ibn Munir, 2023). That the judge can administer justice according to law, being bound to strict rules of law. In the event he is not bound to strict rules of law, he may use his discretion, apply principles of natural justice, equity and good conscience etc. (Ibn Munir, 2023). Karl Llewellyn was another famous American jurist famous for propagating the school of legal realism. He believed that "the modern jurist must adopt the standpoint of an impartial observer viewing the law in strictly functional terms with the objective of understanding rather than influencing the social process" (Verdun-Jones, 1994). He typified the realists' focus on the facts of law in action: the results of law suits; the impact of law in cutting short disputes or channeling private conduct; the pervasive influence of prior normative doctrine and societal attitudes in all the law's activities (Casebeer, 1977). He was more concerned with the study of law as an institutional study within its boarder social context (Verdun-Jones, 1994). Hence, he found more value in actual realistic impact that law had in society rather than the law itself. To him, one must concern himself with the law's practical nature more than its normative foundation.

Therefore, to summarise, we may say that "legal realism states that judges decide according to what will best achieve social goals such as efficiency and utility" (Munir 2006). They further maintain that there is no intrinsic value in maintaining any consistency with the past (Munir, 2006).

Critique

While the realm of sociological jurisprudence may seem very interesting, ultimately it is an unsustainable theory. The whole precept of this theory according to Roscoe Pound vests upon its relationship and impact on society. However, while the development of law may be contingent upon the sociological conditions and events, the law-making process itself is not. It is not necessary that the law of a particular society may reflect that society's overall condition or events. Consider the examples of totalitarian regimes. In Apartheid Africa, discrimination against the black Africans was part of its law. Hence, the treatment of such people, which included inter alia murder, torture and other such crimes was not illegal despite the fact it was totally immoral to do so. Thus, despite the sociological conditions or events that were taking place, the law did not change. Another example is that of Nazi Germany's treatment against Jews. For the Nazis, it was part of their law and thus was totally legal. The same goes for Israel today. Hence, law is the result of the prevailing values of a particular society, not the social conditions of society. Furthermore, it is also not necessary that the highest stake holder in society will have a profound impact on law. Examples can be of the LGBTQ laws being promulgated despite the overarching presence of the conservatives in America.

Llewellyn is far too focused on the 'practicality' of the law as he likes to call it. However, what he considers 'practicality' is rather not practical at all. How can one achieve an ideal or just result if there are no set of guiding principles at all? Furthermore, there is no consensus on what is considered a just or ideal result amongst the judges themselves, then how will there be any consistency in their decisions? What would happen if Judge Hercules comes to a different conclusion than Judge Octavius? What are they to do then? This is where statutory law or precedent comes into help. In such cases, they will provide a definite conclusion and just result coming from a rich tradition of legal principles enunciated overtime.

Additionally, as per Holmes, the law is a result of judicial law-making that occurs due to the judge applying the prevailing social norms that have arose due to change in society. However, this theory fails to understand the primary role played by statutory law and precedent. Furthermore, a judge is bound by precedent unless the instant case is distinguishable before the court. Other than such cases, the judge cannot overrule precedent. Also, a non-elected official cannot be considered a primary legislator. Even if he rules a case according to what he considers as just, what if one or both of the

parties consider it an unjust decision? Hence, the role of the judge cannot go more than the simple interpreting and applying the law. Not to mention, according to Lon L. Fuller, Holmes also fails to understand the role of law that is promulgated and used by certain public officials such as a sherif (Palms, 1965). Certain public authorities also have the authority to promulgate, operate under and enforce their rules as well. It goes without saying that these authorities are non-judicial authorities.

According to H.L.A Hart, he rightfully calls the followers of the American realism as rule-skeptics, that is to say that they are skeptical about enacted rules. This criticism especially goes against Karl Llewellyn, who went as far calling rules 'pretty playthings' (Shauer, 2009). Albeit, this view does not survive a full reading of his treatise, let alone the entire corpus of his work (Shauer, 2009). Nonetheless, Hart also criticizes the fact that the realists do not account for the fact that the law serves purposes other than adjudication (Hart, 2012). The law is there for setting behavioural standards as well. The allowed and prohibited acts or omissions are all products of enacted rules, statutory provisions and not judicial decisions except for the rare occasion. Hart further states that the realists only accept judge-made law but fail to realize that the courts themselves are a product of the law and are thus backed by legal recognition (Hart, 2012). Should already promulgated law not already exist, then a court of law should also not exist as then there would no difference between a court decision and the decision of a private person (Hart, 2012). While Hart's criticism is valid insofar as the rejection of promulgated law is concerned, his criticism of judge-made law cannot be considered valid due to the fact he himself is a proponent of the judge makes law theory (Munir, 2013). In fact, his stance towards the judge makes law theory also seems to be unclear as he also asserts that "judges declare a custom to be law because it is law" when he was discussing the validity of custom in a legal system (Munir, 2013). Hans Kelsen was also a critic of realism. He argued against realism's assertion that every type of behaviour pattern is law, if that is really indeed the case, then there is no standard behaviour that was not law, such as mis-behaviour (Ibn Munir, 2023). In simpler terms, if every behaviour is ultimately law, than exactly can be considered law and what exactly cannot be considered law? (Ibn Munir, 2023).

Ronald Dworkin also had something to say against legal realism. He stated that legal realism or "pragmaticism" as he called it fails as a theory simply on the touchstone that it does not recognize the rights of people (Munir, 2006) that have been established under statutes, the constitution and even precedent. If people have no rights, then for what do they come to court for? A person goes to a court of law because he feels aggrieved that his right has been violated by someone and thus wishes to have it asserted and restored via a remedy given by a judicial decision (Ibn Munir, 2023).

Hence, law in itself cannot be simply seen as some sort of institution that is built upon a foundation of social conditions or an institution that is built upon the basis of judicial behaviour patterns. It may serve as a part of it but ultimately, it is not the whole of it. The law is at its best the moral values of a particular society given legal weight and effect.

Sociological Jurisprudence Today

We have discussed sociological jurisprudence's origin and rise from Europe to America and we have thoroughly discussed Pound's theories of interests and justice, now the question arises, whatever happened to it? Did it die as quickly as it arose? Is it buried below the earth, never to be dug out and revived? The highest proponents of American legal realism such as Holmes, Llewelyn took to the scene and propagated their understanding of sociological jurisprudence. Additionally, Pound remains one of America's greatest ever jurists and contributed a lot to make sure that the social sciences be read and researched alongside the law. However, in the 20th century, there came the likes of H.L.A Hart, who produced his famous theory of the Rule of Recognition. There was also the famous Lord Denning, popularly called the people's Judge. All in all, Denning might have been Pound's ideal judge to a certain extent, as Denning frequently applied the precept of equity and contributed a lot to the development of law in England in the 20th century although, he did not apply it in each and every case and instead he had developed a reputation as a notorious judicial activist, hence making him a

judicial law maker which Pound abhors. Nonetheless, this is not something that needs to be discussed here (Kirby, 1999). Then of course, comes in Ronald Dworkin, Hart's student and chosen successor, who not only developed his theory of law but in the process destroyed his former teacher's theory as well (Munir, 2023). Hans Kelsen was another famous jurist that came into the scene, with his famous grundnorm theory. All in all, sociological jurisprudence died with Lewellyn once he succumbed to death. Although, sociological jurisprudence may not have its former popularity and has been the subject of a lot of critique, it is still entirely possible that it is being studied in earnest by a lot of admirers and critics. There might come someone else who might become its biggest proponent after Lewellyn. Till then however, sociological jurisprudence might not be what it was during the 19th century.

Conclusion

Sociological jurisprudence is the study of law in relation to the problems of society. Law is therefore contemplated viz-a-viz other social sciences. Law is therefore treated as a social instituted that reacts to the conditions of society. This school of thought emerged from Europe, mainly France and Germany due to the contributions of jurists such as Montesquieu, Jhering, Kohler amongst others. It made its way into mainstream American legal philosophy in the 19th century via Oliver Wendel Holmes Jr. Holmes was particularly influenced by the emerging philosophical school of pragmaticism. He therefore became the father of "legal realism" as it was known in America. Its other proponents following Holmes who were undoubtedly influenced by him were Roscoe Pound and Karl Llewellyn. Holmes believed that law was the result of the judicial behaviour of judges who took into account external factors such as public policies, morality amongst others rather than relying on established law such as statute and precedent. While also believing this, Pound in turn was also of the opinion that law is actually the result of giving effect to the interest of a larger dominant social stakeholder at the cost of the smaller social stakeholder. He also believed that strict adherence to law is ultimately unnecessary for the application of justice. Llewellyn was more concerned with the value in actual realistic impact that law had in society rather than the law itself. To him, one must concern himself with the law's practical nature more than its normative foundation. Hence, law must be taken into a much broader context as a social institution rather than as a set of rules or principles that one is bound by or not.

While these concepts may seem very interesting, this school of thought fails in itself. Holmes fails to realise the importance of enacted statute and also precedent. There will be no consistency at all should judges be given free reign to do what they want. Furthermore, this operation is also reliant on people coming to courts. What about what happens outside courts? Hence, as Hart has correctly pointed out, Holmes has failed to consider the fact that law is also there to set behavioural standards. That there is more purpose to law than just adjudication. Fuller is also correct to point out that there are certain institutions that also promulgate rules, adjudicate certain disputes and even enforce the law due to delegated legislation. They are not judges at all, in that case how are they promulgating rules and enforcing the law? Hence, Holmes theory fails as he is too much skeptical about enacted rules despite their primary importance. Furthermore, his criticism of statutory law and precedent is unjustified as consistency of decisions come from a proper authoritative/binding set of guiding principles. The judge must decide by applying a certain standard that will guide him in his decision. What better standard than the majority will of the people that reflects the moral values of society therein?

In the case of Pound, he is incorrect to say that law is the result of the prevailing conditions of society. It is reflective of the prevailing values of society. Consider the case of Nazi Germany, Apartheid Africa or any other totalitarian regime for that matter, where even the most immoral of laws were rampant because it was reflective of what was considered moral to the totalitarian regime in power then. Furthermore, it is also not necessary that the highest stake holder in society will have a profound impact on law. Even the lowest stake holder interest group can have their ideals promulgated into legislation should it reflect the moral values of society at that particular point in time.

Llewellyn is also too caught up in the 'practicalities' of the law. He is too concerned with how to get the 'just' or 'ideal' decision in a particular case. What is 'just' or 'ideal' for each and every particular case is different for all judges? What if one judge says one thing and another says another thing? Whose decision will be followed? A proper and binding source of guiding principles is necessary so as to make sure that there are consistencies. And as already mentioned hereinabove, what better guiding set of binding principles then the majority will of people that reflects the moral values or standards of society?

Dworkin's criticism against legal realism is also valid. He states that it does not recognise the rights of people as provided by ordinary statute or supreme law like a constitution. If people have no rights, then for what do they come to court for? A person goes to a court of law because he feels aggrieved that his right has been violated by someone and thus wishes to have it asserted and restored via a remedy given by a judicial decision. Furthermore, Kelsen was also correct to assert that if every behavioural standard is law, then there is no standard at all for anything that is not law in his critique of realism.

Hence, law in itself cannot be simply seen as some sort of institution that is built upon a foundation of social conditions or an institution that is built upon the basis of judicial behaviour patterns. It may serve as a part of it but ultimately, it is not the whole of it.

Lastly, sociological jurisprudence is most likely never to arise again. It was promptly forgotten due to the emergence of the new naturalist vs positivist debate and the rise of jurists such as Hart, Dworkin, Denning amongst others. While, sociological jurisprudence did see Llewellyn at the helm in the 20th century, it died along with him. However, it may arise again with a new proponent.

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