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POUND AND CONTEMPORARY JURISTIC THEORY

There is no need to pay tribute to the work of Dean Pound in resuscitating the life of jurisprudence. But his writing is so erudite and his thought contains so many facets that it is not always easy to get a clear picture of the presuppositions of his doctrine. Several interesting works which Pound has recently published[1] add point to the attempt to discover his relation to contemporary juristic theory. We propose to take four topics—administrative law, realism, sociology of law and legal philosophy.

Pound and Administrative Law

For one who was for long considered a radical, Pound takes rather a conservative view of modern developments of administrative law in America. He gibes at modern juristic theory for desiring to add to the legislative, executive and the judicial branches a fourth (the administrative) which is to have a complete rule-making, executing and adjudicating authority, along with its guiding or directing jurisdiction. "In practice . . . . this brings government down to one department, the administrative, exactly as in the old regime in France or the regime which the Stuarts sought to set up in England."[2] The old checks and balances of government, the technique of justice developed by a court, are now to be sacrificed for speed and skilled control by a self-styled expert.

Pound assumes that the presuppositions of modern administrative trends are those of political absolutism. "The presupposition of administrative absolutism is that of every form of autocracy . . . . The corollary of the proposition that men are not competent to manage the details of their private affairs

[1] Contemporary Juristic Theory (1940); a chapter in My Philosophy of Law (Bingham etc., 1941); Fifty Years' Growth of American Law, in 18 Notre Dame Lawyer (1943), 173; Sociology of Law and Sociological Jurisprudence, in 5 Univ. of Toronto Law Jo. (1943) 1.

[2] Contemporary Juristic Theory, 13.

is that they are not competent to manage public affairs. In the end, administrative absolutism must stand upon a political absolutism."[3]

Pound well recognizes the need for progress. "It is bad social engineering to administer justice to a blue print of a society of the past as a means of maintaining the jural postulates of civilization in a different society of the present."[4] Similarly he recognizes that "governments must be able to do things, and administration paralyzed by law is not an enduring political condition. What we must seek is a balance between efficiency and liberty, a balance between the advantages of the vigour and power of a strong administrative regime towards advancing social ends and restraint of official will to power in order to preserve free individual initiative and self-development."[5]

But he sees many dangers in present day trends in America. It is significant that in 1922 Pound admitted that an engineering interpretation of law might be put to ill uses.[6] But at that time he considered that "juristic pessimism" was the great danger. An interpretation was needed that would stimulate juristic activity and Pound did his best to provide it. He was so successful that he now feels that recent juristic theory has moved rather too fast, until it has become almost as one-sided as the old jurisprudence of conceptions.

It is not our purpose to discuss the present dangers inherent in the development of administrative agencies in America. That is an issue on which a vast literature exists,[7] which cannot be conveniently summarized. We merely take the point that Pound is clearly out of sympathy with many happenings in the world today.

Pound and the Realists

The same phenomenon is apparent in Pound's relation to the realists, for much of the initial impetus, which stirred the realists to study law in action, came from his own pen. He is, therefore, in the position of being claimed as a father by a progeny of which he is not very proud. The realist regards Pound as having seen the truth but as having failed to apply it effectively to jurisprudence. "If ever a man hid his light under a bushel it was Pound."[8]

[3] 45 West Virg. L.Q. (1938-9) 205 at 219.
[4] Contemporary Juristic Theory, 83.
[5] *Op. cit.*, 28.
[6] Interpretations of Legal History, 164.
[7] *Cf.* Jerome Frank, If Men were Angels: in 42 Col. L.R. (1942) the attack on Pound by Davis at 89 and 804 and the reply by Bailey at 781.
[8] Frank, 80 Univ. of Pa., L.R. 19.

In the first writings of any new school, we naturally find exaggerations of emphasis and the lack of a balanced view. Tolerance and a sense of proportion are lacking in the writing of the early realists but are possessed by Holmes and Pound to a great degree. It was natural, therefore, for the realists to concentrate on Pound — we quarrel most bitterly with those who are nearest to us. Pound had given the stimulus, but he refused to go all the way to reach what he regarded as one-sided conclusions.

Frank, writing in 1931, applied the following terms to those who did not accept the gospel according to St. Jerome —fundamentalism, scholasticism, childish thought ways, verbalism, belief in the basic myth of legal certainty.[9] Indeed we are quite relieved to get his admission that the rules do have some effect on the judge. With such an approach law is merely the study of official action and whatever moves official action is a fit study for jurisprudence. One American writer even laments that we have no official information concerning the intelligence quotients of judges[10] — the institution of such a test would surely add a new terror to election to the Bench.

In the later writings of the realists much of this exaggeration disappears. K. N. Llewellyn in a thoughtful paper attempts to discover the vein of truth in the polemical writings of his colleagues and he finds it in the emphasis on "sustained and realistic examination of the best practice and art of the best judges in their judging."[11] The greater part of this article would be accepted by many members of the sociological school. It seems that, while the polemics of American writers have added a new zest to jurisprudence, there is less between Pound and the more moderate realists than is sometimes supposed.

Llewellyn considers as mainly expressive of realism:

1. the conception of law in flux:
2. the conception of law as a means to social ends:
3. the conception of society in flux faster than law:
4. the temporary divorce of is and ought for purposes of study:
5. the distrust of legal rules insofar as they purport to describe what courts or people are actually doing:

[9] Jerome Frank, Law and the Modern Mind. It is only fair to add that Frank's recent writings are much more tolerant.

[10] Annals of the American Academy of Political and Social Science, vol. 167, at 144.

[11] On Reading and Using the Newer Jurisprudence, in 40 Col. L.R. (1940) 581, at 614.

6. the distrust of the theory that rules are a heavily operative factor in producing court decisions:
7. the insistence of the evaluation of every part of law in terms of its effects.[12]

The first and third points Pound would recognize to some extent, but he would not agree that law was entirely without definiteness: the dispute here would be merely a question of degree and Pound's more balanced view seems to be preferable. The second and the seventh points, of course, were stressed by Pound again and again before the realists were heard of.

The fifth and sixth points really contain the crux of the difference. Pound himself would emphasize that a jurisprudence of conceptions does not explain the development of the law. But he denies with spirit that law is a myth or a superstition. He cannot agree that Roman law and common law represent nothing more than human deception. "It is idle to say that the arbitrary personal subjective element in magisterial behaviour, which these traditions have for centuries shown us how to subdue, is the reality and this accumulated experience a mere sham. I repeat, experience of social control by the judicial process operating according to law is as objectively valid as engineering experience."[13]

Realism has already achieved its object of throwing new light on the judicial method and of irreverently debunking some rather pious frauds of the past. Its earlier exaggerations are now disappearing: *e.g.*, Frank's explanation of the lawyer's belief in the certainty of law as a result of a father complex, the early philosophic difficulties unnecessarily introduced by the adoption of nominalism. Iconoclasm is useful at certain stages of human thought, but once the orgy of destruction is over, creation must begin anew.

This raises the question whether we can anticipate much constructive work from the functional school, either from the more conservative branch represented by Pound, or the extreme left represented by the realists. So far, the main benefits are that new light has been thrown on the judicial method, a more realistic method of teaching has been employed, and the close relationship between law and social forces has been emphasized. Certain examples may be given. (a) New light has been thrown on the problems of constitutional law: (b) a more enlightened

[12] 44 Harv. L.R. at 1236: For Pound's eight point programme, see Outlines of Lectures on Jurisprudence (1928) 16-18.
[13] Contemporary Juristic Theory, 53.

approach to the problem of punishment has resulted from the evidence painstakingly collected by members of the school:[14] (c) a better understanding of many legal concepts has developed, *e.g.*, property,[15] contract:[16] (d) the actual functioning of the law of tort has been carefully examined:[17] (e) a more realistic approach to legal education has been developed.

Both Pound and the realists share a common desire to make jurisprudence useful:[18] even in the most cynical writings of the realists there runs often a burning passion for law reform. Law in action is studied, not for its own sake, but in order to discover how action may be made more effective. We will discuss in the next section Cairn's criticism that Pound is attempting to create an applied science before the essential foundation in pure science has been laid.

Sociological Jurisprudence and Sociology of Law

In some ways, it is a misfortune that the name sociological jurisprudence was ever invented, for it has been confused with:

(a) sociology in its wide sense:

(b) sociology of law.

Sociology in its broad sense cannot easily be defined, but clearly it pursues the study of society as a whole and in the life of society law is only one of the factors to be considered. Sociology considers law only incidentally in its general survey of society, whereas sociological jurisprudence considers society only so far as is necessary for a true understanding of law. "Functional jurisprudence" is a term which conveys more easily the emphasis on the study of law in action, *i.e.*, law as it affects society and society as it affects law. The functional method thus emphasizes that we cannot understand what a thing is until we know what it does. In the rest of this section, we will refer to Pound's theories as functional jurisprudence in order to save confusion.

Another branch of study has recently been termed sociology of law, and it must be distinguished from that field of functional

[14] Jerome Hall, Theft, Law and Society: Sheldon Glueck, A Thousand Delinquents: and Pound, Survey of Criminal Justice in Cleveland.

[15] Noyes, The Institution of Property.

[16] Llewellyn, Across Sales on Horseback; Pound, An Introduction to the Philosophy of Law.

[17] E.g., the factual investigations into motor car accidents and legal liability.

[18] This is borne out by the programmes of Pound and of the realists which have already been noted. *Cf.* also Yntema, Legal Science and Reform (1934), 34 Col. L.R. 207.

jurisprudence which Pound has made his own. The difficulty in delimiting the sphere of the sociology of law is that each writer uses the term in a different sense. To Gurvitch,[19] sociology of law "is a pure theoretical science, having to do with social facts and the relation of law to those facts."[20] This is the basic study and on the basis of the principles thus discovered, jurisprudence works as a mere technology. Timasheff[21] adopts somewhat the same approach treating sociology of law as a science the content of which depends only to a small extent on changes in legal relations. This study is divided into such branches as criminology, the sociology of civil law and political sociology. There is a different jurisprudence for each social field—thus one for Rome and another for France.

It is clear that there is a broad difference here from Anglo-American terminology which treats sociology as a practical science which concentrates more on research and investigation of facts than on philosophical theories.[22] Also, jurisprudence is treated as a wider study than merely the analysis of one particular system.

To Cairns, modern jurisprudence is largely "a meaningless and futile pursuit of a goal incapable of achievement".[23] The only method by which progress can be achieved is by the creation of a legal science—for to call modern jurisprudence a social science seems to Cairns a travesty.[24] Every technology is based on one or more pure sciences, as the very name of "applied science" suggests. In order to create a pure science of law, the first attempt must be to formulate statements asserting invariant, or almost invariant, relationship among the facts in its specific fields: secondly, it must be emphasised that the point of departure is not law as such, but human behaviour as influenced by, or in relation to, the fact of disorder.[25] This approach naturally gives a wide scope to the science of law e.g., it would include a large part of what is now known as political science. Cairns recognises that the difficulties in the way of such an achievement are enormous, but if the goal of the jurist is unified theory, that unified theory must be grounded upon social phenomena and not upon legal concepts.[26]

[19] Sociology of Law (1942).
[20] Pound, 5 Univ. of Toronto Law Jo. (1943) 1.
[21] The Sociology of Law, (1939) 28-29.
[22] Pound, 5 Univ. of Toronto Law Jo. 8.
[23] Theory of Legal Science (1941) 11.
[24] "Modern legal study, with few exceptions, possesses none of the characteristics of social science": *op. cit.* at 3.
[25] *Op. cit.*, at 9.
[26] Theory of Legal Science, 11.

Thus ambitious programmes, varying in approach, have been laid down by Pound, the realists and now by Huntington Cairns with his plea for legal science. It certainly is advisable to decide where we wish to go before we start out on the journey: but at present one wonders whether there is not a danger of the debate on destination absorbing the major part of the energies of jurists.

These programmes (whichever we adopt) require co-operation in research which can hardly be carried on by university representatives, burdened by teaching duties, or by practitioners surrounded by work. The American Law Institute could succeed with the Restatement because it appealed to the purse of the Carnegie Corporation and to the energy of lawyers. The aim of the Restatement was clear and definite—can the same be said of modern jurisprudence?

The great success of the physical sciences contrasts strikingly with the rather meagre results secured by social studies: hence arises the cry that if only the rigorous method of the scientist were applied to the analysis of social life, then sociology and jurisprudence would be removed from their present stagnation. The realist school have zealously adopted this approach, and there is a tendency to assume that a study of facts will solve the problems of jurisprudence. But it is too lightly assumed that the materials of community life can be dealt with by the methods of the physicist. For the sociologist, controlled experiment is rarely possible, for he cannot ensure that all the factors in a social situation are kept constant save the one which is varied in order to discover its effects. Whether man has free will or not, he is a more complex study than an alpha particle. No trick of method can secure for the social sciences the compact definitions and universal demonstrability of the natural sciences.[27] Law is not a collection of facts, but of standards: it does not merely describe what happens, but lays down what ought to happen.

Pound recognises more clearly than the realists the part played in legal development by ethics or a legal philosophy. He would argue that it is not possible, even as a method of study, to divorce temporarily the *is* and the *ought* as suggested by the realists. "We must not ignore the power of ideas. The economic interpretation and psychological realism themselves are ideas. In jurisprudence we are dealing ultimately with what ought to be.

[27] M. R. Cohen, Reason and Nature: Michael and Adler, Crime, Law and Social Science.

Ideas of what is affect ideas of what ought to be and vice versa."[28] The relation of Pound to legal philosophy is discussed below.

Cairns recognises the need for considering ethical factors, considering that it would be possible to have a postulational science of ethics and law in combination. At the moment, however, he prefers to circumscribe the initial field of inquiry, by concentrating on the behaviouristic realm and leaving the study of ethics for the future. It is premature to judge whether a behaviouristic science of law could achieve much. The work still remains to be done, for Cairns' treatise is but a brilliant introduction. But the task is not one for the lawyer alone. The sociologist must set his house in order before such a science of law could succeed. The work of Sorokin[29] emphasises how inexact is much of the thinking that passes for sociology.

Neither Pound's functional jurisprudence, Llewellyn's realism, nor Cairns' science of law can be really successful until the mind of man and the evolution of society are better understood. This is said, not to discourage effort, but to point out that progress will be inevitably slow, for the advance of any type of functional jurisprudence is limited by that of other social sciences.

Pound and Legal Philosophy

Pound's attitude to legal philosophy is one full of interest. At an early stage when the word philosophy raised horror in the minds of many lawyers, he had the courage to produce a work with the title "An Introduction to the Philosophy of Law."

Pound's view is that the legal process is best described as social engineering — the attempt to satisfy the maximum of wants with the minimum of friction.[30] The obvious question at once arises: since all interests cannot be satisfied, what criterion is to be used in making the compromise. Pound emphasizes again and again that the best gift that legal philosophy could give to jurisprudence would be a workable theory of values, but he is quite emphatic that philosophy has failed in its task. In a work written in 1922, Pound stated that he was sceptical as to the possibility of demonstrating the validity of absolute values. "I do not believe that the jurist has to do more than

[28] Contemporary Juristic Theory, 54.
[29] Contemporary Sociological Theories. This work is now several years old, but little has happened since to justify a change in opinion.
[30] Interpretations of Legal Philosophy, 156: An Introduction to the Philosophy of Law, 98-99.

recognize the problem and perceive that it is presented to him as one of securing all social interests so far as he may."[31]

Naturally, as he emphasizes, the law must get on with its task — it cannot wait until philosophers are agreed. "While we are waiting for a new philosophy conceived of in terms of *can* rather than of *can't*, political and legal thought cannot stand still. We must be at work upon our persistent problems, working with the help of philosophy if we may have it, but without that help if not."[32] We do not halt surveying and ask for the overhauling of the subject because its postulates of planes and straight lines and perpendiculars are out of line with Einstein's conception of a curved universe.[33] Law has been using a practical measure of values which, put simply, is to secure as much as possible of the scheme of interests as a whole with the least friction and waste.[34] "To the proposition that we can't arrive at a measure of values we may reply that we have found one, and a very workable one, whether we can prove its philosophical validity or not."[35]

Pound's jural postulates of civilization are drawn not from any absolutes, but on the particular needs of our day and generation. He emphasizes again and again that the law can make only tentative compromises, valid for that time and place. Surely this is implicit in the very notion of social engineering as used by Pound. In terms of philosophy, this angle of Pound's thought might be described as relativism.

Yet what is surprising is the virulence of his attack on what he terms the "Give-it-up Philosophies".[36] When Neo-Kantians argued that judgments of value are relative and cannot be proved, Pound thinks that this logically leads to the view that there is nothing more to politics and jurisprudence than force and threats. *Right* has begun to lose its meaning for jurisprudence. When a right is not thought of as something existing before law, but as a mere inference from threats of force, it loses its importance. His feeling is that philosophy has failed and that a "give-it-up" philosophy is not adapted to guide legal thought today except in the direction of administrative and political absolutism: if all is relative, one man's guess is as good as another's. This tirade reads rather curiously from

[31] An Introduction to the Philosophy of Law, 96.
[32] Contemporary Juristic Theory, 56.
[33] *Op. cit.*, at 41-2.
[34] *Op. cit.*, at 75.
[35] *Op. cit.*, at 81-2.
[36] Contemporary Juristic Theory, ch. II.

one who advocated satisfaction of a maximum of wants with a minimum of friction and who denied that any absolute criterion of value could yet be discovered. Philosophically, relativism[37] seems to mark much of Pound's theoretical writing: but when a practical problem arises, such as the development of modern administrative law, then a very definite and persistent philosophy is revealed. While not adopting any particular type of natural law philosophy, the fire of his attack suggests that there are certain absolutes to Pound the man, if not to Pound the jurist. And in spite of all Pound's disappointment with modern legal philosophy, he emphasizes strongly in one of his latest works that jurisprudence needs a creative philosophy as its foundation.[38] He refuses to give up his faith in philosophy because the fashionable philosophies of the moment refuse to do anything for law.

The danger in many philosophic theories of the nature of law is the temptation to define law as "that which I like". The theory of a close connection between ethics and law satisfies one of the most deeply rooted desires of man. To many it is revolting in fact and absurd in theory to regard law merely as the will of the stronger. This question has been debated interminably since the days of the Greek Sophists. Some deny that any rule is law which does not accord with some absolute which is discovered either by intuition or by metaphysical reasoning. If all accepted the doctrines of the Catholic Church, there might be a common basis on which to build, but the increasing secularization of social thought presents problems today that did not exist when the voice of the universal church was accepted as authoritative by jurisprudence.

In American thought we find may relics of the view that the power of popular assemblies is limited by the rules of natural law. It is unnecessary to do more than to refer to the interpretations placed by some Courts on the Fourteenth Amendment. Statutes opposed to the first great principles of the social contract were declared not to be law.

A logical development of this approach leads Bodenheimer in a recent work to describe law as a means between anarchy and despotism. "Law in its purest and most perfect form will be realised in a social order in which the possibility of abuse of power by private individuals as well as by the government is reduced to a minimum."[39] Few democrats would criticise this

[37] Not relativism in the Neo-Kantian sense, but in the sense that the jurist must draw his values from the needs of his particular day and generation.
[38] *Op. cit.*, 55.
[39] Jurisprudence (1940), 19.

as an *ideal* for law. But Bodenheimer draws the conclusion that law is almost non-essential in Nazi Germany, since so many of the rules in force do not satisfy his own particular test.

The reformer and the Nazi join hands at one point—law is regarded as power rather than as a restraint on power. The difference is that the former would use the power for the benefit of the individual life, the latter for the advantage of the ruling clique.

Both these theories (law as justice and law as force) contain elements of truth. It is impossible on any theory to divorce law and power. Law can limit force only if there is behind law a greater force. Realistically we cannot deny the term law to any rule merely because we disapprove of the social philosophy on which it is based. Every system contains both justice and injustice, although the proportion of each ingredient differs from one system to another. To attain a rule of law is not enough —it all depends on what kind of law it is. While law should be related to justice, it may in actual fact be far from it.

But if we cannot divorce law and force, neither can we ignore justice in analysing the nature of law. It is admitted that it is futile to define law as that which is just and to deny the name of law to any rule we consider unjust. But force can be effective only against a minority. A community may be artificially created by ruthless force, but such communities rarely endure.

Pound's own views on these questions are not clear. There are so many facets to his thoughts that there is always a danger in reviewing his writing that one aspect may be emphasised at the expense of another. Thus he will admit that legal philosophy has failed in providing a measure of legal values and that law must proceed empirically by evolving working standards: but if a philosophical school attempts to show that absolute values cannot be discovered, then he claims that this leads to absolutism, tyranny and the divorce of law from all conceptions of right. Surely the essence of law, from a realistic point of view, is not in metaphysical absolutes, but in the inner convictions of the community in question. If the community is determined to retain liberty, no theory will conquer it. If the community is not so determined, liberty may easily perish. This is said, not to diminish the importance of founding law on a reasonable theory, but to remove the atmosphere of heroics which is sometimes used in attacking a philosophical doctrine. The conservative desires to keep law as restraint in order to protect attacks on property

and vested interests: both the Nazi and the reformer emphasise law as power, as each desires to remould the world nearer to the heart's desire. Power is not in itself immoral, though it may easily become so. Untrammelled majority rule is not necessarily an evil, as the experience of England has shown. In a country with a written constitution, it is possible cynically to describe the business of a constitutional lawyer as that of "stopping people doing things." Ethics, morality and right are not necessarily on the side of those who wish to put the brakes on social change. In the long run, a community gets the kind of law it deserves.[40] As Lord Wright has put it: "In the constitution of this country there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved."[41]

Conclusion

The present position is that analytical jurisprudence is dull: philosophical jurisprudence is lost in the quagmires of metaphysics or behaviourism: functional jurisprudence is yet to be . A revolt against orthodoxy means something to those nutured along traditional lines. But there are dangers (which Pound has never failed to stress) in teaching revolt where there is no clear understanding either of what orthodoxy is or what the revolt intends to do. This is clearly apparent when some types of modern jurisprudence are applied to legal education. For those trained in the exact study of legal concepts, a "functional" cynicism and realism may be a useful adjunct. But cynicism and realism (or even idealism) can never be a substitute for legal knowledge. Too much enthusiasm in teaching the law of torts from a functional point of view leads the student to a dislike of the tedium of discovering exactly what the cases do decide.

This is so well brought out by Cavers[42] that we reproduce his paragraph in full:

'What the realists have been trying to do is to have the non-realist's cake and eat it too. Like the non-realists, the realists dearly love to talk about legal concepts, only they like to take them apart, whereas the non-realists like to put them together. But what the realists like to do just won't work in terms of education. The non-realists taught a working system

[40] Clearly a small community may for a time be crushed by a larger one, *e.g.*, in the present state of Europe.
[41] *Liversidge* v. *Anderson*, [1942] A.C. 206 at 261.
[42] (1943), 43 Col. L.R. at pp. 453-4.

of magic. The realists have been so busy destroying that magic as a preliminary to something else, that that something else has yet to be tried. Moreover, the old system of magic was a pretty teachable system. . . . What the realists now teach is exorcising. Exorcising, however, can seem important only if you have once believed in magic. Most of us law teachers have been under the spell, but our students have not. They gain our disbelief quickly, if confusedly, and henceforward the rites and runes which we dissect hold little fascination for them. . . . They have substituted vapour for magic and the deadliest thing about it is that the vapour is second-hand."

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