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Roscoe Pound's Theory of Justice& Mechanical Jurisprudence: A Critical Evaluation

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Abstract

This paper discusses what mechanical jurisprudence is, what it entails, what Pound meant by the development of law being stagnated by strict and rigid body of rules by means of stare decisis, what the "practical application test" is, whether Pound advocated legal pragmaticism, what was Pound's concept of legislation and the development of law, what did Pound mean by justice according to law and justice without law? The findings of this paper are that mechanical jurisprudence is the strict and rigid systemized body of rules made by legislation and stagnated by the doctrine of stare decisis. There are 2 types of justices, justice which has a pre-legal element involved and justice with a legal element involved. That in the former, the judge is applying the strict rigid principles of law and in the latter the judge uses his discretion and applies the means of equity, natural justice, good conscience etc. That he was a firm believer of a judge being a law discoverer rather than a law maker despite being a positivist. We've understood with examples that the making and development of law is not contingent on the change in human conditions of society, that logic is substituted but not with the human condition, but rather with the means of equity, natural justice, morality etc and that it is the natural development in any legal system. We've also understood that Pound believes in the practical application test as he is legal pragmatist but that such an application is impractical. The methodology in this work is doctrinal.

Keywords: Jurisprudence, Roscoe Pound, Mechanical Jurisprudence, Practical Application Test, Justice

Introduction

This paper discusses what mechanical jurisprudence is, what it entails, what Pound meant by the development of law being stagnated by strict and rigid body of rules by means of stare decisis, what did Pound mean by the "practical application test", whether Pound advocated legal pragmaticism, what was Pound's concept of legislation and the development of law, what did Pound mean by justice according to law and justice without law?

Pound's Mechanical Jurisprudence

Roscoe Pound was a scientist, a PHD in botany in fact and one of America's most famous jurists. Rather than considering and deliberating law by using logic and syllogisms like all scientists however, he instead believes that law should be the opposite. That, logic should not be used as the

primary element in the making of law. Rather, it should be used as a secondary factor, as an instrument in the making of law. He believes that the primary factor of making law should rather be the human condition first. That whether, in making or developing this law, the human condition will be considered and accordingly the legislation or judicial decision shall be adjusted to it. By human condition, he means, the human conditions of society, the different social classes of humanity, the poverty stricken, the wealthy, the middle class and the respective relationships between all three classes should be considered so as to make sure that true social justice is achieved. This is what he calls the theory of social engineering.

However, this is beyond the scope of this paper, so this much shall suffice for now.(Ibn Munir 2023)We shall instead focus solely on his "mechanical jurisprudence". It is over where he discusses what he calls "scientific law". He observes that "scientific law is a reasoned body of principles for the administration of justice, and its anti- thesis is a system of enforcing magisterial caprice, however honest, and however much disguised under the name of justice or equity or natural law. But this scientific character of law is a means, a means toward the end of law, which is the administration of justice. Law is forced to take on this character in order to accomplish its end fully, equally, and exactly; and in so far as it fails to perform its function fully, equally and exactly, it fails in the end for which it exists. Law is scientific in order to eliminate so far as may be the personal equation in judicial administration, to preclude corruption and to limit the dangerous possibilities of magisterial ignorance.

Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation" (Pound 1908) Hence, he believes that there are two types of law, one is the scientific law, where the law is systemized set of principles, a body of rules which is binding on the court so as to make sure that the administration of justice is achieved. The second type of law is which is not a systemized set of principles or a body of rules, but rather its opposite, it is not organized or systematic but rather what the court believes to be law under the means of natural justice or equity.

Hence, he is talking about how the courts have different judicial attitudes in certain cases and thus apply their own unique sense of justice under the guise of natural justice or equity. Basically, when the court rather than applying the law use their discretion and instead apply the doctrines of natural justice and equity to guide their judicial conscience. We shall discuss this later on. Pound also believes that the law takes on a scientific character because it is forced to so, to achieve the means of an end. That end, being a systemized body of rules, which should be prevented. He believes that our courts have relied too much on judicial decisions to develop law. That the doctrine of precedent only develops law to a certain extent for a certain period, that principles are set, that a body of rules is developed and afterwards, there is no more new development. These principles after being set are no longer deliberated upon by the courts, hence there is no more development of law. He believes there are periods of legal development. It starts with legislation by the legislators, where the principle is first enumerated within the law. Later on, this principle is deliberated upon, discussed upon and developed by the courts. After being developed however, the principle is than set. The courts than no longer, deliberate or discuss the principle. They instead consider it the rule that it is bound to follow and would follow it again and again.

Therefore, there is no further development. He believes that this causes the law to be become far too mechanical. That is to say, rigid, unchanging, not evolving, not developing. He calls this the "jurisprudence of conceptions". This means that law is being developed solely for the sake of being developed due to a rigid process of judicial decisions and judicial speculation. Where precepts are being developed rather than practical results. He believes that judges rely on the body of rules to

develop certain principles of law without taking into consideration whether such principles are practical, that is to say applicable on the society at large. He instead believes that rather than law be developed like this rigidly, the courts should consider the end product instead. That courts consider whether the law being developed is applicable to the human condition in society. That rather than using hard logic or rhetoric to set a legal principle, we should instead apply the human factor first, that whether the law being developed can be applied automatically in society.

Hence, he only sees logic as a secondary tool, an instrument, a means to an end. That law is developed due to social experience, to human conditions to society and that logic is merely one of the tools in the realization of that. This is entirely reminiscent of Oliver Wendell Holmes Jr.'s legal pragmatism. He observed that "the life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." (Holmes 1881) But of course, this is something that Pound entirely admits. He observes that "sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument." (Pound 1908)

Hence, Pound is no doubt a proponent of the legal pragmaticism school of thought. He believes that this is what sociological jurisprudence is meant to be and what it means to achieve. Indeed, quite unusual for a scientist who usually believe in hard logic and rhetoric to enunciate any theory they come up with two instead believe in the human condition being the first element to be considered in the development of the law and for logic to be used another instrument towards achieving the same. He calls this the "jurisprudence of results". This he burrows from Rudolph Ihering's jurisprudence, where he considers that the first question should always be how will a rule or decision operate in practice? Pound further discusses this in light of the legal developments of the Romans, the English and also of the USA. How in all three cases, all of them substituted logic with something else and that led to the profound development in law. The Romans used philosophical precepts, the English used equity, while the Americans would rely on English case law and consider their applications and consequences in society.

Hence, he believes this is where the development stops, where the conceptions are now fixed, the principles settled, the premises settled, everything else becomes mere deduction from there. The law than becomes a body of rigid rules and thus stops the development of law. Afterwards, comes than a new period with new legislation where fresh new principles and new rules are legislated by the legislator, but even than this is not a period of growth. This is but the reawakening of the judicial accomplishment of the past. And it is from here where judicial activity will continue on the basis of the principles enumerated within the legislation. Hence, he believes that logic should be substituted, should be used as a secondary factor, an instrument, a means to an end and that first and first most should be the human condition, whether, such a legislation or judicial decision will achieve a practical result in society?

Pound's Theory of Justice

Pound believes that law is not an essential element in the administration of justice. (Pound 1913) He professes that justice is divided into 2 types, justice which has a pre-legal element involved and justice with a legal element involved. He believes that "justice may either be administered

according to the will of the individual who administers it for the time being, or it may be administered according to law." (Pound 1913)

The first type is judicial, where the norms, guides are applied when justice is administered. The second type is administrative. This is where justice is administered by the will or intuition of someone due to him having the discretion to do so as he is not bound by any fixed rules. When Pound talks about the non-legal element in the administration of justice, he discusses that the judge either uses his discretion or natural justice or equity and good conscience or certain and permissible rules of relaxation of rules with reference to the requirement of individual cases and circumstances or the equitable application of law, of free search on the right (Pound 1913). He then proceeds to discuss how history has used both types of administration in justice, the judicial and the administrative elements, moving between both, particularly in the 19th-20th centuries. He then critiques both types of administration of justices, how administration of justice according to law leads to more uniformity, standards being created and how it ensures better balancing of interests but at the same time, it could become too rigid due to having strict unchangeable rules.

While considering administration of justice without law, he sees it ideal for a simple agricultural society where economic existence is simple, where the will of the people can be easily ascertained and applied to. It should be noted however that he cautions against such a notion, especially in a developed economic and industrial society. In such a case, he believes that there are too many complex developments made in society, such that there needs to a standard of uniformity, a body of rules that should be adhered to. He believes that courts administering the will of the people in certain cases are no different than the olden notion of administering the will of the King in each and every case. However, he still feels that even in such a developed economic society, justice without law is needed so as to combat the rigidness and strictness that comes as a result of justice with law. He then gives an example of the development of equity in England, how it arose when the British common law was too rigid or strict to be applied in every case. From his point of view, "equity began as reaction towards justice without law". (Pound 1913)

Hence, from the discussion above, we can assume that Pound was a firm believer of the Judge being a discoverer of law rather than a law maker (Munir 2013) as he feels that discretion should be used sparingly, that there should be proper law administered in a society, particularly a mature one and that the judge may use his "intuition" or "will" when he is not bound by strict and fixed rules and therefore has discretion to do so. Now we can understand that for Pound, justice can be administered with a legal element or "non-legal element" as he likes to call it, however what he calls a non-legal element is quite simply the judge applying principles of law when the law cannot be resorted to, that is to say, when there is a new type of case, unprecedented, where the judge may resort to other means such as natural justice, equity and good conscience etc to decide the case.

Critique

Let us first discuss whether Pound's criticism on what he calls "mechanical jurisprudence" is justified? By mechanical jurisprudence, we mean the hard and rigid systemized body of rules which are first enumerated within legislation and then developed by the judges in cases. Well, to a certain extent, he is correct. Logic is not always correct. Law is not just a logical process. It ultimately does require the touch of morality, natural justice, equity etc. There are numerous examples of this. The doctrine of equity for example. Equity was developed as a means to combat the extreme rigidness of the strict common law system of England. However, it by no means replaced the common law system. In fact, it only served as an alternative for common law should there be no remedy available in the common law before later on merging with the common law. This is clearly seen in the equitable maxim, "*equity follows the law*". (Ibn Munir 2022)

Hence, saying that equity came as a result of non-satisfying justice among the people by the common law is indeed correct to a certain extent, but it was by no means due to a complete change in the human condition. While, it's true that equity developed multiple new remedies but most of all it developed the already existing law as well. Thanks to equity, the principles of contract, tort, due process etc developed even more. It did not at all create new law but merely developed the already existing one. And when he talks about America, he forgot to see that fact that America would've applied English case law anyway as it was a former British colony and thus inherited the common law legal system. And like all of Britain's old colonies, they would undoubtedly apply the case law of the country from which they not only inherited the legal system but also from where the common law legal system originated as well so as to receive guidance and develop their own legal system as well. But let us not forget about the Romans. They too undertook the same evolution of law from rigid strict laws to be supplemented by the principles of equity. (Riccobono and Nathan 1925)

Hence, rather than human condition, this was the natural evolution of the law. The law going from a strict and rigid set of systemized body of rules to being supplemented with morality, equity or the principles of natural justice is not a new proposition. It was always the natural evolution of a legal system. It is not entirely incumbent upon the conditions of society itself to be involved in the development of law. A society's conditions could be that of a particular racial group being discriminated and the law would provide that no particular racial group is to be discriminated on the basis of their race. Take the example of the Civil Rights of Act of 1965. It would seem after this, the African-American community should not have been subjected to any form of racial discrimination at all. But here we are in the 20th century, where a person like George Floyd became a victim of police brutality. We can also take the example of the Apartheid State of South Africa as well. The legislation in such a state provided for a massive number of discriminatory policies against the black African community. And yet, there was no legislation against it.

Despite these types of social conditions existing, the law never developed. The court did not apply morality, equity or natural justice. They were guided by discriminatory laws and did not feel the need to change it or apply the means of morality, equity or natural justice. Apartheid only came to an end when there was widespread revolution which overtook it. And let us not forget the nazi regime. Once more, despite the fact social conditions were that of a totalitarian regime with violation after violation of human rights and dignity, the law did not develop at all. There was no application of morality, equity and natural justice. That only came to be after the nazi regime was defeated in World War II and many nazi officers were tried in the famous Nuremberg trials.

Hence, the judges did not even consider the conditions of society during these terrible times. They did not conduct any "practical application test" of a statute when interpreting the statute neither did the legislature for that matter. And how exactly would one test the practical applicability of a particular statute and its interpretation as done by the judges via judicial reasoning? Would the judges have people fill out petitions on how they feel this law should be interpreted? Would the judges have to call out people and interview them for their thoughts and feelings of the case? One might argue that public pressure influences cases as well. Indeed, this is true to a certain extent, however, public pressure does not influence each and every case. (Epstein and Martin 2010) There will always be someone or some particular group in society being unsatisfied on a particular decision by a court. A very glaring example of this is the famous O.J. Simpson trial. To this day, there are many opposing views particularly by the African Americans and White Americans on both the criminal and civil verdicts.(Anastaplo 1997) We can even take an example of our own country.

The case of "*Malik Muhammad Mumtaz Qadri v. The State*" (PLD 2016 SC 17) is still the subject of debate today. Many still consider him a hero for what he did and lament that his death sentence should not have been upheld by the Supreme court, while others say that his death sentence was rightly upheld and his act of murder was not at all justified. In both cases, the courts did not fall to

public opinion or pressure. They simply interpreted and applied the law as is the job of any court of law. Of course, by no means am I saying that public pressure or opinion cannot influence a judicial decision, it certainly can and there are numerous examples of it such as the famous case of "*Roe v. Wade*"(410 U.S. 113 (1973)) being overturned by "*Dobbs v. Jackson's Women Health Organization*".(No. 19–1392) The pro-choice supporters had a field day. I am merely saying that it is not always the case as seen in the examples I have discussed hereinabove. Interpretation of law by means of judicial reasoning is not a scientific process or scientific experiment being performed. The judges have to see all the facts of the case, the applicable law, interpret and apply said law in the instant case. They do not necessarily see the conditions of society for their decisions. They will either see what the law says or would uses sources of law where the case is such that there is no answer in the law. Lastly, the notion that the doctrine of stare decisis can lead to rigidity in the law is correct to a certain extent. Law cannot further develop if judges keep on applying past precedents to every case.

However, this is also dependent on the fact of new or similar cases coming to a court. Stare decisis is applied on the same cases. The emphasis is on the same. It can lead to the development of law that can be used for years to come. Examples can be of the various equitable remedies, or the precept of promissory estoppel etc. And of course, should there be an error in precedent, the judge is not bound to follow it. Not to mention, a precedent can be overruled or even distinguished in the instant case. (Munir 2014) Of course, the reason he forgets to mention the fact that precedent can be overruled is due to the fact that in the USA, the Supreme Court has a fixed bench of 9 judges who always hear the case. Hence, a precedent cannot be overruled by the same court in the USA except in appeal to the appellant court. In the case of the USA however, they can review their judgments.

Let us now move onto his theory of justice. For Pound, justice is the end means of law. He believes that justice can be achieved with and without law. 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. Hence, Pound despite being a strict positivist does not subscribe to the view that the judge is a law maker. He believes that the judge either applies the law or he uses his discretion when he cannot apply the law. And by discretion he means, that he considers natural justice or equity and good conscience of which he is a big admirer and more. Thus, he is a believer of the judge being a discoverer of law rather than a maker of law. This is very strange considering that he is a positivist. However, his notion of justice without law is nothing more than a judge falling back towards history, towards sources of law such as customs, norms, principles, natural justice, equity etc in order to interpret and apply the law. The judge is not there to administer justice. He has but one job to interpret and apply the law and to resort to the sources of law when the statute is silent.

Conclusion

We've now discussed and understood Roscoe Pound's mechanical jurisprudence and what it entails. We've understood that Pound believes that law cannot be developed purely by logic alone and that it needs to be substituted for the human conditions in society. That Pound believes that law can be developed purely on the basis of the change in human conditions in society. That a rigid system of law developed purely by the doctrine of stare decisis does not develop law at all and instead stagnates it. We've also understood that Pound believes that justice is divided into 2 types, justice which has a pre-legal element involved and justice with a legal element involved. What he calls justice with law and justice without law. That in the former, the judge is applying the strict rigid principles of law and in the latter the judge uses his discretion and applies the means of equity, natural justice, good conscience etc. That he was a firm believer of a judge being a law discoverer rather than a law maker despite being a positivist. We've understood with examples that the making and development of law is not contingent on the change in human conditions of society, that logic is

substituted but not with the human condition, but rather with the means of equity, natural justice, morality, good conscience etc and that it is the natural development in any legal system. We've also understood that Pound believes in the practical application test as he is legal pragmatist but that such an application is impossible in application. And that he has certain misconceptions about the doctrine of stare decisis.

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