

INTRODUCTORY CONCEPTS ON SOCIOLOGICAL JURISPRUDENCE: JHERING, DURKHEIM, EHRLICH

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Introduction

In his concept of Law, Hart describes his enterprise as being a study in “descriptive sociology” all the while explaining the rules according to which people in a society act and react. While undeniably a positivist theory of Law by his own admission, Hart’s theory tends to lean on and allude to concepts of sociological theory whose main and pervasive message is that “law is a social phenomenon”. To further clarify this concept, sociological jurists tend to focus on studying how law comes into existence and the manner of its operation and its impact on those to whom it applies. In so doing this school of thought goes beyond simply looking at the nature of law in legal terms but rather closely examines the workings of society in general by relying heavily on social sciences such as sociology, history, political science and economics to build a fuller picture of the workings and nature of law.

Sociological Jurisprudence has a long and distinguished history and can be traced as far back as the writings of Hume who in “*A Treatise on Human Nature*” argued that law’s origin did not lie in a peculiar common conception of human nature at all. According to Hume, law owes its origins to social conventions and was in itself a developing social institution. In addition to Hume’s start on describing law as a social phenomenon, Montesquieu put forward the idea that law originated out of social custom and good laws therefore had to be in accordance with the spirit of the society. Other jurists over the years like Weber, Durkheim, Pound, Comte and many more also contributed to this school of thought forwarding various views on how law can be understood in the wider context as a social phenomenon theoretically, but also drawing on real and independent studies of society.

There is no consensus and common thinking that can readily be identified as the central approach to sociological jurisprudence because of the wide range of areas of studies that have influence on the development of this school of thought. However, there are some core basic assumptions which characterize the thinking of a good proportion of sociological jurists including the following ideas:

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- Law is only one of a number of methods of social control and as such it is not unique in its function and place in society.
- Law must be seen as being open to modification through the influence of various social factors as law is not a closed system of standards and structures that are purely legalistic.
- Sociological jurists tend to emphasize more on the actual operation of the law arguing that this is where the real nature of the law may be seen rather than in theoretical and academic sources.
- Sociological jurists disagree with the approach of the *Natural Law* schools that rely on absolute values as the basis of law. Instead the *Sociological Jurists* take a relative approach and regard law as a socially constructed reality.
- Sociological jurists also disagree with the command notion of law favored by the analytical jurists who see law as a set of enforceable norms set down by an identifiable sovereign. As far as most sociological jurists are concerned, law bases itself in social customs that governments must enforce.

So, there are numerous worthwhile theories that can be looked at and common features that can be observed. For the purposes of this note, certain prioritization has to be made to cover some of the core theories within the school of thought. It is therefore necessary once more to select proponents of sociological jurisprudence to study the development of the theories. The theories advanced by Rudolph von Jhering, Emile Durkheim and Eugen Ehrlich will be introduced in this note, and a further note will address Dean Roscoe Pound and Max Weber. However, the rationale for selecting these sociological jurists lies in the fact that they all viewed sociological jurisprudence as describing and explaining how the law changes in society and advanced some of the most influential concepts in this school of thought without which any discussion of the theory would be inadequate.

Rudolf von Jhering: Law and Social Purpose

Generally credited as being the father of sociological jurisprudence, Jhering's theory of law bases itself on social interests. In short, for Jhering, law exists to serve social interests. Law according to Jhering is: "the sum of conditions of social life in the widest sense of the terms as secured by the power of the state thorough the means of external compulsion".

Jhering highlights the role of coercion (external compulsion) in securing the purpose of the law which is the condition of social life. For Jhering, law consists of those rules laid down by society that have coercion. This notion of coercion is similar to the notion emphasized by command theorists. Since the state is the sole possessor of coercion in society, it is the only source of law. The criterion

that distinguishes law from ethics and morality is therefore lies in the fact that Law is recognizable and realizable due to the force of the state.

However, unlike command theories, Jhering goes further in identifying coercion as the outer side of law while he states that norms make up the inner element of law. The norm is a proposition of a practical kind (or rule) in as much as it is a direction for human conduct and Jhering describes it as an abstract imperative. Abstract imperatives in the ethical world order which Jhering describes are social imperatives such as law, morality, ethics etc. However, laws are regularly laid down by the state. The legal imperatives are directed to the organs of the state that are entrusted with the management of coercion. Thus norm is a purely formal element leading to the core concept of the coercion which is central to Jhering's theory.

As both norms and coercion are formal elements of law as per Jhering, they do not inform the reader of the specific contents of the law. It is however through the content of law that the purpose served by law in society may be revealed. While a key consideration, this therefore means that the content of law is infinitely varied and relative to the different societies. There is thus the possibility of describing the contents of law and social conditions of life. It is vital to highlight that for Jhering, law cannot make the same regulations for all the time and for all the people. It must adapt them to the conditions of the people to their degree of civilization and to the needs of the time. The standard of law is not *truth* (which is an absolute) but *purpose* which is relative (even if they may on occasion resemble each other) and this purpose is to secure conditions of social life.

Conditions of social life include the condition of physical existence as well as those goods and pleasures that give one's life its true value in his judgment. All legal principles for Jhering can be reduced to the security of condition of social life. The conditions of social life as related to the attitude of law toward them are three types: (1) extra-legal, (2) mixed legal, and (3) purely legal. Extra-legal condition of life belongs to nature and man receives them without expending any effort. Law has nothing to do with man in nature. The *mixed-legal* condition belongs exclusively to man and includes preservation of life, reproduction, labor and trade corresponding to his instincts of self-preservation, sex and acquisition and law comes to assist these instincts when they fail. The purely legal conditions are those that depend entirely on legal command for e.g. the command to pay debts or taxes.

Jhering insists that the realization of the law by the state enables the individual to desire the common interest as well as his own individual interest, thus individual interest becomes part of social purpose by connecting one's purpose with the interests of others/the society. The reconciliation between the interests of the individual and those of the society is achieved through the levers

of social motion. Society acts upon individuals through two basic motives of egoism and altruism. The egoistic levers (of social motion) are made up of reward and coercion while the altruistic levers are made up of feelings of duty and love.

Jhering clearly indicates the place of law in fulfilling a clear social purpose of advancing the interests of society. But his critics believe that he fails to clarify or determine a way in which one can deal with conflicting purposes and interests thereby making his theory such that there will be a heavy reliance on the concept which does not allow for a proper balancing of interests between the individual and collective interests. To clarify, it is in fact likely that the social motions of the levers of reward and coercion can subjugate individual interests instead of reconciling them. Moreover to say that deeply abiding conflicts of interests can be eliminated by feelings of duty and love seem inadequate in truly providing for mechanisms for balancing interests.

Another area of weakness of the theory may lie in the fact that while the main concern of his theory is to consider those conditions of man and society that are independent of law, or those conditions that emerge prior to law and that define law's function and goals, it would be reasonable to expect an inquiry into extra-legal sources of law in detail. However, Jhering's subsequent inquiry confines itself to analyzing concepts and techniques of law instead of clarifying objective conditions and purposes that call for the application of law and define the functions which makes the theory somewhat too limited compared to the wider scope that would be expected from a theory of this nature.

Emile Durkheim: Social Solidarity

Emile Durkheim, a French sociologist, is widely considered to be the father of sociology. While clearly not a lawyer or a student of law, Durkheim wrote on legal issues ranging from criminal process to the law of contracts. His contribution to sociological jurisprudence is undeniable. In his various works, and particularly the book titled "*Division of Labor in Society*" he deals with the issue of law in society. He asserts that law was the standard by which any society could be evaluated since "law reproduces the principal forms of social solidarity". To clarify this statement, he makes a distinction between two types of such social solidarity:

- *Mechanical solidarity*: According to Durkheim, mechanical solidarity prevails in small scale homogeneous societies. Durkheim assumes that most laws in such societies would be of a penal and repressive nature since the entire society would take an interest in criminal activity and would seek to suppress and deter it. In short, the focus of law in societies that form mechanical solidarity is more on criminal law rather than civil law and is more concerned with punishment and suppressing anti-social activities.

- *Organic solidarity:* Durkheim states the organic solidarity is found in more heterogeneous and differential societies where there is a greater division of labor as well as greater differences between individuals. This more pronounced division of labor means that people advance/are positioned in society based on merit. Moreover, in such societies there is less of a common societal reaction to crime as the people come from many different backgrounds and so law becomes less repressive and more restitutive.

Durkheim's ideas of social solidarity like the idealist and natural law methodologies is capable of being filled with whatever content one wishes of it, ranging from liberty to the suppression of liberty, from social progress to social reactions and so on. This makes the theory somewhat too ambiguous in one sense where clearer parameters would have been useful.

Eugen Ehrlich: Law in the Inner order of Human Association

For Ehrlich, the center of legal development lies not in legislation or juridical science, or judicial decision but in society itself. It is the inner order of association not legal proposition that determines the fate of man. The explanation for social phenomena comes not from the juristic construction but by inferring the underlying modes of thought from fact. Accordingly, people regard their rights as issuing from relations of one person to another and not from legal propositions about those relations. Thus the state precedes the constitution that family precedes the order of the family, possession precedes ownership etc. Thus the Inner order of human association comes temporally before legal propositions, but is also the basic form of law from which legal propositions are derived.

Ehrlich explains that in social association, human beings come together and recognize certain rules of conduct as binding. Gradually, they regulate behavior with the rules. Examples of rules, according to Ehrlich, include rules of law, work, religion, ethics, decorum, tract, etiquette, fashion. Ehrlich maintains that the legal norm is of the same nature as all other rules of conduct. The essential compulsion behind the legal norm is social compulsion.

The state is merely one legal association among numerous others such as family, religious institutions and corporations. Consequently, there are many legal norms that have not been expressed in legal provisions of the state. The function of the state norms of compulsion is to protect norms formed in society and to protect the various institutions of the state. There are social facts of the law that exist in the conviction of an association of people. These facts are usage, domination, possession and declaration of will. Norms of law are derived from these facts. State compulsion is not necessary for this process.

These facts of law affect legal relations in three ways: a) they give enforcement to these relations, b) they control, hinder or invalidate these relations and c) they impute legal consequences to their relations that are not derived directly from them. Only one variety of legal norms, namely the norms of decision is state-made. The transformation of state norms into a fundamental legal norm takes place when those norms become part of the living law. The living law (the law as it actually exists in society) is always in a state of change and is always ahead of the state law. It is the task of jurisprudence to solve this tension between the two. It is thus a product of social developments as well as a stimulus of them. The task of the jurist is technical whereas the social facts of the law help in resolving this tension. However, where the social facts of the law are not so clear, the jurist is to seek guidance in principles of justice.

Over time, this theory has received some criticisms especially from jurists like Kelsen. Some of the common problems often associated with the theory include the following:

- This theory suffers from the problem that it fails to distinguish law from customs and morals.
- The theory points out basic elements governing human communities that underlie the law but the basic problem of resolving conflicts remains uninvestigated. Especially since it does not even deal with the problem of conflicting interest.
- The conception of the living law does not take an adequate account of the differences of social institutions that exist in different societies.
- The theory treats the distinction between law and custom too simply, and thus fails to analyse how law and custom influence each other.
- Social institutions for Ehrlich arise spontaneously, thus there is an automatic ordering of various social relations such as marriage, family associations, possessions etc. However, such complex and far-reaching forms of social relations do not sprout out spontaneously.
- The interplay between law and custom may not be as pervasive as Ehrlich suggests (some laws may not have anything to do with customs and still be hugely important for e.g. tax).
- Law is not always an expression of the custom of those whom it governs as it also applies to infants, incompetents, etc.
- Law is often a deliberate and conscious act to alter certain practices found in customs and usages. This makes law far from being an expression of customs because it may contravene them.
- There are two aspects of custom that need to be distinguished namely custom as a source of law and custom as a type of law. This distinction is quite familiar in international law. Ehrlich fails to make this distinction.
- Ehrlich distinguishes between legal norms created by the state for

specific state purposes such as those needed to protect constitutions, finances, etc. and legal norms whereby the state contributes only its sanction to social facts. However contrary to his conclusion regarding the importance of customs, it seems that deliberately created law for specific state purposes has been greatly expanding in response to modern social conditions and this has increasingly pushed custom to its place of innocent irrelevance.

The above mentioned theories could have received greater attention with only one theory being explored at a time. Yet, these notes are merely meant to briefly introduce the concepts, and a general introduction to concepts and the roots of the theories paves the path to further reading and inquiry on the themes highlighted and other theories. Having started to introduce the vast body of theories that make up some of the earlier theories within the vast body of Sociological Jurisprudence, the discussion is far from complete. At this point, what this note should hopefully have achieved is to create an awareness of the vital links between law and society and law within society. The theories of Roscoe Pound, Max Weber and Karl Marx should also be seen to fully cover the themes at hand. Moreover, it would also be vital to cover some of the very recent and modern theories from Michel Foucault and Jurgen Habermas which also make up part of the concepts of law and society. ■

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