

# SOCIOLOGICAL JURISPRUDENCE: IT'S HISTORY, APPLICATIONS AND TRENDS

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## **Abstract**

*Sociological jurisprudence is a legal theory which is the result of understanding the sociology of law. It deals with the question on how does law affect society. This paper traced the personal and professional attributes that shaped the proponents' ideas and arguments for sociological jurisprudence and the factors that contributed to this juristic thought. It further identified the applications and trends of jurisprudence anchored on social sciences specifically the sociological jurisprudence. It used the historic-genetic approach of research method. The identification of proponents was mainly based on Fernando's A Course in Legal Theory and the Routledge's Jurisprudence 2010-2011. Result showed that the emergence of sociological jurisprudence was caused by the growth of social sciences in the later part of the 19<sup>th</sup> century. Legal formalism which was heavily represented by positivism served as a precursor to this juristic school. The birth of sociology in Europe as a new science and the pragmatism in USA paved the way for its wider acceptance.*

**Keywords:** sociological jurisprudence, law, pragmatism, legal formalism

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## **1.0 Introduction**

Laws are so pervasive that they affect every human individual and society (Leiboff & Thomas, 2004) - from the individual's rights and his/her an obligation towards society and the latter's duties to protect the former's rights and to ensure compliance to international laws and treaties. But having a common definition of law and its universally accepted to "what- law-ought-to-be" has remained to be elusive for new philosophies of law have emerged especially for the last century.

From the antiquity of western philosophies of law to critical legal studies and emerging legal theories in the late 20<sup>th</sup> century, governments and legal communities around the world have witnessed varied philosophies of law. But beyond these learned disputes by the different schools of legal thought much desire is needed to critically examine the factors that

contributed to their respective emergence and its contemporary legal applications. It is in critical investigation for an offered jurisprudence that secures the confidence and acceptance of its applications. As succinctly stated by Aquino (2006),

*"When one is dead-set on knowing (which usually translates into "memorizing") codal provisions and jurisprudential citations, then there is hardly any room for the highly educated adventure that allows one to ask – and to attempt at solutions..."*

One juristic school of thought – sociological jurisprudence, has increasingly influential in legal applications since it emerged. From the social science use to determining facts to making laws not only in the state level but in the international scene,

it is evident that this school is poised to remain one of the dominant philosophies of law. It is in this context that this study on sociological jurisprudence and its history, applications and trends was conducted.

## **2.0 Review of Related Literature**

### **2.1 Definitions and Principles of Sociological Jurisprudence**

Adhering to the “is” and “ought-to-be” approach in the study of jurisprudence, this juristic thought integrates law and the social sciences. It seeks to understand law as a particular social phenomenon and also as a means of social control for social change (International Encyclopedia of the Social Sciences, 1998). Hoebel, as cited by Vago (1991), characterized law as a response to social needs.

It is sociological because of the recognition of law’s social function (Leiboff & Thomas, 2004). Salonga and Laurel (n.d.) stated that “we cannot understand what a thing is unless we study what it does. In effect, legal development is the key to the nature of law (Ibid.). Fernando (2012) succinctly stated that sociological jurisprudence is a legal theory which is the result of understanding the sociology of law.

According to Leiboff and Thomas (1999),

*“Pound’s sociological jurisprudence is therefore law-centered but the techniques he used to develop his theory were based on technology and science. Hence, his is revolutionary.”*

Vago (1991) adds the following:

*“Sociological jurisprudence is based on a comparative study of legal systems, legal doctrines, and legal institutions as social phenomena and*

*considers law as it actually is – ‘law in action’ as distinguished from the ‘law it appears in books’”*

Fernando (2012) stated that sociological jurisprudence is a legal theory which is the result of understanding the sociology of law. It deals with the question on how does law affect society.

### **2.2 Emergence of Sociological Jurisprudence**

Carrington’s “Aftermath” in Cane and Stapleton; Essays for Partick Atiyah (1991) as quoted in Salter and Mason’s (2007) Writing Law Dissertations: An Introduction to the Conduct of Legal Research traced the emergence of sociological jurisprudence as presented:

*“By the start of the twentieth century in North America, formalism was rapidly losing its grip upon legal education, partly in response to the influential work of legal realists but mainly because of wider cultural and social changes”.*

This revolt against formalism (preoccupation with the technical and logical aspects of law) was attributed to Savigny’s reaction against natural law, Jhering’s attack on German Pandectists and to Maine and the work of anthropologists and early sociological jurists (International Encyclopedia of the Social Sciences).

Jurisprudential literature revealed that early seminal writings of early sociologists paved the way for the sociological approach in the study of law. In Hume’s *Treatise on Human Nature* in 1740, it was argued that the law owed its origin not to some quirk of human nature, but to social convention, and who described law as a developing

institution. Also, Montesquieu's *Spirit of Laws* in 1748 put forward the view that law originated in custom, local manners and the physical environment and asserted that good laws were those which were in accordance with the spirit of society (Jurisprudence, 2011).

The writings of F. Adams Ross and Lester F. Ward greatly influenced the legal philosophy in American sociological jurisprudence. In fact, its principal figure relied heavily anchored his argument that law should be studied as a social institution (Vago, 1991).

In short, the emergence of this juristic thought was due to the birth of sociology in the late of 19<sup>th</sup> century (International Encyclopedia of the Social Sciences, 1998). It is important to note that France was considered the birthplace of sociology through Emile Durkheim (Ibid.)

Deeper investigation disclosed that influences of Enlightenment and the social changes in the 19<sup>th</sup> century that both generated social problems and reform movements considered to be the offshoots of Industrial Revolution (1750-1825) gave way these modern social investigations through social sciences. Industrial Revolution brought demographic, ecological effects and social structural changes. Vago rightly said that *as societies become larger, more complex, homogeneity gives way to heterogeneity*.

The secularized liberty and equality and religious skepticism which influenced in the legal and political affairs led to formalism (New Catholic Encyclopedia, 2003). In the field of jurisprudence, formalism took its form in positivism.

But again, as mentioned in the preceding section, formalism has waned its authoritativeness for new social changes needed new and effective approach. Thus, Leiboff and Thomas (2004) summed it

that the emergence of a new science of sociology in Europe and of pragmatism in USA served a precursor to Pound's sociological jurisprudence.

### **3.0 Methods Used**

The main research method used was the *historico-genetic* approach. The study analyzed the factors that influenced the emergence of sociological jurisprudence and so with the proponents' as well as their legacy to jurisprudential thought. Also, it traced the stages of the school's of thought development. The identification of proponents was mainly based on Fernando's *A Course in Legal Theory* and the Routledge's *Jurisprudence 2010-2011*. These are Eugen Ehrlich and Roscoe Pound for the former while Rudolf von Jhering, Max Weber and Emile Durkheim for the latter. It is important to note that Pound was also included in the list of Routledge's. Policy Science Approach (McDougall) was not included in the list due to limited references.

### **4.0 Results and Discussions**

The personal and professional attributes that shaped the proponents' ideas and arguments for sociological jurisprudence and the factors that contributed to this juristic thought are herein discussed.

#### **4.1 Eugen Ehrlich (1862-1922)**

Life and Works: Born in Czernawaz, the capital province of Bukovina, then a part of the Austrian Empire, Ehrlich studied law at the University of Vienna and became Privatdocent of the said university (International Encyclopedia of the Social Sciences). He is considered as the founder of the sociology of law (Ibid.)

His *Fundamental Principles of the*

*Sociology of Law* which was published in 1913 contained the following: discussion of sociological jurisprudence, development of law in different countries, importance of legal history and juristic science, and the study of the “living law”.

He supported Savigny’s line of thinking but with more emphasis on the present, with much more practical and active purpose (Fredmann, 1967).

On Law: Ehrlich defined jurisprudence as merely a branch of sociology and extends the boundary of jurisprudence almost to absurd lengths (Salonga and Laurel). He emphasized that positive law cannot be understood apart from the social norms of the living law (Ibid.) It is because, according to him, law originated from social facts and depends not on state authority but on social compulsion (Lloyd, 1969). In his Foreword as quoted by Vago (1991), he emphasized that the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.

Central point of Ehrlich’s approach narrowed down to minimization of the differences between the law and other norms of social compulsion. As to its difference that of Pound’s, the former concentrates on law outside the courts while it is on litigation for the latter (Fredmann, 1967).

He advocated the theory of the free law, a school opposed the jurisprudence of concepts (International Encyclopedia of the Social Sciences, 1998).

As defined by Bodenheimer (1974),

*“Free-law movement stressed the intuitive and emotional element in the judicial process and demanded that the judge should find the law in accordance with justice and equity.”*

He adds the following:

*“If law is unclear or unambiguous, judge should decide according to the dominant conceptions of justice or according to his subjective legal conscience.”*

## **5.2 Roscoe Pound (1870-1964)**

Life and Works: Pound was born and reared in Lincoln, Nebraska by a lawyer-father and a mother who worked in a university. He obtained his PhD in Botany at the University of Nebraska. In 1901, he was appointed as commissioner (auxiliary judge) of the state Supreme Court and became a member of the law faculty on the following year. From 1916 to 1936, Roscoe Pound became the Dean of the Harvard Law School and eventually held a university professorship chair (International Encyclopedia of the Social Sciences, 1998).

His 1906 and 1907 Addresses to American Bar Association aroused storm of protest for they emphasized the need for sociological jurisprudence. His articles: *Mechanic articles: Mechanical Jurisprudence* (1908), *Liberty of Contract* (1909), and *Law in Books and Law in Action* (1910) criticized the mechanical application of outmoded legal processes and procedures and some aspects of common law (Ibid.)

Pound is considered the principal figure in sociological jurisprudence (Vago, 1991) and founder and leader of American sociological jurisprudence (Salonga & Laurel, and Bodenheimer, 1974).

His intellectual ingenuity was strongly influenced by James’s pragmatic philosophy (Bodenheimer, 1974) and relied heavily on the findings of early sociologists in asserting that law should be studied as social institution (Vago) and in creating a legal theory in translating “law in books” to “law

in actions” (Leiboff and Thomas, 2004).

Also, Hegel’s philosophy of historical evolution greatly influenced social engineering based on balancing social interests.

On Law: Pound advocated the law’s role in facilitating social cohesion with minimum friction and waste. Along with many scholars, he emphasized that the major function of law in modern society is social engineering – a purposive, planned, and directed social change initiated, guided, and supported by the law of which its purpose is to control interests and to maintain harmony and social integration.

Routledge’s Jurisprudence highlights the following:

*“Claims and interests can be discovered through the analysis of social data, including the incidence of legal proceedings and legal proposals ... these claims and interests exist independently of the law and it is the function of the law to serve and reconcile them for the good of society as a whole.”*

As cited by Vago (1991), Pound stressed the following:

*“Law was specialized form of social control that exerts pressure on person in order to constrain him to do his part in upholding civilized society and to deter him from anti-social conduct, that is, conduct at variance with the postulates of social order.”*

### **5.3 Rudolf von Jhering (1818-1892)**

On Law: Rudolf von Jhering emphasized that law is an instrument for serving the needs of human society (Lloyd, 1969) and that its purpose is to secure the conditions

of social life (Sinha, 1993). Thus, legal principles should be reduced to the security of social life (Ibid.) and that the success of a legal process was to be measured by the degree to which it achieved a proper balance between competing social and individual interests (Lloyd, 1969).

As to the tool in balancing conflicting interests, von Jhering took up the “social utility from the principles of Bentham’s utilitarianism.

### **5.4 Max Weber (1864-1920)**

Life and Works: Weber grew up in Germany during the Bismarckian era and was raised by a lawyer-father (International Encyclopedia of the Social Sciences, 1998). He attended several German universities of which it paved the way to his prominence for he became as government consultant and professor in economics. In 1898, he suffered nervous breakdown and took a leave of absence from his university engagement and then lived as private scholar then briefly returned to his academic works immediately after his death (Ibid.).

Max Weber played a crucial role in the development of sociology and remains an ever present force in contemporary sociology (Vago, 1991). He is opposed to the holistic intellectual tendencies advanced by Marx and Hegel.

His unfinished work “Wirtschaft und Gesellschaft” ranks among the classics of modern social sciences with wealth of concepts formulated on the basis of a wide range of comparative historical materials (Vago, 1991).

As revealed in this work, Weber had a diverse intellectual antecedents such as Kant’s distinction between practical and pure reason, Hegel’s distinction between state and society, utilitarianism, and Marx’s materialism. Also, his legal training and

emphasis on conflict characteristic of Nietzsche and the Social Darwinists markedly reflected in his work.

On Law: For Weber, there are three (3) elements to be considered law. These are 1) external pressures in the form of actions or threats of action; 2) these always involve coercion or force; and 3) implementers of threats whose official role is to enforce the law (Vago, 1991). As cited by Vago (1991), Weber added the following:

*“Starting with the idea of an order characterized by legitimacy, he suggests: An order will be called law if it is externally guaranteed by the probability that coercion (physical and psychological), to bring the conformity or average violation, will be applied by a staff of people holding themselves specially ready for that purpose.”*

He typified legal systems into legal procedures which are “rational” and “irrational”. The former is based on logic, scientific methods while magic and faith in supernatural for the latter. His is the concept of rationality characterized as a crucial feature of modern legal systems (Ibid.). According to Bodenheimer (1974), this is Weber’s interesting contribution to legal theory.

### **5.5 Emile Durkheim (1858-1917)**

Life and Works: Emile Durkheim was born in the town of Epinal in the Vosges and was raised with a Jewish parentage of which some of his forebears were rabbis (International Encyclopedia for the Social Sciences, 1998). He was schooled in the prestigious Ecole Normale Superieure in Paris. From 1885 to 1886, he took a leave of absence from teaching in some provincial schools in Paris to study sociology in

Marburg, Berlin and Leipzig raised with a Jewish parentage of which some of his forebears were rabbis (International Encyclopedia for the Social Sciences). He was schooled in the prestigious Ecole Normale Superieure in Paris. From 1885 to 1886, he took a leave of absence from teaching in some provincial schools in Paris to study sociology in Marburg, Berlin and Leipzig.

Part of his doctoral dissertation which is *The Division of Labor in Society* outlines his thesis of law in society (Vago, 1991). His last major work entitled *Elementary Forms of the Religious Life* was published in 1895.

Though his academic interest was in philosophy, he got strong concern with political and social applications. In fact, he was very much involved in political affairs such as in the Dreyfus case and in World War I. Durkheim’s solid intellectual traditions such as English utilitarianism, German idealism and French background were reflected in his frameworks.

A French sociologist, Emile Durkheim is considered as one of the two principal figures of the modern phase of sociological theory and made a serious contribution to the development of systematic legal sociology (Gurvith as quoted by Vago, 1991)

On Law: For Durkheim, the function of the law is to generate social solidarity (Jurisprudence, 2012). This social solidarity is classified into mechanical and organic. The former focused in small scale communities while heterogeneous and differentiated for the latter. These two types of solidarity logically generated two types of law: *repressive* (or penal law) – mechanical solidarity and *restitutive* (emphasis on compensation) – organic solidarity.

He posited that crimes reinforces the social reality of moral order and strengthens the solidarity of the collective (Jurisprudence). It is because he believes

that crime and punishment work together: crime violates norms which are reinforced by punishment, which reasserts the moral order (Ibid.).

The next describes the applications and trends of jurisprudence anchored on social sciences specifically the sociological jurisprudence.

### **5.6 Applications and Trends**

Monahan and Walker (2006) identify four major uses of social science in law. These include the uses to determine facts, to make law, to provide context, and to plan for litigation.

A celebrated case in 1908, *Miller v. Oregon* of the US Supreme Court, became an opportunity for putting Pound's sociological jurisprudence into action. Louis D. Brandeis who represented Oregon filed the "Brandeis Brief" to the Court of whom it only included 2 pages of legal citations but rich in statistical, sociological, economic and physiological information (Brandeis Brief, 2002). According to Salonga and Laurel (n.d.), the acceptance of the Brandeis Brief means that the courts must now consider the real social problems instead of confining the argument to abstract logic.

The Brandeis Brief became a springboard for social sciences used in determining facts. Professor Kenneth Culp Davis (as cited by Monahan and Walker) called these facts in their application to law as "adjudicative facts". He defined it as follows:

*"When an agency (or court) finds facts concerning immediate parties-what the parties did, what the circumstances were, what the background conditions were – the agency (or court) is performing an adjudicative function, and the facts*

*may conveniently be called adjudicative facts."*

As to the use of law in determining facts, three areas cited by Monahan and Walker of which social science can determine adjudicative or case-specific facts include trademarks, obscenity and damages. In *Elgin National Watch Co. v. Elgin Clock Co.*, US District Court, District of Delaware (1928), *Zippo Manufacturing Co. V. Rogers Imports, Inc.*, US District Court, Southern District of New York (1963) and *Kis v. Foto Fantasy*, US District Court, N.D. Texas (2001), utilized social science evidence through surveys in establishing consumer confusion. However, Rule 401 of the Federal Rules of Evidence sets guidelines on the admissibility of social science research. These include the *materiality* and *probative value* (Monahan and Walker, 2006).

Social science can also be used to make law. Professor Kenneth Culp Davis (as cited by Monahan & Walker) termed "legislative facts" as legal application of social science. He defined legislative facts the following:

*"When an agency (or court) wrestles with a question of law or policy, it is acting legislatively, and the facts which inform its legislative judgment may conveniently be denominated legislative facts."*

Numerous decisions by the federal appellate courts and the United States Supreme Court revealed that legislative facts have already been accepted for the last sixty years (Ibid.) Specifically in the constitution law, social science was utilized in supporting the First, Sixth, Eighth and Fourteenth Amendments of the US Constitution (Ibid.). Take the case of *Brown v. Board of Education of Topeka*, Supreme Court of the United States (1954) which changed the

landscape in the segregation of children in public schools.

The third use of social science is to provide context. It is the combination of the elements of each of the two conventional applications in providing judges and juries with a general context for determining factual issues in particular cases such for future, present, and past acts (Ibid.). For future acts, social science can be utilized for predicting behavior when applying for bail, awaiting trial and in some pretrial release decisions. For present acts, profiling can be used in detecting passengers for possession of illegal weapons and drugs (Ibid.). Social science can also provide relevant information in determining facts occurs when a fact is alleged to have happened in the past. In *People v. Poddar*, California Court of Appeal (1972), the appellate court's decision in finding Poddar guilty of 3<sup>rd</sup> degree murder was overturned by the California Supreme Court. The latter found the jury's instructions to be defective because it excluded the anthropologist's testimony. The appellate court stood on the ground that only experts on mental sciences can testify on the existing penal law's inclusion of "diminished capacity" In effect, the California legislature abolished diminished capacity as a defense to crime in 1982 (Ibid.).

The fourth use of social science to law is to plan for litigation of a case (Ibid.) These include in choosing the venue, selecting jurors, and the instructions of jurors. Public opinion polls and publicity can sway venue selection decisions. Also, in *Mitchell v. Gonzales*, Supreme Court of California (1991), the court denied the BAJI No. 375, the so-called proximate cause instruction but in the Court of Appeal's decision – it was found out that the former erred in denying the plaintiff's request. Thus, it emphasized the importance of proper jury instructions.

The preceded section has revealed the significant application of social science to law for the last century. In fact, this juristic school specifically the sociological jurisprudence continued to grow a gathering momentum and a widening range of concerns (The New Encyclopedia Britannica, 2010). Its activist drive to maladjustments and inadequacies of the law has paved way to ad hoc remedies (Ibid.). Also, there is much evidence of the utilization of social science materials and methods in the study of law in proliferation especially in the United States (Cohen et al., 1958; Jones 1962 as cited in The International Encyclopedia in Social Sciences, 1998).

On the other hand, the growth of sociological jurisprudence greatly depends on the real advances of the sociology itself (Salonga and Laurel). The said authors had reservations considering that the methods used by social science specially sociology were not as predictive and universal as compared to natural sciences.

## **6.0 Conclusions**

The emergence of sociological jurisprudence was caused by the growth of social sciences in the later part of the 19<sup>th</sup> century. Legal formalism which was heavily represented by positivism served as a precursor to this juristic school. The birth of sociology in Europe as a new science and the pragmatism in USA paved the way for its wider acceptance.

Sociological jurisprudence will remain to be one of the dominant philosophies of law especially in legal applications for as long as social sciences particularly sociology secures its relevance to providing *facts* in solving social problems. Also, its pragmatic approach will strengthen its position as a more favored school of legal thought as long as the natural law or any of the other legal



philosophies will not be widely and universally accepted.

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