Encyclopedia of Law & Society: American and Global Perspectives

Sociological Jurisprudence

Sociological jurisprudence is often associated with Roscoe Pound (1870–1964) and through him with the American legal realist movement. However, there are historical and theoretical reasons for including several European scholars, such as the Polish-Russian jurist Leon Petrazycki (1867–1931) and the Austrian jurist Eugen Ehrlich (1862–1922), under this rubric. These scholars were critical of analytical jurisprudence for its conceptual formalism and neglect of empirical facts such as the role of social forces in creating the legal order and shaping legal behavior. They also argued that legal research, legal education, and judicial decision making should adopt the methods and insights of social sciences to counterbalance this shortcoming.

The founders of sociological jurisprudence distinguished themselves from mainstream sociologists, such as Émile Durkheim (1858–1917) and Max Weber (1864–1920), who were also interested in law, on one important point. While mainstream sociologists used law to study social developments and issues arising out of the rise of modernity, Petrazycki, Ehrlich, and Pound, and a generation later, Georges Gurvitch (1894–1965), employed social science to transform legal education and practice and to devise a scientific concept of law. At the center of this transformative legal project, there are theories and concepts of law that are empirically tuned and broader in scope than what most jurists recognize as the law proper.

Roscoe Pound

Pound criticized and challenged the legal formalism that dominated the American legal thought of his day for being mechanical, artificial, and out of touch with the needs of society. Instead, he argued for a jurisprudence that placed the human factor and condition, rather than logic, at the heart of its analysis. He borrowed and used insights from the philosophy of pragmatism and the discipline of sociology to develop a new approach to law, legal research, and legal education. This led Pound to argue that "law in action," not "law in the books," constituted the basis of law and legal institutions. He criticized the individualist theories and standards of *legal* justice to which lawyers adhered and instead urged both legal scholars and practitioners to work toward a concept of *social* justice that was informed by the standards of sociology.

European Jurists

European scholars went further than Pound by directly challenging the underlying ideology of legal positivism. They urged jurists to recognize the vital role that informal and unofficial mechanisms of social control played in creating legal institutions and molding legal behavior. In this way, the scholars confronted the jurisprudence of their time by presenting the social forms of law, rather than the rules posited by the state, as the basis of legal order. For them, the state could not be the primary source of law for the simple reason that its existence presupposed a form of law. Petrazycki and Ehrlich argued, each in his own way, for an empirically based concept of law that was **[p. 1410 ↓]** broader than state law and existed independently of any outside authority.

Petrazycki distinguished between forms of official law, supported by the state, and intuitive law, consisting of legal *experiences*, which, in turn, consist of a complex of psychic processes in the mind of the individual with no reference to outside authorities. Petrazycki's work addresses sociological problems, and his method was empirical; he maintained that knowledge of objects or relationships could be gained only by observation. However, he couched his theory in the language of cognitive psychology and moral philosophy rather than sociology. Consequently, his contribution to the development of sociology of law remains largely unrecognized.

In contrast, Ehrlich adopted a more pronounced sociological approach, developing a theory of law that focused on how social networks and groups de facto organized social life. He examined the relationship between law and general social norms and distinguished between positive law, consisting of the compulsive norms of state requiring official enforcement, and *living law*, consisting of the rules of conduct that people obeyed and that dominated social life. The latter emerged spontaneously as people interacted with each other to form social associations.

Petrazycki's and Ehrlich's distinctions between two primary forms of law were similar in that they both saw the foundational forms of law developing independently of the state and outside the sphere of positive law. They differed in that Ehrlich's living law emerged out of the need for groups or associations, while Petrazycki's intuitive law was a product of the individual's experience of psychic phenomena. Pound, on the other

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hand, distinguished himself from both Ehrlich and Petrazycki, identifying a discrepancy within state law. Pound recognized that law was only one among many mechanisms of social control, but unlike Petrazycki and Ehrlich, he did not call these alternative mechanisms law. Pound thought that law in action, which often diverged from law in the books, was also a form of state law. His distinction captured the discrepancy between what the courts say and what they do or between the expressed aims of a statute and its actual effects. Law in action, intuitive law, and living law are all products of empirical inquiry. They are formulated by comparing and contrasting them with the traditional concepts of law. However, this should not obscure the fact that scholars defined them in different terms to serve somewhat different legal ends.

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http://dx.doi.org/10.4135/9781412952637.n642
See also

- Durkheim, Émile
- Ehrlich, Eugen
- Gap Problem
- Gurvitch, Georges
- Informal Law
- Judicial Decision Making
- Petrazycki, Leon
- Positive Law
- Pound, Roscoe
- Realism, American Legal
- Weber, Max

Further Readings

Ehrlich, Eugen. (1936). Fundamental Principles of the Sociology of Law . Cambridge, MA: Harvard University Press (Orig. 1912).

Gorecki, Jan. (1975). Sociology and Jurisprudence of Leon Petrazycki . Urbana: University of Illinois Press.

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Nelken, David. "Law in Action or Living Law: Back to the Beginning in Sociology of Law." Legal Studies 4 (1984). 157–82. http://dx.doi.org/10.1111/lest.1984.4.issue-2

Petrazycki, Leon. (1955). Law and Morality . Cambridge, MA: Harvard University Press.

Podgórecki, Adam. "Unrecognized Father of Sociology of Law: Leon Petrazycki." Law and Society Review 15 (1980). 183–202.

Ziegert, Klaus A. "The Sociology behind Eugen Ehrlich's Sociology of Law." International Journal of Sociology of Law 7 (1979). 225–73.