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LAW AND SOCIAL INTERESTS

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Abstract
The paper is dedicated to an important domain of social science which examines the relationship of law and social interests. In the course of the development of legal science and its perception from the sociological point of view, a separate discipline, sociological jurisprudence, was born which targets law in a sociological way. As one of the founders of this academic discipline, Roscoe Pound made an immeasurable contribution to better understanding of law and legal phenomena. In this paper, the authors analyze Pound's doctrine of law from the angle of sociological concept of interests. A special focus was placed on the classification and gradation of interests, as well as on the relations between the results of the creation of law and the interests which exist in society.
Keywords: *law, interest, sociological jurisprudence, Roscoe Pound, legislation.*

Introduction

On the horizon of legal science and its development, an important place is reserved for a renowned American scientist, Roscoe Pound. His studious research of law and its connections to sociology exceeds the usual scope of the sociology of law. Offering a specific and autonomous disciplinary approach in the form of sociological juresprudence, Pound distinguished himself by analyzing law as a social phenomenon and by contextualizing and linking it to different interests which exist and are realized in society. By encircling law with society, Pound contributed to the efforts aimed at understanding law not only as a sprout of society, but also as an instrument for ensuring social development.

Sociological insisting on confronted interests as the basis for the existence of society is transferred into the domain of legal contemplations, whereas the social interests are deeply involved in the structure of the essence of law. Consiquently they

become the instrument for its understanding and the motive which drives the legal order towards activism, so that the goal of law would be eventually identified through resolving the conflicts of these interests. The core of the sociological jurisprudence, represented and promoted in the works of this author, is actually distinguished by the concept of interests, so that his "theory of interests lies in the conceptual core of sociological jurisprudence".[12] Pound himself underlines that his theory of interests was based on Jhering's idea "according to which interests are defined as claims, wants and desires, or (as I like to say) expectations which people assert de facto and which law must do something about if organized societies want to last longer, as it was convincingly pointed out by Llewellin". [9]

Social engineering, law and interests

Pound was acknowledged as being the first sceintist who clearly and resolutely formulated the idea of social engineering which is incorported in the foundation of the comprehension of law itself. "For present purposes I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence—in short, a continually more efficacious social engineering ". [10] With such an approach to the problem of law understanding, Pound builds the structure of social engineering whose meaning is reflected in securing the compromise in the process of resolving confronted social interests, all aimed at achieving an efficient functioning of society and eliminating the obstacles to social development. His claim that the law is primarily "the instrument of social control"[3] gives such a meaning to legal order which conseqently defines the role of jurists in a society. Namely, the role of jurists and legislators is to achieve such social engineering with „rational and consistent balancing of the interests existing in society".[5]

Social reality does not allow the realization of all (i.e. everybody's) interests, demands and desires; the corpus of possibilities for their realization is limited, otherwise, the existing social resources would be exhausted by unresolved conflicts and

unacceptable domination of one's interests over the other's. This is the reason why the social engineering is built with the aim to identify multiple interests in a systematic and well-planned way, to classify and evaluate them in an adequate way and to find optimal models for optimal solutions. In this context, law with legal rules becomes one of such models in the structure of social engineering. The evaluation of different interests leads us to justice, which is now comprehended as an instrument for their realization. Namely, we have been given a task to take Aristotle's acknowledgement of justice as an equal distribution of social goods and to translate it to the system for the realization of interests. And this would mean that the pendulum of the habit of the natural law's usual ethical understanding of justice is diverted towards social justice appealing to legal science and legal practice to build and apply this social-legal value. [1]

Pound's line of understanding the relationship between interests and law is based on the stand that law does not create, but only recognizes interests, while the people and society as a whole are the right address for clarifying the origins of interests. Law appears only when its reacton is needed as a result of not being possible to meet everyone's expectations. This is the matrix of the structure we encounter even in the situation of understanding law in the context of social relations which become legal only when a conflict arises between them; then the legal order enters the scene with the aim to create harmony and balance between people. The same situation is with interests - as long as they remain undisturbed, without controversies, confronted claims and conflicts between them, there is no need for law to interfere their regular realization. However, when a conflict emerges between them, the legal order will not allow the holders of interests to fight for their realization outside legal institutions, since such conflicts may obstruct the stability of legal order and hinder its historical development.

Entirely devoted to interests and the concept of interests, Pound enters the following elements into the goals of legal order: acknowledgement of certain interests; setting the boundaries for the recognition and realization of the interests through legal norms which are developed and applied in judicial and administrative procedures in accordance with an adequate technique; striving to secure the recognition of interests within certain boundarie. In this way, Pound's legal order is intervowen with interests, but also it is influenced by them. Indeed, law does not create interests, but accepts that

they existed in people and in society, even before they are regulated by law, which may lead us to conclude that the appearance, existence and functioning of legal order is actually preconditioned by the existence of interests created by people and society. „ The demands of human beings to own things and to work with things, i.e. to create, have been there for ever, and whenever a certain number of people got in contact, a conflict or a competition between individual interests occurred as a result of the competition between individuals or rivalry between groups, associations or alliances of people, or the competition between the individuals and such groups, associations or alliances - all referring to the attempts to satisfy human demands and desires“. [9]

Hence, Pound's assertion that law does not create but only recognizes social interests is quite clear. Although at first sight this postulate seems plain, in most cases it is not easy or simple to recognize a social interest. In order for the legislator to recognize a social interest at all, it is necessary to determine the precise position of that social interest in the legal order, as well as its relationship with other either individual or public, but already existing interests. This is a complex mental and logical operation whose execution requires certain experience and the knowledge of existing social interests, i.e. their characteristics and traits. Adequate recognition of social interests is of crucial importance for the legal order, but also for the entire social order. If the legislator cannot recognize a certain social interest in the right way, or cannot recognize it at all, this will certainly lead to the instability of both legal and social order.

Yet, no matter how the recognition of social interests seems important, it is not the most crucial issue in resolving the problem of stability of legal and social order. From the standpoint of law, after the indentification of a social interest, it is necessary to discover the method how to achieve that interest in an efficient way. Sole identification of a social interest without the possibility of its achievement does not contribute to establishing harmonical social relations. It is obvious that we are in domain of a very compound and complex problem where the discovery of an adequate instrument for the realization of the given social interest is of crucial importance. It is necessary to say that the same rules apply in the case of regulating a certain legal rule. Here it is important to secure that the legal rule will be applied. In most cases state ensures the application of a certain legal rule through the monopol of physical force. In case a state

is not able to ensure the application of a legal rule, then we can raise the question of the purpose of the existence of these rules. Consiquently, they will be treated as a dead letter and, it could be said, that such a state is not based on the rule of law. Also, a question is raised what happens in case there is a conflict between two social interests. Pound believes that such a dispute needs to be resolved by a judge who is expected to have knowledge, skills and experience that will help him determine clearly which social interest is in the concrete case more acceptable.

Pound's classification of interests

Investing his efforts into an adequate classification of interests, which would be the initial stake for a subsequent division of legal authorities and legal obligations related to allowing (or preventing) their realization, Pound offered various classifications of interests (individual, public and social; personal interests, interests in family relations, property interests…). We will hereby hold to his basic classification of interests into individual, public and social.

The individual interests include claims, demands or desires involved in a person's individual life; public interests are claims, demands or desires of politically organized society and its segments; and social interests are the demands of civilized society. Pound performed an additional classification of individual interests into: 1) personality interests or claims; 2) domestic relations interests or claims; 3) interests of substance or material interests, claims or demands related to our individual economic life, i.e. activity. [9] Thus, for example, the first group of individual interests should be understood as inseparable from indivudual's personality and they are created as a result of the aspirations which are embedded into the structure of individual's personality in order to secure his owness: physical and mental. Based on the knowledge on the historization of the reaction of law to these individual interests, as well as based on the stand of the contemporary law towards them, Pound performs their further classification, organizing them in the following way: „1) physical personality, (2) freedom of will, (3) honour and reputation, (4) privacy and various forms of sensibilities and (5) belief and opinion." [9] Physical personality, as Pound treats it in the context of the first group of individual interests, is, in essence, expressed by using the vocabulary of basic human rights, as

the right to physical and mental integrity. Here it is emphasized that the injuries to bodily integrity may be considered to be the first violation of one's right in the history of rights, along with an interesting explanation how to understand the reaction of primitive forms of human organizations to such incidents. Indeed, taking into account the organized reactions of primitive societies to individual bodily injuries, we can conclude that they did not consider them as the violation of individual interest. Bodily injury inflicted to an individual was deemed to be the violation of the interests of the entire group to which that individual belonged; such situations should not be recognized as the violation of individual interests, but as the violation of the interests of the entire group to which the individual belonged. „Therefore, first we have the ideas (1) on group interests in order to washoff the insult and (2) on social interest in order to prevent disorder, which appeared much before the idea on the individual interest of physical personality. These three ideas have gradually yielded the idea on individual interest which is ensured by individual right ".[9] After mastering the meaning of the physical part of one's personality, the subsequent development of human awareness and consecutive development of legal civilization bring us to the level of understanding the individual interest in relation to the injury of physical integrity, while the awareness of the existence of the mental part of personality will come later on, after the clarification of the initial ignorance related to individual nature of physical integrity. Pound analyzed in details all other sub-groups of individual interests (freedom of will, honour and reputation, belief and opinion), making the effort to connect and derive them from the physical personality in a specific way. When clarifying the point of the recognition of the freedom of belief and opinion, Pound underlines that it is a relatively new phenomenon in the field of law and ethics and creates a concept of interest controverises where, on one side, we have an individual interest (freedom of belief and opinion), which, at the same time represents a social interest, as the general interest of society, to ensure the freedom of expression of belief and opinion for all people. However, on the other side, we can encounter another social interest which is in conflict with the individual interest of the expression of free belief and opinion and then, it becomes necessary to resolve this conflict by evaluating which interest takes precedent. Thus, we will have the situations where the „individual interest, even if expressed as a social interest aimed at protection of freedom of belief

and opinion, must concede".[9] In our observations, Pound missed the opportunity to present the case of Sacco and Vanzetti as an example of such contorversies and the absence of his reaction to this case was duly noted. It seems that he had an opportunity to link his principled discussion on the topic of free beliefs and opinion with this concrete case from the court practice, particularly because he was criticized in legal literature for his passive attitude towards the case, which resulted in the violation of the right to fair trial and two cruel death penalities. Moreover, it should be taken into account that in this part of his "Jurisprudence" he quoted, intentionally or not (you can never know) the following: „Therefore, the social interest for the freedom of belief and opinion must be considered in relation to the social interest for general security and the social interest for the security of social organizations – political, religious, family and economic institutions. Such a point of view assumes a possible repression of public manifestation or public promotion of certain beliefs or disbeliefs which may have a character that may be attributed to the intention of demolishing social institutions or weakening the state authority. An example of such case can be found in the federal legislation on foreign anarchists from the previous century, i.e. on foreigners - communists." [9] (and the above mentioned case also involved two workers, immigrants, who belonged to the anarchist movement).

It is obvious that Pound consistently follows the same methodological orientation in describing all groups of interests and their additional classification to sub-groups; he is sifting them through a historical prism explaining their origin and development as a preface to describing the contemporary state of the relationship between the legal order and the given interests.

Public interests also represent an important group of interests in Pound's classification of interests and they are the result of the existence of political organization of society, the creation of its interests and the need to secure the realization of these interests. The existence of public interests was introduced into the legal order as a result of the efficiency in society and it is the task of the legal order to recognize their existence by regulating them within an adequate legal form. The rise of public interests from the social mass is the result of the dominant power of relevant social forces which have the authority to form certain public interests and subsequently incorporate them into the

legal order. Pound here makes a distinction between public interests as the interests of the state as a legal entity and the interests of the state as the guardian of social interests.

Pound describes general security, the security of social institutions, general ethics, preservation of social resources, general progress and personal life as the most important social interests. However, in this scheme of social interests, the priority is given to personal life, which should represent the reflection of the philosophy of style of American society. The definition of this sub-group of social interests is that it represents a claim, desire or demand that every individual should be allowed, in accordance with the social life in a civilized society, to live a life of dignity pursuant to the living standards of that society. In this context, there is also a social interest for the freedom of individual will, social interest for the individual opportunity and social interest for individual living conditions. In Pound's interpretation, the freedom of individual will assumes that the submission of the will of one individual to the will of another individual by applying the force of politically organized society, must be based on rationality which assumes a rational evaluation of the given interests and rational attempts to reconcile or adapt those interests. Individual opportunity means that all individuals should have equal opportunities - political, physical, cultural, social, economic - to prove themselves in the society.

These various types of social interests are often interconnected, equated or confronted in social life. Their relationship is in the state of co-existence while keeping their own differences that distinguish them in terms of their understanding and legal treatment. Yet, it is hard to assume that each individual interest will be relevant for public and social interests...and some private issues can be resolved at individual level without transferring them to public level".[7] The quoted author emphazises Pound's concept according to which competitive interests must be balanced taking into account the legal presumptions that are expected from a reasonable person in society, which means that society should give as much as it can, bearing in mind reasonable expectations of people in a civilized society and with minimum of conflicts and victims. [7]

Having no doubt about general nature of social interests, still they are not created by a simple summation of individual interests or public interests, but they appear as a separate entity with a particular general quality which rises above the mass of individual

interests and majority of public interests. The prevailing desires and expectations in a society can be recognized from the social interests and they are protected by legal order and defined by law through legal claims, i.e. rights. Firmly oriented towards understanding law as a specific social phenomenon, Pound recognizes law as a legally protected social interest. Law, according to him, represents an attempt to satisfy and harmonize different interests, demands, aspirations, desires, either through their immediate realization or through ensuring certain individual interests, that is, through the demarcation or compromise of individual interests – in order to allow the realization of the largest possible segment of interests or those interests that are the most important for our civilization, with the minimum victims in the scheme of all existing interests“, [9] - which represents an upgrade of Jhering's understanding of this conceptual problem.

From the point of interest of legal science and sociological jurisprudence, what is more important is Pound's explanation of the possibility of realizing certain interests through legal rules and rights. Namely, he explains the grounds based on which the legal order recognizes the law permitting some interests to be achieved and preventing the achievement of others. In reference to this, Pound offers the experience from the legal practice and emphasizes three possible methods: „One is to discover, through experience, the method that will secure the adaptation of overlapping and conflicting interests which will be the least harmful for the overall scheme of interests and which will offer this experience a reasonable growth… The second method assumes the evaluation of interests according to the court postulates existing in the given historical periods and locations, in the situations when the interests seek to be recognized… And the third method, which was used in ancient Rome, but is also the characteristic of modern and mature law, refers to the authoritarian idea of what a social, i.e legal order should be and what it should serve in applying the legal doctrines and legal institutes“. [2]

By placing the interests in the center of understanding law through its social contextualization, sociological jurisprudence was given a special meaning. Therefore, it deserves to be recognized in the scientific literature as a special form of pragmatism in the philosophy of law which puts focus on human factor and reinstalls the logic as an instrument.[4] Placing the legal order in the context of interests implies that judges are

given a special role in applying law - its application will not be mechanical, but rather creative and directed towards discovering the rules which represent a compromised formula for settling the demands for the realization of interests.

It is possible to find the answer how to understand and identify social interests by employing practical research efforts, given the fact that they should be treated as "empirical entities to be found within society, more precisely, in law and legal processes that take place in society. Social interests, therefore, are not abstract postulates". [12] Taking into account this particular nature of social interests, the path to their recognition leads through laborious identification and analysis of a large number of legal documents and researching into the sources and reasons of multiple pressures exercised during the creation of certain legislative solutions. Having made great effort in that direction, Pound recommends the distribution of social interests favouring those which ensure general security, the security of social institutions, general ethics, preservation of social resources, general progress and personal life. This series of six social interests contains the criterion for the goal striving towards their realization.[6] The quoted author will identify in Pound's theory the attempts to explain the events that take place in the process of creating law and the rule of action as a method for resolving the encountered problems. The answer lies in the compromise as a basic aspiration which impacts the essence, creation and development of law in order to achieve the balance of all social interests which need to be regulated by law. Maintaining the critical tone in analyizng Pound's stands on the conceptualization of social interests, P. Lepaulle warns us about the problem of understanding the law as a result of the balance of interests, since this would assume a complete impartiality of the legal order, which is not realistic to expect. Besides, if such a concept of social interests is based on the belief that we should attempt to please, if possible, all the members of society, then we would encounter serious objections. History has warned us that the claims and demands of all segments of society were combined in such a way that it additionally contributed to self-destruction of those societies (for example, Babylon, ancient Greece, Roman Empire).[6] On the other side, objections are raised as a result of the interpretation based on which Pound came up with the idea of the greatest happiness for the greatest number of people, which means that the ultimate goal is the happiness,[6] and not the people. Pound responded to the

raised objections with a theoretical statement that although we are thinking in the context of society, we still have to think about individual interests and the possibilities that individual persons should affirm their own individuality. [11] The justification of this point of view is additionally confirmed by a negative experience - the absence of the compromise between the interests which existed in the society in the 17th century when there was excessive and unacceptable insisting on public interest "that defeated ethical and social life of individuals".[11] Therefore, it is impermissible to ignore individual interests regardless the fact that the securing and realization of individual and public interests also serve the purpose of social interests. Pound asserts, rather clearly and expressively, that the most distinguished social interests are the ethics and individual's social life, thus basically equating the individual interests to social interests.[11]

Underlining the objections which were raised on the account of Pound's concept of social interests and the compromise as the central point of social engineering will help us understand more objectively the essential points of the given problem. It is, therefore, also important to define the relationship between the interests and the law, i.e. to determine whether the law only applies, or also creates the existing interests and whether the legislator is authorized only to formulate them or he may also decide whether they exist or not? In relation to this issue, Pound remains firm in his stand that the law does not create interests, but only recognizes them. Yet, the role of legislator does not end here since his function is not only to recognize the existence of interests, which are there anyway, regardless his will, but he also must determine what he will recognize as an interest and decide to what extent he will exert his influence on them in regard to other interests (individual, public and social). [11] Hence, the recognition of the existence of interests is not a simple and mechanical action which the legislator will perform by a plain screening of society since in this process of the identification of interests we encounter complex relations between the holders of certain types of interests within a society. The legislator is here in a specific situation given the fact that his institute includes a large number of public interests which the legislative (i.e. state) power strives to achieve. An ability of the legislator to recognize social interests is a delicate task which carries the burden of subtlety. Failure to respond to this challenge in a successful way may slow down social development as a result of the inability of legal order to recognize certain

interests in a satisfactory way - they are definitely embodied in society, but without an adequate legal formulation, it will be impossible to realize them through legal, institutionalized channels. Hence, the legitimacy of the existence of certain interests does not depend on the will of legislator, since their existence is independent of that will, yet, the incompetence of the legislator to respond in a right way to the social obligation to correctly identify certain interests may generate social conflicts whose intensity will depend on the importance of those unrecognized and unregulated interests. Namely, legal order prescribes the rules for securing the compromise between the interests whose existence is regulated by legal rules: if the law does not incorporate the interests which are important, then it is not possible to reach a social compromise.

The recognition of the interests is not the only task of the legislator in the process of building the legal order's sphere of interests - it is rather an activity of technical quality. What is more important is to find the way how to secure the existing, legally regulated interests, which poses the most demanding task for the legislator. We are speaking about the matrix of a logical concept that we can find in the contemporary grammar of human rights: if we want to have a dominant position of human rights in a constitutional-legal order, it is not sufficient just to regulate them, it is necessary that they are guaranteed in an adequate way, i.e. it is vital to have established normative and institutionalized mechanisms for their protection. The same is applied to interests - not only their existence needs to be legally regulated by legislator, but also an adequate mechanism of their protection must be in place as the precondition for their realization; otherwise they will remain at the level of pure proclamation. If the legislator just remains within the scope of a simple identification of the existence of a certain interest without foreseeng its adequate legal protection, this could be an indicator of the influence of the legislator's will on that particular interest, meaning that the legislator is not willing to have that interest realized which, again, may be the source of the destabilization of society or the obstruction of its development, depending on the importance of that particular interest. This is why in the situations when we have two mutually confronted interests, the suggestion, and the expectation, is that the problem should be resolved by a judge who has a necessary intuition and vital legal knowledge and understanding of the relevant points of view from the legal science. [7]

Conclusion

Summing up the research conducted in this paper, we can proceed to closing reflections. In order to reach acceptable solutions for confronted interests, it is necessary to take into account social goals guaranteed by these solutions. This will require the research into law through the ideal element – an idea that can be noted in the Pound's concept. Pound believes that the following are the practical measures for the realization of the social engineering: the research into social effectiveness of legal institutions and legal doctrines, research into means for ensuring the highest efficiency of legal norms, sociological history of law and the demand for finding a reasonable and correct solution for concrete individual cases.

The identification of interests represents only the first component in the mosaic of their social engineering whose purpose is preconditioned by the ability to resolve the apparent conflicts of interests, which is why it necessary to establish a balance between them. Sociological jurisprudence represents a quest for the answer to the central problem of the legal order - the success in balancing the interests. It is not denied that the legislator has an important role in this process, but the problem cannot be solved with abstract legal formulations and by applying the methods of logical deduction of concepts from the law; only the creative role of a judge who is equipped with sufficient dosage of intuitive competence, necessary knowledge acquired from the practice and essential legal experience can produce the answer to dilemmas on the controversies existing among interests.

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