JURISPRUDENCE Q and A II

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INTRODUCTION

The Sociological School of Law is a collection of academics and practitioners committed to the study of law as a social phenomenon. In other words, sociological approach to jurisprudence is the study of law in its social setting or as a social institution1.

Roscoe Pound and his theory

Roscoe Pound (1870-1964) who was a dean in Harvard Law School is known to have been the most influential proponent of the American Sociological jurisprudence. He essentially saw law as a social institution created and designed to satisfy human (individual and social) wants. He agonized over the fact that traditional scholarship focused almost exclusively on the law in the textbooks to the detriment of the law in action. Law in action refers to the law that actually reflects the current behaviour of the people2.

In his Outlines of Lectures on Jurisprudence (1943), he defined interest as: a demand or expectation which human beings either individually or in groups, or associations or relations, seek to satisfy, of which, therefore, the adjustment of human relations and ordering of human behaviour through the force of a politically organized society must take account.

LEGAL INTEREST

According to Pound, there are three categories of legal interests, namely, individual, public and social interests.

Individual interests

Are "claims or demands or desires involved immediately in the individual life and asserted in title of that life". Individual interests are asserted for the titles of individual life. What this logically leads to is the fact that as these interests by and large only involve the individual, the interests tend to fall into the scope of private law although in the actual balancing the interests this is a generalisation that may not be always true3.

Public Interests

A "claims or demands or desires involved in life in apolitically organised society and are asserted in title of that organisation. They are commonly treated as the claims of a politically organised society thought of as a legal entity". These types of interests are asserted for or in the title of politically

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organised society. Political interests can be generalised as falling within the scope of [public law which includes] criminal law although there is clearly an overlap with individual interests⁴.

**Social Interests**

Were originally included by Pound as a distinct and vital set of interests whereby they were described as "claims or demands or desires involved in the social life in civilised society and asserted in title of that life. It is not uncommon to treat them as claims of the social group as such"⁵.

These interests have been regularly tied to the concept of security. As such, one vital part of security is for society to enjoy an organised legal system within the political organisation which could arguably also fall within the public interests as political organisation also requires the existence of some form of legal control which can only be provided by the legal system⁶.

**JURAL POSTULATES**

Pound introduces the concept of "jural postulates" as the method by which interest may be tested and evaluated so that the conflicts between the various interests may be resolved. Jural postulates presuppose legal reasoning about rights and obligations at the various levels and involve what human beings must be able to (reasonably) assume in a civilised society⁷.

According to Pound, these assumptions may vary from one legal system to another based on ethnocultural lines and can even be different within the same legal system while others are quite similar in all societies⁸.

Pound seems to have formulated some jural postulates by generalising some values protected by existing laws within the American Legal system and suggests that these do not need to be tested against objective morality as they fit in with the "functions of law" within the specific reality⁹.

**The five jural postulates identified by Roscoe Pound**

Pound clarified that for the American Legal System’s approach to property, possessions and legal transactions the postulates include;

(i) People must be able to assume that others will not be intentionally aggressive; (ii) People must be able to assume that they can control things that they have discovered, created or legitimately

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⁴Ibid
⁵Ibid
acquired; (iii) People must be able to assume that other people will honour reasonable expectations which they create and undertakings which they give, as well as making restitution in respect to unjust enrichment which they could not have reasonably expected to receive (good faith in dealings); (iv) People must be able to assume that other people will act with due care not to create unreasonable risk of injury to others; (v) People must be able to assume that other people will control things which they maintain on their land and which are like to escape and cause damage.

**RELEVANCY OF ROSCOE POUND JURAL POSTULATES IN MODERN TANZANIAN LEGAL SYSTEM**

Pound’s conception of law as an instrument of balancing interests to achieve social cohesion continues to influence the evolution and application of key law principles. Balancing of interests involves weighing between individual and social or public interests.

In Tanzania, Courts have been called to intervene whenever there is a clash between and among the various categories of interests in society. This is reflected in the case of Mulbadaw Village Council & 67 others v. National Agricultural and Food Corporation¹⁰, in this case there was a conflict of interest between the government and villagers and thus the court was called to decide as to whether the land acquisition by the government was lawful. Thus the court held that the Mulbadaw Village council and Mulbadaw Villagers were lawfully possessing land and they could only be deprived of their land by due operation of Law, not by mere blessings of the government and party leaders in Hanang District and Arusha Region; the provisions of the Land Acquisition Act (No. 47 of 1967) were not followed in acquiring land belonging to Mulbadaw Village Council and Mulbadaw Villagers and therefore such acquisition was unlawful.

Thus from the above case it goes without saying that the court balanced the interest of the community against those of the state and thus generally safeguarded their interest as pound envisages.

Nevertheless, the significance of jural postulates (legal values) in the identification, recognition and protection of interests is still relevant. In Tanzania for instance, the constitution provides for such aspirational values as human rights, equality of freedom, democracy, social justice and rule of law.

Essentially, Part III of the Constitution of Tanzania, 1977 as amended time to time solely deals with the Fundamental Rights of the citizen and people of this country wherein the citizens and the people are provided with certain rights. These rights are provided by recognizing the public and private interest of the individual.

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¹⁰[1984] TLR 15 (HC)
For instance under Article 16 of the Constitution of United Republic of Tanzania as amended time to time every person is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect personal and protection of his residence and private communications.

Also Article 28 (3) of the Constitution of United Republic of Tanzania as amended time to time reads thus;

“28.- (3) No person shall have the right to sign an act of capitulation and surrender of the nation to the victor, nor ratify or recognize an act of occupation or division of the United Republic or of any area of the territory of the nation and, subject to this Constitution and any other laws enacted, no person shall have the right to prevent the citizens of the United Republic from waging war against any enemy who attacks the nation”.

However in ensuring that the diverse interests are balanced in the society Article 30 (1) of the Constitution of United Republic of Tanzania as amended time to time reads thus;

“30.- (1) The human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest”.

Therefore the rights that are provided in the constitution have certain limits and hence these rights will not be accessible under certain situation and certain circumstances. Further, satisfying the third condition of Pound these rights has been secured as the Constitution of Tanzania says that any law that is in conflict of the Fundamental Rights will be held void11.

Generally these values have been inshrined in the Constitution where they have been made justiciable and enforceable in the enactment, application and interpretation of law and policy. In this sense, they bind courts and legislators in a manner that Pound envisaged.

Pound’s dural postulates is still useful in explaining how Tanzanian laws evolves and functions. He has extended this thinking to the development of statute law by engendering a notion of balancing of interests in the legislators’ actual work. The Tanzanian legislature when crafting a particular legislation normally take on board the diverse interest of the society and thus balance it by enacting a more just and equitable legislation12.

11Article 30 (5) of the CURT, 1977
Lastly, and perhaps most significant, Pounds view on social engineering as the purpose of law and the theory of autopoeisis are applicable in explaining legal change in Tanzania. Continuous scientific, political economic and social changes are creating new problems that merit intervention by law. The law is thus constantly balancing interests and interacting and “ingesting” these problems as presented in the form of legal disputes and claims brought before courts and legislatures. In the end, by way of new enactments and judicial decisions, law adapts to the new changes.\textsuperscript{13}

**Criticism levelled against the theory**

However despite the fact that Pound’s postulates theory bears some relevancy in Tanzania legal system but the said theory has not been left without any criticisms as hereunder contended;

First, his thinking appears to adopt a consensus model of society, wherein there is widely shared understanding of interests and values. However this may not be the case as different social groups and strata may hold different values and interests (a conflict model). Secondly, his classification of interests is problematic as the line separating social and state interests may be too thin to discern, hence making it difficult to conceptualize the balancing of these interests. Thirdly, it can be assumed that the jural postulates (legal values) forebear the claims—otherwise courts and legislators would have problem identifying and agreeing on these interests every time a conflict is presented to them. This would therefore make the law creation process dependent on static postulates thus not sufficiently account for legal change.

Fourthly, the theory does not account for vested interests (e.g. those that accrue to by virtue of operation of law). Sixth, the conceptualization of interests does not take into consideration that some interests can be created by the law (e.g. welfare law creates interests for dependants). Seventh, it is difficult or impossible to achieve a cohesive society through balancing of interests, where there is a minority whose interests are irreconcilable with those of the majority. Lastly, the theory only accounts well for judge-made law and not less for legislative innovation.

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INTRODUCTION

Historical context of the UDHR:

Following WWII\(^\text{14}\), the United Nations (UN) came into existence\(^\text{15}\), mandated with the objective of preventing future cataclysms. Following the UN Charter, World leaders deliberated on a possible document that would complement the Charter and guarantee rights to individuals everywhere. The HR Commission was set up\(^\text{16}\), and eventually, on December 10\(^\text{th}\) 1948, in Paris, the UDHR was adopted by the UN, with eight abstentions\(^\text{17}\).

The UDHR has been signed by copious States and by virtue of its intercontinental approval; the UDHR has acquired the status of customary international law (CIL). It is indeed, as Eleanor Roosevelt put it, the “international Magna Carta for all mankind”\(^\text{18}\).

Anatomy of the UDHR

The UDHR contains 30 Articles that list important civil, economic, political, social and cultural rights. For example Article 1\(^\text{19}\) and Article 2\(^\text{20}\), establish the concepts of dignity, liberty, equality and brotherhood. Articles 3 to 21\(^\text{21}\) cover civil and political rights, a few of them being the right against torture, the right to an effective remedy for human rights violations and the right to take part in government.

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\(^{14}\) World War II (1939-1945)  
\(^{15}\) 24\(^\text{th}\) October 1945  
\(^{16}\) Eleanor Roosevelt of the USA, Rene Cassin of France, Charles Malik of Lebanon, Peng Chung Chang of China and John Humphrey of Canada were among the members of that Committee.  
\(^{17}\) Belorussian Soviet Socialist Rubublic (SSR), Czechoslovakia, Poland, Saudi Arabia, South Africa, The Soviet Union, the Ukrainian SSR and Yugoslavia  
\(^{19}\) Art. 1, Universal Declaration of Human Rights, 1948  
\(^{20}\) Art. 2, Universal Declaration of Human Rights, 1948  
\(^{21}\) Art. 3-21, Universal Declaration of Human Rights, 1948
Articles 22 to 27\textsuperscript{22}, lay down economic, social and cultural rights, including the right to work, the right to form and join trade unions and the right to participate freely in community life.

The principle of indivisibility of human rights is laid down in Article 28\textsuperscript{23} and it can be considered to be the most progressive provision present in the UDHR. It links all the enumerated rights and freedoms and highlights the interconnected nature of different types of human rights.

**IMPLICATIONS OF UDHR**

The UDHR marked the first time that the rights of individuals were consolidated in one document. In this regard Pope John Paul II alluded to the UDHR as “one of the highest expressions of the human conscience of our time”\textsuperscript{24}. Robinson advances that the UDHR “exerts a moral, political and legal influence far beyond the hopes of many of its drafters.”\textsuperscript{25}

Its birth disseminated a notion that Human Right apply to everyone, everywhere

Principally, the UDHR has brought rights to the fore and attributed them with the status and respect they deserve. The UDHR is perceived as the foundation for HR developments post-dating it. Since its inception, many of the rights enshrined within it have infiltrated the municipal laws of many States.

**UDHR led to Adoption of ICCPR and ICESCR**

Following the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted in 1966. These

\begin{flushleft}
\textsuperscript{22}Art. 22-27, Universal Declaration of Human Rights, 1948  \\
\textsuperscript{23}Art. 28, Universal Declaration of Human Rights, 1948  \\
\textsuperscript{24}“John Paul II, Address to the U.N., October 2, 1979 and October 5, 1995”. Vatican.va.  \\
\textsuperscript{25}M Robinson, ‘The Universal declaration of human rights: A living document’ [1998] AJIA , 52(2) 119
\end{flushleft}
two instruments effectively made many of the provisions of the UDHR binding on States that ratified them.26

The UDHR has also inspired a plethora of International Conventions

For instance, Articles 327, 1228, 1829 and 1630 UDHR are all reproduced in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950 in Articles, 231, 832, 933 and 1234 respectively.

A myriad of HR Treaties reaffirm the rights promulgated by the UDHR

One is the Convention on the Rights of the Child (CRC) 1989, which serves to protect children, inter alia, from economic and social exploitation35.

UDHR has served directly and indirectly as a model for many domestic constitutions, laws, regulations, and policies that protect fundamental human rights

These domestic manifestations include direct constitutional reference to the Universal Declaration or incorporation of its provisions; reflection of the substantive articles of the Universal Declaration in national legislation; and judicial interpretation of domestic laws (and

27Everyone has the right to life, liberty and security of person.
28No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.
29Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
301. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. 2. Marriage shall be entered into only with the free and full consent of the intending Spouses. 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
31Right to life
32Right to respect for private and family life
33Freedom of thought, conscience and religion
34Right to marry
applicable international law) with reference to the Universal Declaration. Article 26 UDHR\(^{36}\) for instance, has found its place in Chapter III of Tanzania’s constitution after the constitutional amendment of 1984.

**Since its inception UDHR has extensive moral authority**

It can be advocated that it promulgates general moral precepts, applicable to everyone, thereby universalizing the notion of a fundamental baseline of human welfare. In the 1960s and 70s for example, several organs of the UN utilized the UDHR’s provisions to condemn racial discrimination in South Africa during the Apartheid\(^{37}\).

**The gist of UDHR has been tested and affirmed in a number of courts decisions** Notably in *Mtikila & Others v. Tanzania*\(^{38}\), a case heard before the African Court on Human and people’s’ Rights (African Court). The African Court rendered its judgment on 14 June 2013, with a further ruling on reparations on 13 June 2014\(^{39}\). The case concerns three applicants: two Tanzanian non-governmental organisations (NGOs); the Tanganyika Law Society and Human Rights Centre; and Reverend Christopher R Mtikila\(^{40}\).

Tanzanian election laws prohibiting independent candidates from running for public office were held to be in breach of various articles of the African Charter on Human and Peoples’

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\(^{36}\) 1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. (UDHR)

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. (UDHR)

3. Parents have a prior right to choose the kind of education that shall be given to their children. (UDHR)


\(^{38}\) Tanganyika Law Society and The Legal and Human Rights Law Centre v The United Republic of Tanzania App 009/2011

\(^{39}\) Reverend Christopher R Mtikila v The United Republic of Tanzania App 011/2011 14 June 2013 (Judgment)

\(^{40}\) Reverend Christopher R Mtikila v United Republic of Tanzania App 011/2011 13 June 2014 (Reparations Ruling)
Rights (African Charter), the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (Universal Declaration) and the rule of law\textsuperscript{41}. 

In the same vein, The High Court of Tanzania in \textit{Ephrahim v. Pastory & Kaizilege}\textsuperscript{42}, referred to article 7 of the Universal Declaration, in overturning as unconstitutional a norm of Tanzanian customary law which discriminated against women.

\textbf{Conclusion}

It can be safely concluded that the UDHR has universalized the concept of basic human rights among the international community. One major drawback of the UDHR is its preoccupation with holding the state accountable for all human rights violations within its territory. The UDHR neglects human rights violations caused by socially and culturally sanctioned violence, where non-state actors such as individuals, families, communities and other private institutions are accountable. Despite all its shortcomings, the UDHR has continued to remain the key reference point for all international human rights discourse.

\textbf{INTRODUCTION}

\textbf{Wesley Newcomb Hohfeld} was a professor at Stanford University and later Yale University who wrote only a few articles before his premature death in 1918. His most famous article \textit{Some Fundamental Legal Conceptions as Applied in Judicial Reasoning} became a canonical landmark in American

\textsuperscript{41}Judgment paras 4, 78, 89.2 & 120 
\textsuperscript{42}Civil Appeal No. 70 of 1989 (Unreported)
jurisprudence. His work remains a powerful contribution to modern understanding of the nature of rights and the implications of liberty.

To reflect Hohfeld's continuing importance, a chair at Yale University was named after him. Since the appearance of his *Fundamental Legal Conceptions* in 1913, his work has attracted both followers and critics; his ideas have appeared in United States Supreme Court opinions, and the Restatement of Property.

**The hohfeld's Relation and how it enhance legal Reasoning**

Hohfeldian analysis enhances legal reasoning by allowing one to deduce one legal concept from another. To that effect Professor Hohfeld identified eight atomic particles by splitting the atom of legal discourage which he called "the lowest common denominators of the law." He defined these eight basic jural relations to clarify legal thinking and understanding, Hohfeld divided the eight into pairs which cannot exist together (opposites), and those which must exist together (correlatives).

<table>
<thead>
<tr>
<th>JURAL RELATIONS</th>
<th>RIGHT</th>
<th>PRIVILEGE</th>
<th>POWER</th>
<th>IMMUNITY</th>
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<tr>
<td>OPPOSITES</td>
<td>NO- RIGHT</td>
<td>DUTY</td>
<td>DISABILITY</td>
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<tr>
<td>CORRELATIVES</td>
<td>DUTY</td>
<td>NO-RIGHT</td>
<td>LIABILITY</td>
<td>DISABILITY</td>
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**Explanation of relation**

Hohfeld's relations can be best understood through examples. Following are the different examples of different legal relations.

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44 Ibid
48 Wesley Newcomb Hohfeld (June. 08, 2019, 6:49 PM) https://en.wikipedia.org/wiki/Wesley_Newcomb_Hohfeld
Hohfeld explained the correlations as “if X has a right against Y that he shall stay off the formers (X) land, the correlative is that Y is under a duty toward X to stay off his place”. Thus, a right is enjoyed by an individual as against another individual is that the second shall do or refrain from doing something for the first. Thus X has a right against Y with regard to act A, if and only if Y has a duty to X with regard to act A⁴⁹.

Hohfeld has also explained "no-right“ and "privilege” concepts as well. They are, respectively, the opposites of "right" and "duty." The terms "privilege" and "no-right" are also correlatives. X has a privilege against Y with regard to act A, if and only if Y has a no-right against X with regard to A⁵⁰.

A “liability” is the correlative of a “power”. A person X is under a liability, if there is an act another person can perform that will affect the legal relations of X⁵¹.

“Disabilities” and “immunities” are the opposites of “powers” and “liabilities”. If X does not have a power with regard to individual Y, then X is under a disability with regard to Y. Similarly, if Y is not under a liability with regard to X, then Y has an immunity with regard to X⁵². Whereas “Disabilities” and “immunities” are also correlatives of each other. If X has a disability with regard to Y, that is, X has no power to affect Y’s legal relations, then Y is immune from having his or her legal relations affected by X. Similarly, if Y is immune with regard to X, then X is under a disability with regard to Y⁵³.

If rights and duties must always be paired, then no-rights and privileges must also always be paired. Thus, an individual has a no-right against another individual with regard to a particular act if and only if that individual does not have a right against the second individual with regard to that act. Similarly, an individual has a privilege against a second individual with regard to a particular act if and only if the individual does not have a duty toward the second individual with regard to that act⁵⁴.

Hohfeld’s Cube Theory

Another way through which hohfeldian analysis enhances legal reasoning by allowing one to deduce one legal concept from another is through his Cube theory. The theory presented here is that the

⁵⁰Ibid
⁵¹Ibid
⁵²Ibid
⁵³Ibid
⁵⁴Ibid
eight jural relations may be effectively graphed as the eight corners of a cube, and this image unifies all eight into a single logical structure. **This structure symbolizes real legal relationships and assists an understanding of the way legal relations work**\(^{55}\).

The cube demonstrates that Hohfeld’s ideas fulfill his original intention - to clarify legal thinking. Once it is known that there are eight and only eight jural relations, that there are well-defined relationships among them, and that these relationships behave in predictable ways, then the analysis of all legal questions, even the most complex, becomes easier. Two disputing parties are able to define their unsettled question more precisely, and the court, a agency or legislature is able to settle the same question with correspondingly greater precision\(^{56}\).

**Conclusion**

Hohfeldian analysis allows one to identify and define people’s relative positions under the law and the legal issues involved in any dispute. Therefore Hohfeld’s fundamental legal relations are essentially shorthand ways of describing the legal effects of acts done by human beings. The ultimate legal effect in a court judgment. Hohfeld analysis thus in theory, assist in completely describing the legal effects of any act of any person.

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**REFERENCE**

**BOOKS**


**JOURNALS**


**ARTICLES**


**QUESTIONS ATTEMPTED**

QN. 2 Critically discuss relevance of Roscoe Pound jural postulates in modern Tanzanian legal system.
QN. 6 Discuss the implications of the Universal Declaration of Human Rights, 1948.

QN.4 Critically discuss how Hohfeldian analysis enhances legal reasoning by allowing one to deduce one legal concept from another.