THE SEARCH FOR THE "WORKABLE LEGAL PRECEPT" IN A CONTEXT OF INCOHERENCE AND UNCERTAINTY: REFLECTIONS ON ROSCOE POUND'S THEORY OF JUDICIAL EMPIRICISM FROM A EUROPEAN PERSPECTIVE *

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In Roscoe Pound's theory of "judicial empiricism", the remit of the judge is the search for the "workable legal precept": i.e., finding a solution, which is coherent with the legal framework as well as with a principle of "justice" in the specific litigation. Through this trial and error process, jurisdiction of the Courts concurs in the social engineering function of the law as a whole.
In Pound's view the law is functional to the progress of "civilization", which cannot be achieved but taking into account historical, technical and "ideal" elements. This implies that any rule-making or law enforcement, including the judiciary's, should take place within a well determined cultural, theoretical and ethical framework.
Looking at Pound's thought from a contemporary European perspective, the paper suggests a reading of Pound, which may lead to a clearer perception of the need to recover the historical, the technical and the ethical foundations of the law in the EU and the Member States.

I. JUDICIAL EMPIRISM AND THE WORKABLE LEGAL PRECEPT

In Roscoe Pound's theory of "judicial empiricism", the remit of the judge is the search for the "workable legal precept"[2]: i.e., finding a solution, which is coherent with the legal framework as well as with a principle of "justice" in the specific litigation.

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In his well-known essay of 1923 on the *Theory of Judicial Decision* Pound focused on the "distinct things included in the idea of law", which constitute the basic materials for the judge's work.

Positive statutory and case law are but one starting point. Indeed, *consolidated ideas,* inherited from history and free from any specific hierarchy, indicate which rules to apply to the controversy and how to interpret them in order to make them fit with the case at stake. A well-defined *technique*, synthetically named *interpretation*, provides the judge with "modes of looking at and handling and shaping legal precepts"[3].

In order to limit the constant risk that interpretation may become largely *fictitious*, as it tends not to call acts of creation – development of rules by their rightful name[4], in Pound's view interpretation must be *technical*, i.e. *rational* and *not arbitrary*. Logic is *not* the *only* method, but it is *a* method.

The third basic material is the set of philosophical, political, and ethical ideas about the aims of the law. Both positive rules and techniques are continuously re-examined, confirmed or reshaped under the test of the outcome their application would lead to in the specific controversy.

One of the perennial features of the "spirit of the common law", according to Pound, is the "refusal to take the burden of upholding rights from the concrete each and put it wholly upon the abstract all"[5]: therefore, "judicial empiricism" is a never-ending search, which implies continuous confrontation with ever-changing fact, and the unavoidable risk of mistakes.

Positive legal precepts, including both case law and statute law, cannot but rarely stand on their own. It is necessary to assure that they "work" in the specific case, i.e. that they fit with the other materials, which the judge has to work on.

It is very hard to match legal precepts, case by case, with the philosophical, political and ethical foundations of the law, through a technique that constantly needs fine-tuning. On the other hand, according to Pound, judicial empiricism is the main evolutionary force of the common law.

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[2] Among the many works by Pound on the issue: R. POUND, *The Theory of Judicial Decision*, in 36 *Harv. L. Rev.*, 1923 641, 802; ID., *The Ideal Element in American Judicial Decision*, *ivi*, 1931, 136; ID., *Natural Law and Positive Natural Law*, in 68 *Law Quart. Rev.*, 1952, 330, 332; ID., *The Ideal Element in Law*, Calcutta, 1958, 49 ff.

[3] R. POUND, *The Theory of Judicial Decision*, 645; ID., *Juriprudence*, St. Paul Minn,. 1959, I, 2, 111.

[4] See R. POUND, *Spurious Interpretation*, in 7 *Columbia L. Rev.*, 1908, 379.

[5] R. POUND, *The Spirit of the Common Law*, Francestown – New Hampshire, 1921, 216; ID., *What is the Common Law?*, in 4 *Univ. Chi. L. Rev.*, 1936, 176, 182

The judiciary (just like any other legal formant) may accomplish such a hard mission only by trials and errors.

In *The Ideal Element in Law* it is said that "We make the best practical adjustment we can by experience developed by reason and reason tested by experience in order to solve practical problems in a complex social and economic order which does not admit of satisfying solutions by simple moral maxims of universal validity. But we must have rules of decision if social control is to be maintained"[6].

According to Pound, on the other hand when legal systems are on the verge of major changes, judges *«must go with the main body not with the advance guard, and with the main body only when it has attained reasonably fixed and settled conception»*[7].

The shift from the "ultra-individualist" tradition of the 18th century jurisprudence and the 19th century common law to the "social ideas" which should have inspired the new approach advocated by Pound in the *Spirit of the Common law* was, undoubtedly, one of such major changes.

The advance guard should have been formed by "juristic science and careful legislation worked out consistently and upon a clear program".

"Reversion to justice without law", according to Pound, is never an option.

II. "LAW AS AN AGENCY OF SOCIAL CONTROL" / "SOCIAL ENGINEERING" AND THEIR THEORETICAL FRAMEWORK

Pound defined the law an "agency of social control" and "social engineering"[8]. These are but metaphors, which should not be read literally[9].

Pound was well conscious that law alone is unable to shape society, because of its inherent limitations in dealing with a potentially unlimited number of conflicts.

For example, in his 1954 lecture on *Rights, Interest and Values*, included in *The Ideal Element in Law*, Pound wrote that: "When we look into the history of the subject we soon

[6] R. POUND, *The Ideal Element in Law*, *cit*. p.50.

[7] R. POUND, *The Spirit of the Common Law, cit*. p.191.

[8] See the seminal R. POUND, *The Need for a Sociological Jurisprudence*, in 19 *The Green Bag*, 1907, 6; afterwards, *inter alia*, ID., *Social Control through Law*, New Haven, 1942.

[9] See, among the many studies on Pound's theory of "sociological jurisprudence": E.K BRAYBROOKE, *The Sociological Jurisprudence of Roscoe Pound*, in 5 *Univ. West. Aust. L. Rev*., 1961, p.288; J.A. GARDNER, *The Sociological Jurispudence of Roscoe Pound*, I, in 7 *Villanova L. Rev*., 1961, p.1; part II *ibi*, 165; J. STONE, *Roscoe Pound and Sociological Jurisprudence*, in 78 *Harv. L. Rev*., 1965, 1578.

see that much of the problem of enforcing law is really a problem of intrinsic limitations in view of the nature of many of the interests to be weighed and secured and in view of the nature of legal precepts and of the means of applying them. Historically it is significant that while complaint of non-enforcement of legal precepts is as old as the law, it has been heard chiefly in periods when the law was seeking ambitiously to cover the whole field of social control or in transition to such periods".

The idea of an all-encompassing and all-transforming legislation, and/or judicial law making, is a dangerous illusion that may lead to break the fundamental link between law and the moral / ethical sense of the community, which constitutes the "ideal element".

Therefore, law enforcement may never do without an "ideal image", of ethical / political nature, of what the law's aims should be in each specific case.

On the other hand, law and morals are never equivalent. The judge has to test any moral principle, which may have an impact on a case, under "received legal materials" and "received legal technique", in order to check whether its reception may impair "the general security by unsettling the legal system as a whole".

Furthermore, "the practical limitations on effective achievement of results by the judicial or the administrative process require us not to attempt too much by means of law (in the lawyer's sense) but to bear in mind that there are other agencies of social control that may sometimes do better what morals and morality require"[10].

Such "other agencies", like "home, home training, neighborhood opinions, religion and education" give the law its necessary moral /ethical background. They cooperate with the law in assuring social control, they offer the law possible paths of evolution, which any law enforcement agency will test, through its legal technique, in order to avoid the unsettlement of the whole system.

The "social engineering" metaphor may imply a "mathematical" application of legal precepts, which Pound constantly rejected, since his seminal essay on *Mechanical Jurisprudence*[11].

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[10] R. POUND, *Jurisprudence*, I.2, p.278.

[11] R. POUND, *Mechanical Jurisprudence*, in 8 *Columbia L. Rev.*, 1908, p .101: *"The nadir of mechanical jurisprudence is used when conceptions are used, not as premises from which to reason, .but as ultimate solutions. So used, they become empty words"*. The remedy against "mechanical jurisprudence", in Pound's view, was not ant widening of judicial discretion in applying case law, but the acknowledgement of the paramount role of legislation in promoting a program of social reforms (see N.E.H. HULL, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence*, Chicago, 1997, pp.70 ff.).

At the outset of the lecture on *Legal Reason*, which closes *The Spirit of the Common Law*, Pound hints at "a change from a political or ethical idealistic interpretation to an engineering interpretation". The core principle of this interpretation should be a kind of Pareto – optimal theorem, stating that: "we are seeking to secure as much of human claims and desires - that is as much of the whole scheme of interests - as possible, with the least sacrifice of such interest"[12].

The key issue the qualification of law as an instrument for the protection of *interests*, which Pound expressly borrows from Jhering.

"Engineering", in Pound's wording, does not mean application of mathematical formulas, but thinking of the law as a tool for "social control" through the protection of *actual* individual and / or collective interests (refusing, thereby, any *purely abstract* perspective).

The accent is on the *practical* (*not abstract*) nature of "engineering", that is the outcome rules of experience, just like jurisprudence, and not on its *mathematical* spirit, which jurisprudence does not share.

On the other hand, while jurisprudence and engineering, in Pound's view, share an ideal of "progress" (respectively technological and social), their attitude towards mistake is completely different.

While judicial empiricism is a trial-and-error process, an engineering flaw, which leads to collapsing of a building, would be clearly unforgivable.

The word "interests" is not self-explaining. The definition of such notion as "human claims or wants or demands -which we may think the law ought to protect and secure so far as they may be protected and secured" is too broad. Therefore, in the same lecture on *Legal Reason* Pound developed a *taxonomy of interests*[13], which he expanded and examined in depth in later works.

The fourth "paramount general interest" is "the general morals, the claim or want of civilized society to be secure against those acts and courses of conduct which run counter to the moral sentiment of the general body of those who live therein for the time being".

Pound's sociological jurisprudence, therefore, does not lead to the proposed abandoning of "political or ethical idealistic interpretation", as the author himself will

[12] R. POUND, *The Spirit of the Common Law*, cit. p.195.
[13] R. POUND, *The Spirit of the Common Law*, cit. p.195.

definitively clarify in his subsequent works, such as *The Ideal Element* and the monumental *Jurisprudence*. At the same time, it does not imply the complete rejection of formalism, or of the historical – traditional element, which remains the very core of both the "moral sentiment" of the community and the legal technique.

Rather, it advocates not too strict an adherence to positivist formalism, and a critical approach to the historical heritage of the common law.

Such a critical approach implies acceptation of a discretionary element in law enforcement, which draws jurisdiction and administration near, and acknowledgment of the fictitious nature of interpretation. Therefore, separation of powers should not constitute a dogma.

Pound does never repudiate the "feudal element" within the "spirit of the common law", or the historical path, which, in his view, lead to the transformation of the common law "rights of the Englishmen" into the "universal rights of men"[14]. Rather, he claims that fundamental rights and freedoms granted by the Constitution should never become an obstacle to the protection of collective or general interests.

III. "CIVILIZATION" AS A KEY ISSUE OF POUND'S THOUGHT

Not with standing his above quoted statement of purpose, Pound never really departed from "idealistic interpretation"; his whole work shows a neo-hegelian approach, evident since the very title of the *Spirit of the Common Law*[15], and even more marked in subsequent works.

Unlike von Savigny's, Pound's idealism is *universal* and *not national*. In his view, the "spirit of the (common) law" may teach universal lessons for the progress of civilization worldwide. This approach lead Pound to face major difficulties when he had to deal with foreign policy issues involving the circulation of US legal models abroad[16].

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[14] R. POUND, *The Spirit of the Common Law*, cit. pp.156 ff.; ID., *The Ideal Element*, pp.40 ff.

[15] See W.L. GROSSMAN, *The Legal Philosopphy of Roscoe Pound*, in 44 *Yale L. J.*, 1935, p.605; M.R. COHEN, *American Thought: A Critical Sketch*, Glencoe ILL., 1954, p.75, according to which: "The only serious attempt on the part of an American to organize some actual branch of history in accordance with this Hegelian method is Roscoe Pound's construction of legal history, wherein, however, he follows Kohler rather than Hegel" (reference goes to, *inter alia*, R. POUND, *Interpretations of Legal History*, Cambridge, 1923).

[16] For an analysis of Pound's experience as a legal consultant for the Chinese Guomingdang party, after his retirement from Harvard Law School in the late 1940's, see J.J KRONCKE, *Roscoe Pound in China: A Lost Precedent for the Liabilities of American Legal Exceptionalism*, in 38 *Brook. J. Int.l. Law*., 2012, 1; ID., *The Futility of Law and Development: China and the Dangers of Exporting American Law*, Oxford, 2016, pp.215 ff.

At the fifth place of Pound's basic taxonomy of paramount general interests there *stands "the interest in general progress, the claim or want of civilized society to be secure against those acts and courses of conduct that interfere with economic, political and cultural progress and the claim that so far as possible individual conduct be so shaped as to conduce to these forms of progress"*[17].

In the *Ideal Element*, Pound clarifies that even the Pareto – efficient basic scheme of "social engineering" is but an instrument for the achievement of "civilization", which is the ultimate end "towards which both a maximum of free individual self-assertion and an efficient social organization are but means"[18].

"Civilization" and "progress" are key features of the "ideal picture" of the legal system, which, as seen, is one of the basic elements of the judicial work.

Pound's view of "civilization" and "progress", nevertheless, remains quite obscure. In the *Ideal Element*, for example, he speaks of "raising of human forces" and of "maximum of human control" over "external" and "internal" forces[19].

The author's life-long masonic affiliation and the high rank roles he fulfilled within North-American freemasonry may help to improve our understanding of Pound's ideal of "progress towards civilization".

In his works on *The Philosophy of Masonry* (1915)[20] and *Masonic Jurisprudence* (1920)[21] Pound anticipated many of the key issue of his legal philosophy and exposed his fundamental ideal of "civilization" as the "elimination of the struggle for existence", as the outcome of a "moral order, above and developed out of the social order", until the final accomplishment of "human perfection".

[17] R. POUND, *The Spirit of the Common Law*, cit. p.158. This functional view of the law, of course, was not new. K. KREILKAMP, *Dean Pound and the Immutable Natural Law*,,in 18 *Fordham L. Rev.*, 1949, p.173-174: "By immemorial Scholastic definition laws are reason's ordinations for the common good, and the common good is nothing else than the good of the community as a unified order; furthermore, every precept of Scholastic social ethics is rooted in the psychological truth that sociality is a property of human nature. Nor even among the moderns, of course, was Pound the first to recognize the falsity of individualism-he himself credits the German jurist Jhering with first realizing that the end of law is the social interest. Nevertheless, Pound's contribution to American jurisprudence is great. However old the truth he taught, it was novel to the audience he had, and often unwelcome, and he deserves credit for his part in the movement to gain it a hearing and an influence".

[18] R. POUND, *The Ideal Element*, cit., p.45.

[19] R. POUND, *The Ideal Element*, cit. p.51.

[20] R. POUND, *The Philosophy of Masonry*, Anamosa Iowa, 1915.

[21] R. POUND, *Masonic Jurisprudence*, Anamosa Iowa, 1920.

The key issue of progress of humanity is *"a harmonizing of the interests of each with each other and with all"*, until the "interests of the State and subject are one"[22].

Under the influence of European masonic thinkers, Pound underlines the artificial nature of social order, the need of a *"continual struggle with natural surroundings as well as with other societies and with individuals, wherewith interests or necessities come in conflict"*, until the outcome of "perfection".

Pound's philosophy of freemasonry shares with his jurisprudence the need to be *practical* rather than dogmatic, to *seek an end*, to "base our ideal upon the history of institutions", which should unanimously lead unanimously towards "preservation and transmission of an immemorial tradition of human solidarity and of universality"[23].

Significant examples of this "universality" are the "landmarks" of freemasonry, such as the first landmark, "belief in God, the Grand Architect of the Universe", or the second: "belief in the pre-existence of personality".

Of course, Pound wondered how the first landmark could coexist with the plurality of religions. He pointed out that, for example, Muslim masons could comply with the first landmark by belief in "*their*" God. Such an answer may sound quite *naïve*.

Other masonic landmarks, according to Pound, include secrecy of the masonic organization, that masons be "freeborn and of full age", the male gender of masons.

Pound, apparently, does not take into account the problem of how such landmarks may comply with the constitutional order of Western democracies; in other words, he gets round the problem whether the universal aspiration to civilization should justify, or even require, departing from fundamental democratic principles[24].

IV. WHY LAW AND ITS ENFORCEMENT ARE NOT (AND MAY NEVER BE) "POPULAR"

22 R. POUND, *The Philosophy of Masonry*, cit. pp.32 ff.

23 R. POUND, The Philosophy of Masonry, pp.81 ff.

24 K. KREILKAMP, Dean Pound and the Immutable Natural Law, 203, points out that "What is truly good for man, and what bad, is for Pound unknowable; all that can be surely and scientifically known is what men think to be good". As a consequence: "For all his talk about the philosophy of law, and a natural law theory of law, what Pound is proposing is really more a technique than a philosophy. He is closer to the Analytical School than he thinks. Where they confined jurisprudence to the amoral technique of applying an arbitrarily given positive law, issuing from the ruler, Pound confines it to the quite as amoral technique of applying an arbitrarily given set of moral and social ideals, issuing from society". See also K. KREILKAMP, Dean Pound and the End of Law, in 9 Fordham L. Rev., 1940, pp.225, 230.

As already seen, according to Pound, the judiciary is the main custodian of the relationship between law and the moral sense of the community, as developed through the history of institutions. This is the indispensable foundation of the law. Moreover, according to Pound, courts have been, and will always be somehow "unpopular".

In his presentation at the 1906 annual convention of the American Bar Association (one of the starting points of his career) on *The Causes of Popular Dissatisfaction with the Administration of Justice*[25] Pound identified three levels of such dissatisfaction: some (i) involving *any* legal system, some (ii) lying in the Anglo – American legal system and, finally, some (iii) due to the environment of US judiciary at the time.

Perhaps the most interesting aspect of the first tier is the gap that arises from *"the inevitable difference in rate of progress between law and public opinion"*. Since *"law formulates the moral sentiments of the community in rules to which the judgements of the tribunals must conform",* "these rules cannot exist until public opinion has become fixed and settled". As changes in law and public opinion follow different paces, "law is often in very truth a government of the living by the dead".

"In an age of rapid moral, intellectual and economic changes, often crossing one another and producing numerous minor resultants", the friction between the "moral or intellectual or economic change" and the law "cannot fail to be in excess".

There is one more crucial point about Pound's view of the relationship between public opinion and the judiciary: "public opinion must affect the administration of justice through the rules by which justice is administered rather than through the direct administration".

Public opinion should not press on the courts, nor should judges seek public applause. The effective warranty of justice trough jurisdiction is "the highest scientific standard in the administration of justice". This is the professionals' job, of course: "the daily criticism of trained minds, the knowledge that nothing which does not conform to

[25] R. POUND, The Causes of Popular Dissatisfaction with the Administration of Justice, Address Before the Annual Convention of the American Bar Association (Aug. 29, 1906), in 14 American L. J., 1996, p.445. For a report of Pound's presentation and reactions by contemporaries see J.H. WIGMORE, The Spark that Kindled the White Flame of Progress-Pound's St. Paul Address of 1906, in 46 J. Am. Judicature Society, 1962, p.50. A critical review and some reflections on developments following Pound's speech in B. FRIEDMAN, Popular Dissatisfaction with the Administration of Justice: a Retrospective (and a Look Ahead), in 82 Indiana L. Jour., 2007, p.1193: "The way to crisis is when the judiciary and the law depart from the core common sense and judgment of the American people. In this, Pound was absolutely right. The question is whether we are headed there" (1214).

the principles and received doctrines of scientific jurisprudence will escape notice, does more than any other agency for the every-day purity and efficiency of courts of justice". Consequently, Pound invokes "law schools that are rivalling the achievements of Bologna and of Bourges to promote scientific study of the law".

Pound's advocacy for re-thinking of the individualist "spirit" of the American common law and for reform of the US court system and procedural rules are among the most well-known aspects of his works.

Nevertheless, there are at least two aspects of particular interest nowadays: "the strain put upon law in that it has today to do the work of morals also" and (consequently) "the putting of our courts into politics".

In a time when "absolute theories of moral and supernatural sanctions have lost their hold", "conscience and individual responsibility are relaxed", "the law is strained to double duty, and more is expected of it than in a time when morals as a regulating agency are more efficacious".

Forty-eight years after, in the *Ideal Element*, Pound broadened his statement: "throughout the world, people are dissatisfied with the law", mostly because there was "no well understood idea" to help distinguishing law from arbitrary powers[26].

Finally, "putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench".

Unlike other borders (such as those between the judiciary and the legislative, or the judiciary and the administration), the line dividing courts from politics cannot be blurred.

V. GÉNY AND POUND: LEGISLATORS AND JUDGES BETWEEN "NATURAL ORDER" AND "ARTIFICIAL ORDER"

Pound's sociological jurisprudence shows the clear influence of contemporary continental European lines of thought, such as Jhering's and Gény's.

Pound agrees with Jhering and Gény in emphasizing the role of interests in law enforcement and he shares Gény's view that "l'ordre juridique privé, se ramenant essentiellement à une conciliation d'activités libres et à une harmonie d'intérêts en vue d'une finalité supérieure, ne peut – en dehors de la loi écrite, qui n'en offre jamais qu'une

[26] R. POUND, *The Ideal Element*, cit. p.51.

revelation imcomplète – trouver ses bases profondes et fermes, que dans la justice et l'utilité sociale, seuls éléments objectifs capables d'en suggérer les règles"[27].

On the contrary, he disagrees with Auguste Comte's opinion, followed by Gény, according to which there exist "lois naturelles qui constitue néecessairement la veritable base scientifique de la dignité humaine, dans l'ordre des événements politiques"[28]. According to Pound (who defined Gény a "neo-scholastic"[29]), "civilization" is always artificial, and the harmony of individual and collective interest is not the outcome of a "natural" evolution, but of a constant struggle against natural forces, both "internal" and "external" to each individual and humankind. Legal technique is a weapon in the struggle.

Gény's and Pound's "targets" were profoundly different[30]. Gény aimed, basically, at the rejection of the positivist theory of completeness of legislation, in favour of a wider approach, which would generate opportunities for the judiciary and liberate legal scholars from the boundaries of the "exegetic" approach.

Pound's aim, on the other hand (at least in his foundational works of "sociological jurisprudence" of the 1920's and 1930's), was to foster the transition of the US system from the "individualistic" common law tradition to a more "social" approach, by means of: advocacy for a wider role for statute law, a more critical attitude to case law (and the consequent wider discretion for the judiciary), a flexible judicial interpretation of fundamental rights of the individual granted by the Constitution, in order to facilitate the new "social" approach.

Pound and Gény acknowledge that the judiciary should enforce statute law, avoiding any "spurious interpretation", but this apparent consonance hides a fundamental discord.

Gény's very respectful attitude towards statute law and its faithful judicial enforcement is based on the tacit assumption that legislation, by itself, is but a poor

[27] F. GÉNY, *Méthode d'interprétation et sources en droit positif*, 2° ed., Paris, 1919, I, pp.187-188.

[28] A. COMTE, *Cours de philosophie postitive*, Paris, 1839, IV, lesson n. 48.

[29] R. POUND, *Jurisprudence*, II, 182 -183: "Gény goes on social life as a moral phenomenon. It is something given us as a fundamental truth which may be developed logically into its consequences. His definition of law is essentially a formula of positive law as declaratory of natural law". See also R. POUND, *The Ideal Element*, pp.47 ff.

[30] Pound, Gény and Jhering are sometimes mentioned as forerunners of a generic "tendency to free the judge from the text" (C. PERELMAN, *Rhetorical Perspective on Semantic Problems*, in ID., *The New Rhetoric and the Humanities: Essays on Rethoric and Its Applications*, Dordrecht, 1979, 89); such approach hides the relevant differences between the approach of the three scholars and the context in which they operated.

instrument, whose inevitable and broad gaps may not but leave the widest space to the "juge sociologue", with his scientific method and his technical instruments.

In Gény's view the judge, acts as a "social scientist". He takes as starting points factual data acquired through observation of the natural order[31] and refines them through the specific technical instruments of legal interpretation.

The judiciary, therefore, will be the most appropriate institution to carry on that "gouvernement sociologique" which, according to Comte, will foster the "progrès social" in an harmonic and non-conflictual way (unlike the struggles of politics).

According to Pound, vice-versa, the artificial evolution of society towards civilization does sometimes require major changes, which are better left to the political decision of legislators, while the judges' task is the constant refinement of law through comparison with the moral sense of the community, using the tools of legal technique.

While the "juge sociologue", first, applies scientific formulas learned through observation of social phenomena, and, subsequently, he uses the technical tools of legal interpretation in order to make positive law (mostly statute law) fit for purpose, the judge – "social engineer" builds mostly on experience coming out of a series of trials-and-errors[32].

Pound's reflections on the development of rules of liability without fault with reference to industrial activities at the beginning of the sixties are significant: "Today we are having to apply reason to relations of individual men employing instrumentalities potentially dangerous to themselves in operations controlled by others in an industrial

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[31] F. GÉNY, *Science et technique ed droit privé positif*, I, Paris 1914-1924, pp.91 ff, 95: " – *Avant tout, il faut savoir, en interprétant tous les éléments objectifs que nous présente le monde social, et, au besoin, en faisant appel aux puissances intimes, qui complètent les constatations de l'expérience et les suggestions de l'entendement, (intuition, croyance), quelles sont les règles à poser, tant au vu de la fin à poursuivre que d'après l'efficacité des moyens aptes à y répondre. – Cela fait, il s'agira, pour mettre ces règles en circulation dans la pratique, et les faire en quelque sorte passer de la puissance à l'acte, de pouvoir les ajuster à la vie, les adapter à ses exigences concrètes, à sa molle structure, à sa fluidité incessante, en dégageant et ramenant à effet les procédés d'application du droit*'".

[32] Pound expressed a critical position on Gény's view of "scientific" natural law as the foundation of positive law and of its enforcement. See, e.g., R. POUND, *Natural Natural Law and Positive Natural Law*, in *Natural Law Forum*, n. 49, 1960, pp.70 ff., 75: "It is not the task of philosophical jurisprudence to prove that we must fit legal precepts and their application necessarily and inevitably to a logically demonstrated pattern of the past. It is rather that we have experience also with which to work in applying given patterns and finding how to shape them to new conditions of fact which confront us. The task of reason is not confined to demonstrating universal and eternal validity of precepts as we find them given us in the legal order. Natural natural law is too easily thought of as a systematic logical establishing of the validity of positive natural law. Law is not pure reason in vacuo, but reason organizing and developing experience and corrected and developed by further experience". See also R. POUND, *The Ideal Element*, cit. pp.48 ff.

society. Do we not put too heavy a burden upon reason in expecting it to give us a complete and perfect system of justice, formulated in detailed precepts, good for all times and places and peoples to come? May we not turn to experience also?"[33].

On the other hand, as it was pointed out by Karl Llewellyn in his review of Pound's *Jurisprudence*, Pound analysis of Gény's work focuses critically on the side of "science", and quite overlooks the "technique" (as exposed, mostly, in Gény's *Méthode*, considered by Pound as a minor work)[34].

Pound's apparent oversight on the practical tools used by law enforcement agencies, with the judiciary in the first place, in order to reach results which are both compliant with positive law and coherent with the "données" may sound quite surprising, taking into account Pound's prior emphasis on the finalistic nature of the law and the practical nature of his jurisprudence[35].

VI. A CONTEMPORARY EUROPEAN PERSPECTIVE ON POUND'S THOUGHT: (I) JUDICIAL EMPIRICISM WITH NO LEGAL TECHNIQUE (OR TOO MANY OVERLAPPING LEGAL TECHNIQUES)?

Perhaps due to his distrust on "natural order", Pound set precise boundaries on judicial empiricism.

Two of them, at least, may be of particular interest nowadays: rationality and adherence to an "ideal picture" of the social and legal system, which represents the moral sense of the community.

Neither Pound nor Gény condemned formal logic, or advocated capricious, irrational or emotional approaches to law enforcement. Rather, they challenged the ideological nature of the assumption that logic is the only base of the legal order, and its only evolutionary force.

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33 R. POUND, *Natural Natural Law and Positive Natural Law*, cit. p.82.

34 K.N. LLEWELLYN, *Review of* Jurisprudence *by Roscoe Pound*, in 28 *Univ. of Chicago L. Rev.*, 1960, p.174.

35 In Llewellyn's words, Pound *"recognizes the importance of technique, in general. But he turns his back, then, on the craft-aspect, the daily working aspect for daily working lawyers, of this great Méthode of Gény's- even while, I repeat, he is sniffing out the greatness which has been missed by every other American writer except Cardozo"* (K.N. LLEWELLYN, *Review of* Jurisprudence *by Roscoe Pound*, p.178).

Gény underlined that logic should be the basis of *legal principles*, whose correspondence to reality has to be checked using the laws of sociological sciences (which are logical themselves, though not *formal*).

Pound (refusing, once again, the idea of a "natural" order) made clear that logic is not the origin and the essence of the legal system. Pound's mission was, maybe, easier than Gény's (and even more than Jhering's), since the "formalistic" approach was an "import product" in the US.

In Pound's view, the law has a scientific nature "not because it has an appearance of universality, but to the extent that it organizes in a logically coherent scheme of exposition the best that we know and think about the materials of the legal system"[36].

As any aspect of jurisprudence, logic has practical consequences, directly linked to effectiveness of the legal system: "Classification is a shaping and developing of traditional systematic categories in order to organize the body of legal precepts so that they may be (1) stated effectively with a minimum of repetition, overlapping and potential conflict, (2) administered effectively, (3) taught effectively, and (4) developed effectively for new situations".

"Legal precepts are not deductions from nor inevitable consequences of classification"[37] but their effectiveness needs logical grounds[38].

Though, of course, Pound was deeply interested in Jhering's work, he substantially overlooked Heck, and the *Freirechtlehre*[39].

The well-known diatribe between Pound and the "realists" sheds further light on the issue.

Ever since the 1931 article on *The Call for a Realistic Jurisprudence*, Pound pointed out that "many of these realists seek to ignore the logical and rational element and the

36 R. POUND, *Jurisprudence*, II, cit. p.21.

37 *Preliminary Report on Classification of the Law*, 2 *Proc. of the American Law Institute*, 1924, 370.

38 Very interesting remarks on the point are offered, in the context of an updated reading of Langdell, by C. P. WELLS, *Langdell and the Invention of Legal Doctrine*, in 58 *Buffalo L. Rev.*, 2010, pp. 551 ff.: *"Langdell's conception of doctrine remains an important part of our legal culture. Like the air we breathe, it is essential although it rarely excites our interest. Whether we like it or not, we inevitably teach doctrine to our students. We may teach other things as well; we may even teach our students to be skeptical of doctrinal arguments. Nevertheless, our students will emerge from our classes with a fine-tuned sense about doctrine itself"* (554).

39 According to N. DUXBURY, *Patterns of American Jurisprudence*, Oxford, 1995, p.63 since the early Thirties Pound underwent a radical change in his attitude towards European legal thought, proclaiming that American scholarship should have followed completely independent paths. Such statement does not seem to find any confirmation in Pound's late works, such as *The Ideal Element*.

traditional technique of application, or art of the common law's lawyer craft, which tends to stability and uniformity of judicial action"[40].

In the same writing, Pound even claimed for a "rationalization" of the irrational. Though admitting "the existence of an alogical, unrational, subjective element in judicial action", he advocated a "study of concrete instances of its operation to reach valid general conclusions as to the kind of cases in which it operated more frequently, and where it operated most effectively or most unhappily for the ends of the legal order". Within the realist movement, "somebody"[41] thought that Pound was turning from the fighter for reform of *The Spirit of the Common* into an inveterate conservative[42].

Pound cordially replied with a harsh criticism. The 1939 statement that "realism is essentially an art that cultivates the ugly" is but an example[43].

As it was pointed out, "like Holmes, Pound was both an anti-formalist and a formalist; but while Holmes was a hero to the realists, Pound 'ended up as their favourite whipping boy' "[44].

Pound could never accept any dismissal of logic or the abandonment of the idea that the legal system is made up of a coherent set of rules, nor any idea of legal scholarship as mere reporting of what is done by law enforcement officers, with the judiciary in the first place[45].

The first and foremost problem of the "judicial empiricism" theory nowadays, from a European point of view, is the *constant weakening of the technical - logical element* in both statutory and case law.

One aspect of such problem is that Pound's advocacy for a "social" rethinking of the US common law has sometimes been received in Europe as an apology for "spurious jurisprudence" (which Pound opposed fiercely), i.e. for conscious manipulation by courts of statutory precepts in order to reach political aims, careless of textual and logical interpretation.

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40 R. POUND, *The Call for a Realist Jurisprudence*, in 44 *Harvard L. Rev.*, 1931, pp.697 ff., 710.

41 In his 1931 writing, Pound never mentioned any realist by his own name, just referring to "the realists" as a whole.

42 K.N. LLEWELLYN, *Some Realism about Realism – Responding to Dean Pound*, in 44 *Harvard L. Rev.*, 1931, pp.1222 ff.

43 R. POUND, *Modern Administrative Law*, in 51 *Rep. of the Virginia State Bar Association*, 1939, pp.372, 385.

44 N. DUXBURY, *Patterns of American Jurisprudence*, 60, quoting G. GILMORE, *The Ages of American Law*, New Haven Conn., 1997, p.137.

45 R. POUND, *The Future of Law*, in 47 *Yale L.J.*, 1937, pp.1, 6.

Poor and misleading statutory wording (Italian legislation offers many examples) is but another aspect of the problem.

From a European point of view, the key issue comes with EU law and its effects on national legal systems.

In 1963 the landmark ECJ *Van Gend en Loos* decision[46] stated that the EEC Treaty imposed obligations and rights not only for Member States and the Community institutions, but for the individuals as well, "in a clearly defined way"; through the Treaty, Member States had created an autonomous legal order, with "an authority which can be invoked" by nationals before their State judges.

Immediately after the decision, comments, including writings from authors directly involved in the case, placed a great emphasis on the "supremacy of EEC law" principle, and the birth of a "new legal system"[47], which would have led progressively to entirely overcome the barriers between the national sovereignties.

Van Gend en Loos was seen as the starting point of a new "legal method to unify Europe", different from the "traditional" path based on political decisions and inter-governmental relationships. The "very needs of the population ruled by this unique body of law" would have led to a final, unavoidable, "political coronation"[48].

Such approach charged the national courts with the task of protecting EEC-originated rights even against their own national legislation, i.e. a task that is typical of constitutional courts. This way, national courts were somehow set above their own

[46] EUCJ, 5 February 1963, C 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*.

[47] A. TRABUCCHI, *Un nuovo diritto*, in IX *Riv. dir. civ.*, 1963, pp.259 ff. Alberto Trabucchi was a member of the Van Gend court. According to a reconstruction of the debate within the court, his position was crucial to determine the final outcome (M. RASMUSSEN, *Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952−65*, in 21 *Contemp. Eur. Hist.*, 2012, pp.375, 395–96. See also P. GORI, *Souvenirs d'un survivant*, in *50th Anniversary of the Judgment in Van Gend en Loos . Conference Proceedings – Luxembourg, 23 May 2013*, Luxembourg, 2013, p.29.

[48] In the words of R. LECOURT, *Le role du droit dans l'unification européenne*, in 17 – 18 *Bulletin de l'Association des Juristes Européens*, 1964, pp.5, 23, quoted by A. VAUCHEZ, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Policy*, Cambridge, 2015, p.140 (Robert Lecourt was the rapporteur of the ECJ *Costa v. Enel* decision, and became President of the ECJ from 1967 to 1976).

national laws[49] (to which, in democracies, they are usually subject: see, e.g., art. 101 par. 2 of the Italian Constitution)[50].

As it has been pointed out, "jurisdictional functionalism emerged as a new way of conceiving the articulation between Europe and the law"[51].

In this view, private law would have been the key unifying element, and the ECJ the key institution, within a co-operating / leading role with national courts.

Afterwards, EU law constantly expanded its influence on private law (mostly by means of harmonization of legislations through directives), going far beyond the original economic policy domain of the EEC Treaty.

The EU legislator quickly followed the path opened by the ECJ, giving way to a proliferation of directives in almost any field of civil and commercial law (exception made for those areas that are most sensitive to *values*, such as patrimonial aspects of family law, or the law of inheritance).

Neither the ECJ nor the EU legislator seriously worried about the technical - logical element, or even about the theoretical foundations of EU law. Pierre Pescatore's sometimes - mentioned words, according to which the ECJ used to operate on the basis

[49] Of course, as it had been foreshadowed by Advocate General Roemer in his conclusions in the Van Gend en Loos case, the direct effect principle would have led to serious constitutional problems in some member states, including Italy (from where the subsequent *Costa* and *Simmenthal* cases originated).

[50] E. BENVENISTI, G.W. DOWN, *The Premises, Assumptions, and Implications of* Van Gend en Loos: *Viewed from the Perspectives of Democracy and Legitimacy of International Institutions*, in 25 *European J. of Int.l Law*, 2014, hold that "while judicial intervention often pre-empts public deliberation, the costs that this imposes are often far outweighed by their benefits when compared to the counterfactual of domination by the executives of the most powerful state parties and the IOs subjected to their control" (102). The Authors reach this conclusion taking into account, *inter alia*, the "defragmentation strategies" of courts, i.e. their capacity to organize sparse legal materials within a coherent logical scheme, in order to give adequate reasons for their decisions. This remark leads back to Gény's *technique*, or Pound's "modes of looking at and handling and shaping legal precepts", which cannot be developed by courts alone, be they national or supranational, but need historical and theoretical foundations. J.H.H. WEILER, *Revisiting* Van Gend en Loos: *Subjectifying and Objectifying the Individual*, in *50th Anniversary of the Judgment in Van Gend en Loos. Conference Proceedings – Luxembourg, 23 May 2013*, Luxembourg, 2013, pp.11 ff. though arguing that the decision was the outcome of "an impeccable classical hermeneutic which was rooted in the treaty before the Court" (12) holds that "Direct Effect, inescapably and inextricably, implicates the Court in the very issues of democratic and social legitimacy which are at least partially at the root of current discontent".I

[51] A. VAUCHEZ, *Brokering Europe*, 143. See also A. COHEN, A. VAUCHEZ, *The Social Construction of Law: The European Court of Justice and Its Legal Revolution Revisited*, in 7 *Ann. Rev. L. & Soc. Sc.*, 2001, p.417.

of "une certain idée de l'Europe"[52], rather than on arguments based on legal technicalities are highly significant. Until the overflow of EU legislation, with its ever-increasing interpretative problems, made recourse to more sophisticated and articulated reasoning unavoidable, the *jugement a phrase unique* decision writing style was typical of ECJ decisions, including *Van Gend en Loos* and *Costa*.

Many attempts of building a "unified" logical system of European private law have been carried out[53], but none of them reached the necessary consensus, or convinced the EU institution to abandon the assumption that sectorial case-by-case statutory interventions, alongside with ECJ interpretative work, are preferable to facing theoretical problems on the conceptual nature of general private law institutes.

Decade after decade, the ECJ case law gradually built its own system, based on landmark logical principles (starting from the very "poundian" effectiveness principle): being faithful to the *Van Gend en Loos* starting point, such system is "autonomous" from those of Member States. Furthermore, ECJ logical and teleological reading of EU legislation aims at overcoming any resistance that national systems, with their "logics", may oppose to full application of EU rules.

Nowadays, European domestic judges have to deal, at least, with three different arrays of "technical - logical elements": the remains of their national concepts and classifications developed in centuries (embodied in the Civil codes, or in the common law), the "hybrid" categories created by the insertion of EU rules in the domestic legal texture (quite often embodied in sectorial "codes"), the autonomous and "superior" logic of the ECJ interpretation of EU rules.

Nothing assures that these three sets of "logical elements" (i.e. of legal techniques) are coherent with each other.

The *Francovich* ruling[54], to name but an example, charges domestic courts with the power/burden of judging their own legislators, applying national tort rules, interpreted under the light of superior principles that the ECJ extrapolated from the rules of the Treaty on harmonization of legislations[55].

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52 P. PESCATORE, *The Doctrine of Direct Effects, An Infant Disease of Community Law*, in 8 *Eur. L. Rev.*, 1984, p.157.

53 See the essays collected in H.W. MICKLITZ, F. CAFAGGI (eds.), *European Private Law after the Common Frame of Reference*, Cheltenham, 2010.

54 EUCJ, 19 November 1991, joint cases C – 6/09 and C – 9/90, *Francovich and Bonifaci v. Republic of Italy*.

55 J. BAQUERO CRUZ, *An Area of Darkness: Three Conceptions of the Relationship between European Union Law and State Constitutional Law*, in N. WALKER, J. SHAW, S. TIEMEY (eds.),

The defeat, by the ECJ, of threats coming from some national constitutional courts (Italian and German) led to different enforcement mechanisms of national Constitutions - through domestic constitutional judges - and of EU provisions through ordinary courts, by means of non-application of national rules conflicting with EU law.

Setting aside, for the time being, the problem of the plurality of EU and national *ethos* (i.e., of the "ideal element"), this implies, at least, that quite often the national judge will carry the burden of choosing the way between constitutional judgment and direct non-application of domestic rules.

Moreover, though many years have passed since the *Costa v. Enel*[56] and *Simmenthal* [57]judgments and notwithstanding the Nice Charter of fundamental rights in the EU, nothing assures that national constitutional interpretation criteria and ECJ principles are logically coherent in all cases.

The same relationship between EU law and national constitutions is still far from clear, while the controversial (and never really applied) "theory of counter-limits"[58], drafted by the Italian and the German constitutional courts, leaves many dark areas.

Is this the triumph or the defeat of judicial empiricism?

VII. (II) JUDICIAL EMPIRICISM WITH NO CLEAR "IDEAL PICTURES"?

In his 1923 essay on *The Theory of Judicial Decision* Pound stated that the most important task of the judge is "to induce a consciousness of the role of ideal pictures of the social and legal order both in decision and in declaring the law"[59].

As seen above, according to Pound the judge should never turn into a disguised politician, nor seek popularity by means of shaping the law according to any moral instance whatsoever coming from society. On the contrary, any such issue should be checked with the instruments of legal technique in order to avoid upsetting of the system

Europe's Constitutional Mosaic, Oxford, 2011, pp.49 ff. 62: "*Francovich*, more than any other judgement, speaks to us about the uncertainty of European Union law, about the imperfect and unfinished character of the rule of law in the European Union. In looking for a final sanction, for closure, 'for normality', *Francovich* exposes the fragility and openness of the system".

56 EUCJ, 15 July 1974, C 6/64, *Costa v. ENEL*.

57 EUCJ, 9 March 1978, C 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*.

58 For an overview, see the essay collected in R. ARNOLD (ed.), *Limitations of National Sovereignty through European Integration*, Dordrecht, 2016.

59 R. POUND, *The Theory of Judicial Decision*, in 36 *Harvard L. Rev.*, 1923, p.958.

as a whole. Major changes should be left to legislators, acting on the basis of a clear and well defined political program.

Development by courts of an "ideal picture of the social and legal order" requires a commonly shared moral sense, with a concept of "civilization" in the background.

Francis Fukuyama's theory of the "end of history"[60], through the final convergence of all systems towards the model of Western liberal democracies may sound quite harmonic with Pound's view. Even Huntington's opposite idea of the "clash of cultures"[61], on the other hand, may not result completely unfamiliar to a line of thought, like Pound's, which conceives "civilization" as the ideal outcome of a continuous struggle.

Sadly, none of these theories seems to explain the meaning of "civilization" in the globalized world.

The emergence of non-democratic systems based on spurious forms of capitalism (such as China or Turkey, or some Gulf area countries), with their economic actors competing in (and with) the Western free market economies, poses further questions about some possible separation of "economic" from "political" or "cultural" civilization.

Pound himself had quite an unhappy experience with China, after the defeat of Koumingtang party, and the consequent dismissal by the newly formed communist State, of his reformation plans based on the exportation of some basic features of the US model (including the common law). Not surprisingly, this turned him into a fierce anti-communist[62], notwithstanding the clear "social" inspiration of his entire work.

One may suppose that Pound would be even more disappointed with the evolution of China in a leading State of the world economy, without dismissal of the single-party system, or full acceptation of any Western doctrine of rights.

Judicial empiricism in a globalized world would still be possible only abandoning the ideal "universal" element, i.e. a key feature of Pound's philosophy. Though Pound admitted, of course, that there was a "Chinese sense of justice", as well as the possibility for Muslim freemasons to follow their religion, he never abandoned the claim for a universal civilization, where all collective and individual interests would have been in harmony.

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60 F. FUKUYAMA, *The End of History and the Last Man*, London, 1992.

61 Huntington's response to Fukuyama in S. HUNTINGTON, *The Clash of Civilizations?*, in 72 *Foreign Affairs*, 1993, p.22, further expanded in ID., *The Clash of Civilizations and the Remaking of World Order*, New York, 1996.

62 J.J. KRONCKE, *The Futility of Law and Development*, p.217.

Globalization, at least at the current stage, makes one much more sceptical.

Things gets no easier looking at Europe only.

What is the common moral sense of Europe today[63]? The traditional answer, based on a mythical "common constitutional tradition"[64], may not suffice.

Long lasting economic crisis and, most of all, mass migrations force the Europeans and their institutions to face the problem of costs of human rights, at least if they are to be "taken seriously", and not merely listed in the Charter of Nice.

Terrorism makes the problem of reconciling security issues with fundamental freedoms dramatic.

Basic moral issues are becoming more and more controversial, and it becomes harder to see any possible harmonization between individual interests and collective interests, which are often seen as structurally conflicting rather than concurring.

A kind of a Marxian revenge led to the multiplication of conflicts within Western societies, including some with a paradoxical flavour, like the clash between freedom of expression and intellectual property, or that the one between freedom of expression and war on terrorism, when the regulation of the Internet is at stake.

In such a scenario, judicial empiricism in the "poundian" sense may call courts to exercise restraint on pressure coming from society, asking for major changes of the legal system: litigation on Brexit, and the defence of parliamentary prerogatives by the Supreme Court[65], is perhaps the most significant example.

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[63] C. BARNARD, *Van Gend en Loos to(t) the future*, in *50th Anniversary of the Judgment in Van Gend en Loos . Conference Proceedings – Luxembourg, 23 May 2013*, Luxembourg, 2013, pp.117 ff., 118: "Despite the prominence of anthems and flags, there is a lack of a central focus around which to develop the identity of the EU citizen. And, as a result, there is considerably less reverence for the Court of Justice [in comparison with the US Supreme Court: A.N.]: large numbers of EU citizens have never heard of the ECJ, fewer still could locate it in Luxembourg or name a judgment". The Author suggests that the ECJ should "develop a new kind of doctrine of effectiveness, one that might mean endorsing the devolution of more decision-making power to the Member States or other actors" (122).

[64] See the decision by the EUCJ, 14 May 1974, C 4/73, *Nold*. The concept is now codified in art. 6 of the Treaty on European Union and in the preamble to the Charter of fundamental rights in the EU. A critical reading in F. FABBRINI, *Fundamental Rights in Europe. Challenges and Transformation in Comparative Perspective*, Oxford, 2014, p.256.

[65] Supreme Court, 24 January 2017, *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union and associated references*. The decision, though confirming precedents stating that the European Communities Act 1972 did not turn the UK legal system into a subordinate of the EU legal system, concluded that Brexit needed repeal by Parliament of the 1972 act, and could not take place as a mere consequence of the vote of June 23, 2016.

In some cases, mostly when ethical issues are involved, courts may be tempted, vice-versa, to accelerate changes in the law, though absent any sufficiently clear "ideal picture" of which new rules society actually claims for, and/or by means of "spurious interpretation" or disregard of legal techniques. Pound's theory of judicial empiricism prevents the judge from applying his own ethics, or the supposed ethic of the majority (which is a political principle and not an instrument of interpretation), or even from building moral foundations for legal rules.

When fundamental moral principles blur, law cannot be asked to act as a substitute.

Not even the inadequacy of politics to design "ideal pictures", and / or its transformation into mere fight of conflicting opportunities for power may justify such a substitution.

The main lesson to be learnt from the theory of judicial empiricism may be, on the one hand, that courts should protect the legal order against subversions from public opinion, as they can (the decision on Brexit is, once again, an example), when the latter tends to shift away from long-stated ethical principles.

Unlike public opinion, law enforcement should never depart from history.

On the other hand, Pound's theory teaches courts the art of self-restraint. The administrative side of judicial action implies testing legal rules under the experience of cases, with acceptance of the risk of errors. On the contrary, setting legal principles with a general value, under the disguise of deciding cases, as a consequence of ethical choices by courts, would not be judicial empiricism, but judicial politics.

Pound's teaching, deprived of its (universal) idealistic background, reminds us the importance of the lawyers' craft - including the judges' - in developing the shared moral sense of the community into technically sound, coherent and effective rules. This may be the core and the limit of law enforcement at the same time.