

ROSCOE POUNDS ON SOCIOLOGICAL
JURISPRUDENCE.

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CHAPTER-I

INTRODUCTION

Roscoe Pound was born on October 27, 1870, in Lincoln Nebraska to Stephen Bosworth Pound and Laura Pound. Pound studied botany at the University of Nebraska in Lincoln, where he became a member of Acacia Fraternity. He received his Bachelor's degree in 1888 and his master degree in 1889. In 1889 he began the study of law, he spent one year at **Harvard but never received a law degree.** He received the first P.H.D. in botany from the University of Nebraska in 1898. He was an Auxiliary judge of the supreme court of Nebraska for a period of two years during 1901 -1903. Thereafter, he worked as Dean of the Law School at Nebraska. He also served as a professor of Jurisprudence in Harvard University and was the Dean of its law school. He was a prolific writer and his major works includes-

- The spirit of the common Law (1921);
- An introduction to the Philosophy of Law(1922);
- Interpretations of legal history (1923);
- Law and Morals(1926);
- The formative era of the American Law (1938);
- Contemporary juristic theory(1940);
- Administrative Law-its Growth , procedure and significance(1942);
- Social control through law (1942);
- The task of law (1944) etc.

Roscoe Pound was one of the most leading and influential jurists who developed the American sociological jurisprudence in a systematic form. He emphasised on interdisciplinary approach to law so that rule of law and life may flow together. He treated law

as a means for affecting social control and did not believe in the abstract or mechanical application of law. He is considered to be the father of American Sociological Jurisprudence for his unique contribution to the science of law and legal philosophy. The emergence of Realist School in America in later years owes its origin to Pound's functional jurisprudence and theory of interests.

During the 19th century the concept of police state began to wither away and the concept of welfare state took precedence due to rapid increase in population, social revolutions leading to social unsettlement. Analytical positivism in such matters failed to meet the demands of social stability giving way to sociological approaches of law. Sociological jurisprudence a part of sociology (the science of social order and progress) predicts and prescribes social behaviour, led to the distinction between a legal sociologist and sociological jurist. Roscoe Pound's theory of sociological jurisprudence, firstly talks of a **factual study**, secondly **social investigations**, thirdly **just and reasonable solutions** and lastly **the achievement of the purposes of various laws**. He appreciated the task of lawyer to that of an engineer to build an efficient structure of society with the satisfaction of the maximum of wants with a minimum of friction and waste. It speaks about balancing of conflicting interests or defactor claims wherein the interests are categorised into individual public and social. The theory gives predominance to social interests as compared to public and individual interests.

Sociological Jurisprudence according to Pound should ensure that the making interpretation and application of laws take account of social facts. Towards achieving this end there should be-

- a) A factual study of the social effects of legal administration,

- b) Social investigations as preliminaries to legislation,
- c) A constant study of the means for making laws more effective, which involves,
- d) The study, both psychological and philosophical, of the judicial method,
- e) A sociological study of legal history,
- f) Allowances for the possibility of a just and reasonable solution of individual cases
- g) A ministry of justice in English –Speaking countries, and
- h) The achievement of the purpose of the various laws.

CHAPTER –II

ROSCOE POUND THEORY

Pound is the most systematic writer on the sociological jurisprudence. Pounds concentrated more on the **functional aspect of law**. That is why some writers name his approach as **functional school**. For pound, the law is an ordering of conduct, so as to make the good of existence and the means of satisfying claims go round as far as possible with the least friction and waste with a minimum of friction.

LAW AS PURPOSIVE AND NEED-BASED

Roscoe Pound's concept of law is of practical importance which inspires judges, legislators and jurists to mould and adjust law to the needs and to interests of the community. Since the society is always changing law should be continually adapted and readapted to the needs of individuals and society. He, therefore, stresses the need of paramount co-ordination and co-operation between the legislators, administrators, judges and jurists to work in unison towards the realisation and effective implementation of law for securing social harmony and social justice to the general public with the a minimum of waste or friction and maximum of material satisfaction of wants, needs and interest.

THEORY OF INTEREST (JURISPRUDENCE OF INTERESTS)

Ihering expounded the concept of Jurisprudence of interests quite opposed to jurisprudence of conceptions the later had made law rigid, logical and purely formal without content. The theory of jurisprudence of interests is based on functional study of man, and society to secure and satisfy needs or demands of the community. Earlier to him Jeremy Bentham had tested every institution or law on the matrix of utility. A supplementary theory of interests to that of

Inhering was further developed, by Pound who in turn further borrowed this idea from 'William James', and 'John Dewey'. Pound like Bentham tested the justification of law with reference to protection and enforcement of social and individual claims. In other words, Pound creates the test: **Does it secure the greatest number of interest with least possible sacrifice of other interests?** In Pound's words 'An interest is a demand or desire which human beings either individually or in groups seek to satisfy, of which, therefore, the ordering of human relations in civilised society must take account. The law does not create interests. It classifies them and recognises a larger or smaller number; it defines the extent to which it will give effect to those which it recognises, in view of

(a) other interests,

(b) the possibilities of effectively securing them through law;

it devises means for securing them when recognised and within determined limits'.

THE CONTRIBUTION OF ROSCOE POUND

The contribution of Roscoe Pound to Sociological Jurisprudence may be studied under the following heads-

1. EMPHASIS ON FUNCTIONAL ASPECT OF LAW-

2. POUND'S THEORY OF SOCIAL ENGINEERING-

i. **Private interests**

ii. **Public interests**

iii. **Social interests**

3. JURAL POSTULATES OF ROSCOE POUND

i. **jural postulate i-**

ii. **jural postulate-ii**

iii. **jural postulate-iii**

iv. **jural postulate-iv-**

v. **jural postulate-v.**

1. EMPHASIS ON FUNCTIONAL ASPECT OF LAW:

Roscoe Pound added new dimensions to Sociological school of Jurisprudence. His approach to Sociological Jurisprudence was different in the sense that he attempted to cover social life as a whole unlike his predecessors who considered law as the main subject of study and society is merely subsidiary to it. Pound laid greater stress on functional aspect of law. He defined law as containing “ the rules , principles, conceptions and standards of conduct and decision as also the precepts and doctrines of professional rules of art.” He thus considers law as a means of a developed technique and treats jurisprudence as a ‘**social engineering**’. The end of law according to him is to satisfy a maximum of wants with a minimum of friction or confrontation. Elaborating the functional aspect of law, Roscoe Pound stated that the function of law is to reconcile the conflicting interests of individuals in the community and harmonise their inter-relations. He termed this as “**social Engineering**”.

2. POUNDS THEORY OF SOCIAL ENGINEERING:

Roscoe Pound conceived law as a ‘**social Engineering**’ its main task being to accelerate the process of social ordering by making all possible efforts to avoid conflicts of interest of individuals in the society . Thus courts, legislators, administrators and jurists must work with a plan and make an effort to maintain a balance between the competing interests in society. He enumerates various interests which the law should seek to protect and classified them into three broad categories, namely-

I. Private Interests / Individual Interest-

Individual interests, according to Pound are claims, or demands or desires, involved in and looked at from the stand point of the individual life immediately as such asserted in title of the individual life’. In individual interest Dean Pound includes-

- 1) **Personality**- interest of personality consist of interests in -
 - a. the physical person,
 - b. freedom of will,
 - c. honour and reputation,
 - d. Privacy ,and sensibilities and
 - e. Belief and opinion.

- 2) **Domestic relations** - it is important to distinguish between the interest of individuals in domestic relationships and that of society in such institutions as family and marriage. Individual interests include those of
 - a. Parents and Children,
 - b. Husbands and Wives.
 - c. And marital interests.

- 3) **Interest of substance**- this includes
 - a. Interests of property,
 - b. Succession and testamentary disposition,
 - c. freedom of industry and contract,
 - d. promised advantages
 - e. advantageous relations with others,
 - f. freedom of association, and
 - g. Continuity of employment.

II. **Public Interest-**

Public interests according to him are the claims or demands or desires asserted by individuals involved in or looked at from the stand point of political life- life in politically organised society. They are asserted in title of that organisation. It is convenient to treat

them as claims of politically organised society thought of as a legal entity. The main public interest according to Roscoe Pound are-

1. Interests of state as a juristic person which includes
 - a. Interests of state as a juristic person i.e. protection
 - b. Claims of of the politically organised society as a corporation to property acquired and held for corporate purposes.
2. Interests of State as a guardian of social interest, namely superintendence and administration of trusts, charitable endowments, protection of natural environment, territorial waters, sea-shores, regulation of public employment and so on to make use of things which are open to public use, etc. this interest seems to overlap with social interests.

III. Social Interests

To Pound's social interests are claims or demands or desires, even some of the foregoing in other aspects, thought of in terms of social life and generalised as claims of the social group. They are the claims functioning of society; the wider demands or desires ascertained in the title of social life in civilised society. Social interests are said to include -

a. Social interest in the general security, -

Social interest in the general security embraces those branches of the law which relate to general safety, general health, peace and order, security of acquisitions and security of transactions.

b. Social interest in the security of social institutions,

Social interest in the security of social institutions comprises domestic institutions, religious institutions, political institutions and economic institutions. Divorce legislation may be adduced as an example of the conflict between the social interests in the security of the institution of marriage and the individual interests of the unhappy

spouses. There is tension between the individual interest in religious freedom and the social interest in preserving the dominance of an established church.

c. Social interest in general morals,-

Social interests in general morals covers a variety of laws, e.g. laws dealing with prostitution, drunkenness and gambling;

d. Social interest in the conservation of social resources,-

Social interests in the conservation of social resources covers conservation of social resources and protection and training of dependants and defectives , i.e. , conservation of human resources, protective and education of dependants and defectives , reformation of delinquents, protection of economically dependants.

e. Social interest in general progress and –

Social interest in general progress has three aspects. Economic progress, political progress and cultural progress.

Economic progress covers freedom of use and sale of property , free, trade , free industry and encouragement of inventions by the grant of patents.

Political progress covers free speech and free association, free opinion, free criticisms.

Cultural progress covers free science, free letters, encouragements of arts and letters, , encouragements of higher education and learning and aesthetics.

f. Social interest in individual life.

Meaning thereby each individual be able to live a human life according to the individual's (a) political life,(b) physical life,(c) cultural ,(d) social and (e) economic life.

In Case-ANIMAL AND ENVIRONMENT LEGAL DEFENCE FUND V/S UNION OF INDIA AND OTHERS¹

JUDGEMENT- The supreme court applied the principles of Economic sustainability and environment protection. If the villagers are not permitted fishing, their livelihood shall be destroyed. If they are permitted there will be a threaten to the ecology. Hence the Supreme Court ordered the concerned forest authorities and the Board constituted to take necessary steps to protect the environment. They shall watch the villagers and give suitable instructions to them. They shall be educated on the importance of environment. The villagers should not enter in other areas accepts to the lakes on which they are given fishing rights.

PRINCIPLE-The supreme court applied sociological approaches in this case for the welfare of tribals, whose source of livelihood is fishing. Not only in this case, but also in every environmental case, the sociological approach of their lordship is crystal clear. Their lordships often say that “law is a social engineering”.

It may be stated that Pound’s classification of interests in his theory of social engineering cannot be said to be fool-proof and one may find some overlapping of interests here and there. Pound himself accepted that the various interests of individuals in a society can only be broadly classified and they cannot be placed in water tight compartments. Julius Stone has rejected the division of public interests and social interests on the ground that in fact they are all social interests.

Pound tackled the problem of interests in terms of balancing of individual and social interests. It is through the instrumentality of law that these interests are sought to be balanced. As Justice Cardozo rightly remarked, “Pound attempted to emphasise the need for judicial awareness of the social values and interests”.

¹ (1997) 3 SCC 549

3.JURAL POSTULATES OF ROSCOE POUND

In order to evaluate the conflicting interests in due order of priority , pound suggested that every society has certain basic assumption upon which its ordering rests, through for most of the time they may be implicit rather than expressly formulated. This assumption may be called as jural postulates of the legal system of that society. Pound has mentioned five jural postulates as follows-

- A. **Jural postulate I-** in civilised society men must be able to assume that others will commit no intentional aggression upon them.
- B. **Jural postulate II-** in civilised society men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labour and what they have created by their own labour and what they have acquired under the existing social and economic order.
- C. **Jural postulate –III –** In a civilised society men must be able to assume that those with whom they deal as a member of the society will act in good faith and hence-
 - i. Will make good reasonable expectations which their promises or other conduct reasonably create;
 - ii. Will carry out their undertaking according to the expectations which the moral sentiment of the community attaches thereto.
 - iii. Will restore specifically or by equivalent what comes to them by mistake, or failure of the pre-suppositions of a transaction, or other unanticipated situation whereby they receive at other's expense what they could not reasonably have expected to receive under the actual circumstances.

D. **Jural postulate iv-** in civilised society men must be able to assume that those who engage in some course of conduct will act with due care not to cast an unreasonable risk of injury upon others.

E. **Jural postulate V-** in a civilised society men must be able to assume that others who maintain things or employ agencies, harmless in the sphere of their use but harmful in their normal action elsewhere, and having a natural tendency to cross the boundaries of their proper use will restrain them and keep them within their proper bounds.

Pounds confessed that these jural postulates are not absolute but they have a relative value. These are a sort of ideal standards which law should pursue in society they are of a changing nature and new postulates may emerge if the changes in society so warrant. Thus the jural postulates by Roscoe Pound provide guidelines for righteous and civilised life and they also seek to strike a synthesis between reality and idealism as also power and social accountability of men in the community.

PROGRAMME OF THE SOCIOLOGICAL SCHOOL-

Sociological jurist insists upon eight points.

1. Study of the actual social effects of legal institutions, legal precepts and legal doctrines.
2. Sociological study in preparation for law- making.
3. Study of the means of making legal precepts effective in action.
4. Study of judicial method.
5. A sociological legal history , study of the social background and social background and social effects of legal institutions, legal precepts, and legal doctrines and of how these effects have been brought about;
6. Recognition of the importance of individualized application of legal precepts of reasonable and just solution of individual cases

- A. In English speaking countries a ministry of justice.
- B. That the end of juristic study, towards.

Roscoe pound based on his theory of social engineering on the assumption that protection of interests is the main subject matter of law and it is the duty of jurists to make a valuation of these interest' for the satisfaction of human wants in order to strike a balance between stability and social change. Thus adopting a functional approach to law, pound stressed upon the need for study of law in relation to and as a part of the whole process of social control

CHAPTER III

CRITICISM AGAINST POUND'S THEORY:

Pound point out the responsibilities of the judge and the lawyer. Pounds contribution to jurisprudence is great. He takes a middle way avoiding all exaggeration. He speaks of value but says that they are relative. He emphasises engineering but does not forget the task of maintaining of balance .his approach is experimental. Pounds theory stands on a practical and firm ground and it has inspired great practical field –work. His emphasis on studying the actual working of legal rules in the society, the importance of social research for good-law making and pointing out the great constructive function which the law is to perform are very valuable contributions to jurisprudence. He point out the responsibility of the lawyer, the judge and the jurist and gives a comprehensive picture of the scope and field of the subject. Pound's influence on modern legal thought is great and the study of the subject is being undertaken under the light of his theory.

Despite pound's great contribution to sociological jurisprudence and his emphasis on studying the actual working of law in the society,his theory suffers from certain drawbacks. Pounds theory of social engineering has been criticised on various grounds.

It is contended that the classification of interests by pound is in the nature of a catalogue to which additions and changes have constantly to be made which is neutral as regards the relative value and priority of the interest enumerated. Pound's theory of social engineering has been criticised for the use of the term engineering, which equates society to a factory like mechanism. Law is a social process rather than the result of an applied engineering. Equating society with a factory is also not correct because the former is changing and dynamic in nature whereas the latter is more or less static. Again , pound's emphasis on engineering

ignores the fact that law evolves and develops in the society according to social needs and wants for which law may either have develops in the society according to social needs and wants for which law may either have approbation or disapprobation.

Dr. Allen² has criticised the utilitarian in pound's theory as it confines the interpretation of wants and desires to any material welfare of individual's life completely ignoring the personal freedoms which are equally important for a happy social living.

It has also been argued against pound's theory of interests that it has no significance in a pluralistic society where there are linguistic, ethics, and religious minorities having diverse interests. Harmonising their divergent interests is by no means an easy task to be performed through law and courts.

A general criticism against pound's theory is regarding his **use of the word 'engineering'**, because it suggest a mechanical application of the principle to social needs, the word "engineering" is used by pound metaphorically to indicate the problems which the law has to face, the objectives which it has to fulfil and the method which it will have to adopt for this purposes. Pound does not give an ideal scale of values with reference to interests. In fact pounds himself has admitted that philosophy has failed to provide an ideal scale of values and that the best that jurist can do is to proceed with the task of adapting law to the needs of his generalisation the choice between conflicting ideologies is one for the community at large. Another criticism against his theory is that emphasis on engineering ignores an important part of law which develops and evolves in the society according to social needs the law simply recognises or approves it. This dynamic feature of law is undermined.

Pound himself has inserted a certain evaluation by describing the interest in individual life as the most important of all. However, there is a danger of an implicit evaluation in the grading of interests as individual, public or social. What is an individual and what is a social interest is

²V.d. mahajan –jurisprudence and legal theory.

itself a matter of changing political conceptions. Many interests come under different categories.

According to prof. Fite³ there is no obligation to respect the personal interests of those who evade the responsibility of standing for themselves. This attitude results in the pressure –group theory of government which sees the legislature as a scene of struggle between competing interests and the cabinet as made up of the representative of various classes.

Pounds theory shifts the centre of gravity in the legal order from legislation to court judgements, but the judiciary has its decisions and therefore cannot really do effective social engineering. Justice can give ad hoc judgements on specific issues coming up before them but they cannot frame a broad plan for restructuring society. Of course, a judge can focus attention on a pressing social problem and through his judgement can create a modern legal principle or suggest some alteration in the law, but he cannot do what the legislature can do.

Justice without law can result in total lawlessness and arbitrariness. The rule of law, that is, the view that decisions should be made by the application of known rules and principles, was a great achievement of positivist jurisprudence. To abandon it would be a retrograde step.

Prof. Dias points out that Pounds engineering analogy is apt to mislead. What, for instance, is the “waste and friction” in relation to the conflict of interests? Further, the construction, for example of a bridge, is guided by a plan of the finished product and the stresses and strains to be allowed to each part are worked out with a view to producing the best bridge of that kind in that place. But with law there can be no plan, worked out in detail, of any finished product, for society is constantly developing and changing and the pressures behind interests are changing too. Therefore, the value or importance to be allotted to each interest cannot be predetermined.⁴

Dias also point out that Pounds assumed that de facto claims pre-exist laws which are required to “do something” about them.

³V.d. mahajan –jurisprudence and legal theory

⁴ Jurisprudence and legal theory ,page no-553

Dias points out that although Pound did not ignore ideals of guidance, he devoted too little attention to them. His awareness of them is evident in his distinction between “natural law” and “positive natural law”. According to him, the former is “a rationally conceived picture of justice and an ideal relation among men, of the legal order as a rationally conceived means of promoting and maintaining that relation, and of legal precepts as rationally conceived ideal instruments of making the legal order effective for its ideal end”. The latter is “a system of logically derived universal legal precepts shaped to the experience of the past, postulated as capable of formulation to the exigencies of universal problems and so taken to give legal precepts of universal validity.” The view of Dias is that it would have been preferable if Pound had enlarged on the criteria of evaluating interests instead of developing particular interests. His work has not much practical impact on account of his sterile preoccupation with interests and too little attention to the criteria of evaluation.

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