Roscoe Pound: 1870-1964

“The law must be stable, but it must not stand still” (Pound, legal-dictionary.com)

Pound disagreed with the notion that “unchanging and inflexible natural law formed the basis for the common law”. He argued that “some constant principles existed in common law, particularly dealing with methods”. He contended that judges apply these principles with common sense without ignoring practical consequences of their decisions. He further argued that judges must decide in a way that supports societal growth. He contended for “sociological jurisprudence” as opposed to “mechanical jurisprudence” (legal-dictionary.com, Encyclopedia, Stanford Encyclopedia of Philosophy).

My Philosophy of Law

- Law is “a highly specialized form of social control in a developed politically organized society – a social control through the systematic and orderly application of the force of such a society” (532).

- Law is regime – legal order – serving following functions:

  1- “Rules of decision”
  2- “Rules of or guides to conduct”
  3- “Bases of prediction of official action”
  4- For bad man “threats of official action which he must take account of before he acts or refrains from action”

- Law operates through both “a judicial process and an administrative process” (532).

- Pound’s view of law – analytical jurists view – “The idea of system and order and prediction lies behind” the term law (533).

- Absolutist view of law – The term law applies to “whatever is done by those who wield powers of a politically organized society simply because, and no matter how, they do it” (533).

- “What is the task of law” (533). Pound argues that law serves an end. In other words, law is a mean to an end. This end is social control.

- Law:

  1- Is “maintained by politically organized societies”
  2- for “adjusting relations and ordering conduct”
3- “through a judicial and an administrative process”

4- “employing a body of recognized or established percepts”

5- “applied by an authoritative technique in the light of authoritative ideals” (533).

- Pound argues for a very practical / pragmatic approach to law by asserting that it allows free will to obtain maximum happiness for itself while reconciling happiness for all (individual interests reconciled with collective interests rather will / happiness of strong at the cost of rest). For him, end and reason are not abstract ideals without concern for practical implications.

- Lawyers and courts are agents of organized political society for the purposes of “organized social control” (534).

- Lawyers must look at the law as mean to an end – social control. Pound does not favor either position that law is merely serving economic ends or ethics should be mixed with jurisprudence. Pound considers science of law to have a broader perspective (534).

- Science of law, according to Pound, is not independent of “science of politics,” sociology, psychology, and philosophy. In other words law is not a mechanical and fixed rather it is fluid and dynamic yet based on established or predictable principles and procedures.

- Pound argues for “the basis of experience developed by reason and reason tested by experience” (534). In other words he rejects absolute reasons that are beyond our control and lack critical component of human experience.

- Pound argues that in nineteenth century jurist encountered three major problems; “the nature of law,” “the interpretation of legal history,” and “the relation of law and morals. However, he considers “theory of interests as a major contemporary challenge for jurists.

- Rules: “a definite detailed legal consequence to a definite detailed state of facts or situation of facts” (535).

- Principles: “Authoritative starting points for legal reasoning” (535).

- Legal perceptions: “Authoritatively defined categories into which cases may be put with the result that certain rules and principles and standards become applicable” (535).

- Legal standards: “are defined as measures of conduct, to be applied according to the circumstances of each case, entailing liability to respond for resulting in case the limits of the case are departed from” (535).

- Relation of law and morals:
1) “the relations of the legal order to a received body of ethical custom in a time and place or to an organized body of principles” that is “arrived at by speculation instead of by observation” (536)

2) “guides to decision” (536)

3) relation of judicial or administrative process to morals (536)

- Pound defines interest as “a demand or desire which human beings either individually or in groups or in associations or in relations, seek to satisfy, of which, therefore, the ordering of human relations must take account” (536).

- Pound argues that “theory of interests” is a major challenge facing jurists. He considers this challenge as; recognizing certain interests, defining legal limits of their recognition and effect, and endeavoring to secure the interests within legally defines limits (536).

- For Pound one key element of law is to “adjust relations and order conduct” within a “politically organized society”. He contends that the law does not create interests but recognize and limit these interests within defined framework to achieve “adjust relations and order conduct”. Interests, according to Pound, exist in a society even if there was no legal order but some other form of social control without authoritative body (536). Conflict or competition among interests can get in the way of achieving end – social order- of a legal regime. Thus law recognizes interests and establishes limits to pursuit of these interests but does not create interests.

- Pound recommends following for a legal regime facing “theory of interest” challenge:
  1- Classify and generalize all interests pressing for recognition
  2- Determine interest to be recognized and secures
  3- Limit the recognized interests in securing their interests
  4- Determine constraints, limits, and / or means at the disposal of law to secure recognized interests
  5- “Work out principles of valuation of interests”

Pound refutes absolutist view of law consisting of fixed and rigid rules. He considers law based on predictable principles and processes but not absolute rules. His view of law is social, practical, and dynamic. His interpretation of authoritative force of law is not a coercive force of few - ruling elite – rather force of society required to preserve social order. Pound considers legal regime as a mean to an end and that end – social order – is to acknowledgement of myriad of interests, legitimate recognition of interests to be secured, limits on securing of these interests, and legal mechanisms enabling promoting orderly conflict and competition among these interests. Finally, I will contend that his legal philosophy of “adjusting relations” (within, between, and among interests) promotes societal structures that promote social, political, and economic mobility and hence modernity and development as opposed to “hereditary or fixed
relations” (within, between, and among interests) that promote status quo and create hurdle for social, political, and economic mobility.