

JURISPRUDENCE

By
ROSCOE POUND

Volume I

Part 1. Jurisprudence

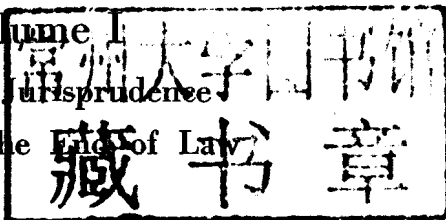
Part 2. The End of Law

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Pound Jurisprudence

INTRODUCTION

Roscoe Pound, retired Dean of Harvard Law School, holds a pre-eminent place among the world's legal scholars, educators and philosophers. The Publisher is privileged and honored to present his monumental work, one of the most important contributions to the world's legal literature of the century. As a leading spokesman for improvements in the administration of justice, as an educator and philosopher Dean Pound's many notable contributions to the law and to the legal profession have markedly influenced the course of legal history. Some highlights of Dean Pound's work and writings are listed here for the reader.

THE PUBLISHER

CURRICULUM VITAE

Born at Lincoln, Nebraska, 1870.

Educated, University of Nebraska, A.B. 1888, A.M. 1889, Ph.D. 1897. Harvard Law School.

Honorary doctorate (LL.D, L.H.D., J.U.D., D.C.L.) from 16 universities at home and abroad.

Practiced law at Lincoln, Nebraska, 1890–1901, and 1904–1907.

On the bench as Commissioner of Appeals, Supreme Court of Nebraska, 1901–1903.

Taught Jurisprudence and International Law at University of Nebraska, 1899–1901.

Dean of the Law School, University of Nebraska, 1904–1907.

Professor of Law, Northwestern University, 1907–1909.

Professor of Law, University of Chicago, 1909–1910.

Professor of Law, Harvard University, 1910–1936.

Dean of the Law School, of Harvard University, 1916–1936.

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University Professor, Harvard University, 1936–1946.
Visiting Professor of Law, University of California at Los Angeles, 1949–1953.
Tagore Professor of Law, University of Calcutta, 1953.
Editor-in-Chief, NACCA Law Journal, 1953–1955.
Chairman of the Section of Legal Education of the American Bar Association, 1907.
President of the Association of American Law Schools, 1911.
President of the National Probation and Parole Association, 1941–1949.
President of the Académie Internationale de Droit Comparé, 1950–1957.
President of the Instituto Internacional para la Unificación del Derecho Público, 1955–1958.
Director of the Survey of Criminal Justice in Cleveland, 1922.
Awarded the Gold Medal of the American Bar Association “for conspicuous service to the cause of American Jurisprudence,” 1940.
Member of the National Commission on Law Observance and Enforcement, 1929.
Member of the American-British Claims Arbitration, 1926–1927.
Director of the National Conference of Judicial Councils, 1938–1946.
President of the American Academy of Arts and Sciences, 1935–1937.
Corresponding Member of the British Academy.
Corresponding Member of the Instituto Argentino de Filosofía Jurídica y Social.
Fellow of the American Association for the Advancement of Science.
Foreign Fellow of the Academia delle Scienze Morali e Politiche, Società Reale di Napoli.
Honorary Member of the Royal Academy of Palermo.
Member of Japan Academy.
Member of Royal Society of Humane Letters, of Lund (Sweden).

Introduction

Member of the International Academy of Legal and Social Medicine (Belgium).

Gold Medal awarded by the National Chengchi University, Nanking, China.

Adviser to the Ministry of Justice of the Republic of China, 1946–1949.

Adviser to the Ministry of Education of the Republic of China, 1947–1949.

PRINCIPAL WRITINGS

The Spirit of the Common Law, 1921, reprinted 1931. Translated into German, Japanese, and Spanish.

Introduction to the Philosophy of Law, 1922, revised ed. 1954, translated into Japanese, 1957.

Interpretations of Legal History, 1923, reprinted 1930, 1946, translated into Chinese, Japanese and Spanish.

Law and Morals, 1924, 2d ed. 1926. Translated into Japanese.

Criminal Justice in America, 1929, reprinted 1945. Translated into German.

The Formative Era of American Law, 1938, reprinted 1939, 1949.

Organization of Courts, 1940.

Appellate Procedure in Civil Cases, 1941.

The Lawyer from Antiquity to Modern Times, 1953.

The Development of Constitutional Guarantees of Liberty, 1957, translated into Vietnamese, 1958.

The Ideal Element in Law, Tagore Lectures at Calcutta, 1958.

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PREFACE

Since Austin, books in English on jurisprudence have been written primarily for students entering upon the study of law or for their teachers. But with the passing of the localism characteristic of the Anglo-American lawyer of the last generation, growing cultivation of comparative law and rising expectation of ultimate achievement of a law of the world, exposition of the science of law should have a wider scope. Daniel Webster said that justice was the great interest of man on earth. Of the three instrumentalities of social control by which that interest is made effective, namely, religion, morals, and law, the brunt of the labor in the world of today has fallen upon law. A science of adjustment of relations and ordering of conduct of individuals so as to promote and maintain an ideal relation among mankind, is something which deeply concerns more than those who are preparing to take part as lawyers in the practice of law.

Accordingly in writing this book I have had in mind the general lay reader, the practising lawyer, the judge, the legislator, the law teacher, and the student, whether the latter comes to his study of law from some preparation in philosophy, in history, in economics, in political science, in ethics, or in sociology, in the course of which he has acquired or confirmed an idea of law as a body of rules. Indeed, I might add those who think of law from experience only of social work on the confines of the legal order. The science of law has much to say to each of these.

What I seek specially to bring out to every type of reader and in every connection is the difference between law and a law, that law is not a mere aggregate of rules of law nor the legal order a glorified system of policing. I would show the importance of both universal principles and local rules, of principles

Preface

by which law is developed by reason applied to experience and then tested by further experience, and of rules of law to meet special local conditions, geographical, ethnic, economic, or historical, which require adaptation of the administration of justice to local needs. Also I would seek to develop appreciation of the importance of balance of the universal and the local, of principle and rule, and of the legal order both to the political order and to the moral order. I would bring out specially the importance of the ideal element in law. But ideals may be local. An idealized picture of a local institution is not a universal ideal.

All this, however, is not to be set forth dogmatically in abstract propositions but will appear in the setting forth of the actual historical and doctrinal or legislative development of the law as a whole and of special fields of the law.

It has seemed to me important also, now that comparative law is finding a place in legal education, to bring out that it is not simply a comparative cataloguing of rules in this lawmaking jurisdiction or that, but may show how, while the same problem of law and justice may often have received different answers from different legislators, yet principles, starting points for judicial reasoning, derived from experience of adjudication or doctrinal exposition, have been tending more and more toward a uniformity of law except where local geographical, ethnic or economic conditions require special rules.

Faith in this as the sound method of expounding the science of law has come to me in the course of a long and varied experience of what the various elements of the community understand by and expect of law, and developed consciousness of the need of more generally diffused understanding of what law and the legal order are.

In 1887, when I was in my junior year in college my father gave me Holland's *Elements of Jurisprudence* (3d ed. 1886), Amos's *Science of Law*, and Maine's *Ancient Law*. In the next

Preface

two years I read them over and over. College education in those days was chiefly Latin, Greek, and Mathematics. I read five dialogues of Plato and Aristotle's Politics under a Professor of Greek who was more interested in Scotch metaphysics (he always quoted Dugald Stewart) than in Greek, and took a required course in philosophy taught from Spencer's *First Principles* by a Comtian utilitarian. Thus I came to the Harvard Law School in 1889 with very confused ideas of law. Professor Gray in his preliminary lectures on the law of property introduced me to Austin and settled my ideas for a time. What counted more, in a happy encounter during the Christmas recess, he led me to read Sohm's *Institutionen des römischen Rechts* (not then translated) and through Sohm I came to read Puchta's *Cursus der Institutionen* and the general part of Savigny's *System des heutigen römischen Rechts*. I read and re-read Austin (in the 5th edition, 1883) and thus left the law school a convinced utilitarian and follower of Austin as were those who got their juristic ideas at Harvard in the great days of Langdell, Gray, Ames, and Thayer.

Reading Holmes on the Common Law while in Law School I had not made much out of it. Reading it again in 1893 and reading Maine's *Early History of Institutions*, I began to turn to the then dominant historical school. In College I had been brought up on Herbert Spencer's *First Principles* and this and my Anglo-American law training did not incline me to philosophy of law. But before I began teaching, contact with a teacher of philosophy, trained at Berlin under Paulsen, induced me to read Kant's *Rechtslehre* and Hegel's *Grundlinien der Philosophie des Rechts* and from them I turned to the later metaphysical jurists and at least began to understand that there was something in law of which English analytical and historical jurisprudence had not taken enough account. Yet it was a decade later that I began to see how to use this understanding. Between 1890 and

Preface

1900 I began the course of systematic reading of all I could lay hand upon in Roman law, comparative law, jurisprudence and legal history which I have kept up ever since.

When in 1899 I was called on to teach jurisprudence at the University of Nebraska I still held to the then orthodox analytical jurisprudence with some reservations and some concessions to Savigny and Maine. Happily in the early years of the present century it was my good fortune to be associated with Edward A. Ross, then Professor at Nebraska, and thus to be set to reading Ward and to thinking about sociological jurisprudence. When I went to Chicago in 1907 I met Albion W. Small, and to Ross and Small, next to John Chipman Gray, I owe a decisive impetus at a critical point in my study.

If James Barr Ames had been spared to live out the allotted three score years and ten we should probably have had a revival of philosophical jurisprudence in America fifty years ago. It was not, however, until I re-read some of his later writings after his death that I saw where he was leading us. So, too, with Holmes. Every student of law in America in the last fifty years was profoundly influenced by him. Beginning to write from the analytical standpoint in the days when he was editor of the *American Law Review*, he fell for a time into the historical current of the latter part of the nineteenth century. His oft-quoted dictum that the life of the law has not been reason, it has been experience, was an epigrammatic formulation of the creed of Savigny and Maine. Nevertheless as early as 1897 he had moved beyond the analytical-historical jurisprudence of the time and had become a pioneer of the sociological jurisprudence of the next decade. But this was not realized at first. It was not until he began his long series of classical opinions upon the juristic questions involved in American constitutional law that law teachers and students sat at his feet.

Preface

Behind this book are seventy years of study and fifty-four years of teaching jurisprudence as well as some years of active practice of law and on the bench of a state Supreme Court. Hence I have written with my eye upon the practical problems of the legal order in the general bigness of everything today, overcoming of difficulties of distance and time which has been making every locality in the world the near neighbor of every other, and multiplication of threats of injury to life and limb through mechanizing of every form of human activity.

This book was planned and writing was begun in 1911. The first nine chapters were done by 1916 when pressure of administrative work followed by the first World War required suspension of work upon it till 1920. Between 1920 and 1926 I wrote chapters 20 to 26. But during that time in addition to much increased administrative and teaching tasks I was busied with direction of the Survey of the Administration of Justice in Cleveland in 1927. Later I was one of the National Commission on Law Observance and Enforcement (1929-1931). In 1937 I was appointed to one of the newly instituted University Professorships at Harvard and had to rearrange my whole program of work. Also the second World War (1939-1945) interfered with consecutive writing. But by 1946 I had written chapters 26-30. In 1946-1949 I was Adviser to the Ministry of Justice of the Chinese National Government in setting up the courts, the whole judicial system having been disrupted by eight years of Japanese occupation, and Adviser to the Chinese Ministry of Education, helping re-establish the law schools. I was in China during this time and got no writing done on the book. Returning to the United States I became Professor of Law at the University of California at Los Angeles, teaching history and system of the common law and jurisprudence, along with ordinary law-school courses. At

Preface

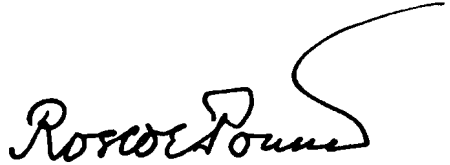
this time (1949–1952) I revised chapters 1–30, and wrote chapters 31–32. In 1953 I left Los Angeles and went to India as Tagore Professor of Law at the University of Calcutta, where I delivered the Tagore Lectures on the Ideal Element in Law, and conducted a question and answer course in jurisprudence. I now retired permanently from law-teaching. Returning to America I was compelled to find remunerative editorial work till in 1955 a foundation, which modestly prefers to bestow its grants anonymously, made me an award, followed by annual grants in aid in 1956, 1957, and 1958. This enabled me to revise the whole manuscript and write the two final chapters: chapters 33 and 34.

Especially I must acknowledge my debt to John Chipman Gray who taught in Harvard Law School, 1869–1912. He set me in the right path at the beginning of my study of law by directing me to Roman law as an introduction to comparative law. Many years afterward, when I came to teach Roman law and jurisprudence at Harvard he sometimes came to my seminar and took part in the general discussion. Moreover, I must acknowledge a real debt to the seventy-five law teachers in law schools in the English-speaking world who have sat in my seminar in jurisprudence and discussed with me and with each other most of the things considered in these pages.

Much of what is put in final form in chapters 1 to 19 was first published in articles in the Harvard Law Review between 1911 and 1937 and has been used by permission of the Harvard Law Review Association. Also in my Tagore Lectures on The Ideal Element in Law I made use of material from chapters 7 to 12 and in places elsewhere which is now published by permission of the University of Calcutta.

Preface

Finally, I must acknowledge indebtedness to my secretary, Miss May M. McCarthy, who has had charge of the manuscript from the beginning. Her indefatigable and intelligent verification of references in many languages and care for the manuscript through multiplied revisions and rewritings has been indispensable.

A handwritten signature in cursive script, reading "Roscoe Pound". The signature is written in black ink and is positioned to the right of the date.

July 3, 1958

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