

# Realistic Socio Legal Theory: Pragmatism and Social Theory of Law

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**Abstract:** Sociological School and Realist school are the schools of jurisprudence. Various notable jurists contend that realist theory is a part of sociological school. On the contrary others are of the opinion that realist theory is a separate school.

This paper strives to analysis sociological school of jurisprudence and realist theory of law. To analyse the concept of realist theory of law and it's co-relation with sociological school. Also, to know what the theory states and whether it is compatible with Indian legal society. Further, the aim of this project is to elucidate the implications and contributions both the schools has made in the legal jurisprudence.

**Keywords:** Sociological school, realist school, Indian legal jurisprudence.

## I. INTRODUCTION

With the rise of societal developments brought with the development of modern science and socio-economic developments, there came to exist among jurist a consensus of belief in the possibility of applying the 'scientific method' to the study of law and legal philosophy, rendering of law more effective as to an instrument of social control for the ends which law is designed to accomplish in the civilization of the time and place.

Sociological school of jurisprudence focus its attention on social purposes and interest served by law rather than on individuals and their abstract rights. According to this school, the essential characteristic of law should be to represent common interaction of men in social groups, whether past or present, ancient or modern. The jurists of sociological school treat law as an instrument of social progress. They are concerned to study the effect of law and society on each other. They contend that relation between positive law and ideals of justice also affects the sociology of law.

Many authorities contended that sociological jurisprudence originated as a reaction to rigid legal positivism which relied on the fact that law is solely based on the coercive power of the state and completely rejected the pursuits of morality and justice as irrelevant in human relations.<sup>1</sup> Sociological school is also opposed to past customs, traditions and values of historical school.

The exponents of sociological jurisprudence treated it as a combination of psychology, philosophy, economics, political science, sociology, etc. They expounded that law was an applied science applying functional methods of investigation and analysis for solving the social and individual problems. According to them, it would be erroneous to address it as a mere command or God's will or the people's conscience as the functional role of law and effects on society constitute the basic philosophy underlying sociological jurisprudence.

Roscoe Pound (1870-1964) is recognized as the leader of the sociological school. He made tremendous advancement towards the accomplishment of his vast legal studies, excursions into legal history, mastery and application of philosophy to law, and his research into case law for purposes of understanding how law is actually functioning. A great advancement in modern times was furnished by Dean Pound to the subject of sociological jurisprudence.

## II. HISTORICAL DEVELOPMENT OF SOCIOLOGICAL JURISPRUDENCE

At the end of eighteenth century the philosophy of jurists towards law regarding its functions, purposes and objectives underwent a radical change. With the rise of societal developments, change in economic conditions, such as the laissez faire philosophy generated differences between different sections of society. Montesquieu (1689-1755) the forerunner of sociological jurisprudence was the first to apply the fundamental principle as he expounded in his work – 'The Spirit of law' that a system of law is a living growth and development interrelated with the physical and societal environment.

The exponents of sociological jurisprudence rendered law as an effective instrument of social control for the ends which law is designed to accomplish in the civilization of the time and place. Therefore, there was a need for a fresh approach to the study of law in terms of pressing needs of the society as the preceding dogmatic approach had failed to deliver the goods. This led to the emergence of the sociological jurisprudence which was later polished by various legal thinkers, jurists, philosophers which can be understood by their philosophies.

<sup>1</sup> Dr. N. V. Paranjape, Studies in Jurisprudence and Legal Theory, (8<sup>th</sup> ed., 2016) p. 91.

### III. NOTED PROPONENTS OF SOCIOLOGICAL JURISPRUDENCE

The great impulse to the movement in modern times was furnished by some noted jurists, philosophers and legal thinkers, who revolted against the historical-metaphysical school. Their contribution and advocacy of their philosophy of sociological school of jurisprudence is significant.

#### ➤ **Auguste Comte (1789-1857)**

The French legal thinker and philosopher Auguste Comte, is regarded as the founding father of sociological science. The term 'scientific positivism' is known for the scientific method applied by Comte to the study of sociological science. His empirical approach was based on experience and observation in an effort to establish co-relation between law and society. He rejected the God theory and forces of nature at the metaphysical stage and according to him the scientific stage lays greater emphasis on empirical observation and study of correlation between observed phenomena themselves. He further pointed out that man cannot live in isolation as he is essentially a social being and all his impulses originate from his social life which are to be regulated and controlled by law and the government. Therefore, it is the society and not the individual which should be the focal point of law.

#### ➤ **Rudolph Von Ihering (1818-1892)**

The nineteenth century German Jurist was born at Aurich (Germany), in 1818. The pioneer of the basic modern trend in jurisprudence, in his work – '*Law As A Means To End*'<sup>2</sup> criticized the notion of individual freedom and liberty as propounded by Immanuel Kant and Jeremy Bentham as they had separated legal theory from social realities. His philosophy was of social utilitarianism, which is an action that results in greatest pleasure for the utility of the society is the best action. His philosophy was different from Bentham as Ihering opined that social interest of the society must gain priority over individual interest and the purpose of law should be to protect the interest of the society on the contrary Bentham advocated to resolve the conflicting interests of the Individuals in the society. Therefore, Ihering's legal philosophy is known as the 'jurisprudence of interests' which emphasizes on sociological aspects of law. Further, he exposed the weaknesses of individualism, which had made the 'individual' as the focus of moral political and legal order, to which Ihering contended it as anti-social and contradictory to social justice. Thus, he was a great critic of Austinian positivism, Benthamite individualism.

The German contemporary described social legal development in terms of battles between competing individuals and groups involving legal support to seek their purposes and interests. Ihering wrote:

"In the course of time, the interests of thousands of individuals, and of whole classes, have become bound up with the existing principles of law in such a manner that these cannot be done away with, without doing the greatest injury to the former .... Hence every such attempt, in natural obedience to the law of self-preservation, calls forth the most violent opposition of the imperiled interests, and with it a struggle in which, as in every struggle, the issue is decided not by the weight of reason, but by the relative strength of opposing forces."<sup>3</sup>

Thereby, Ihering pointed that law is result of constant struggle. Thus, Force produces law immediately out of itself. He contended – "and as a measure of itself, law evolving as the politics of force. It does not therefore abdicate to give the place to law, but whilst retaining its place it adds to itself law as an accessory element belonging to it, and becomes legal force."<sup>4</sup>

#### ➤ **Eugen Ehrlich (1862-1922)**

As a noted Professor of Roman law at the University of Czernowitz in Austria, he believed in the evolution of law concerning the existing society and thereby evolved his theory of 'living law'. The significant contribution of Ehrlich to sociological school of jurisprudence rests in scientific approach to study of law in social context and his special importance to relation between law and the life of the society. He adopted a more practical approach and focused his attention on the social functions of law. According to him the society is governed by the institutions of marriage, domestic life, inheritance, possession, contract etc. which dominates the human life. Therefore living law is extra-legal controls which regulate the social relations in the society. The role of law according to him, is attainment of social justice. He contended that 'the center of gravity of legal developments in the present time or the past, lies neither in juristic science nor in judicial decisions, but in society itself.'<sup>5</sup>

Austrian jurist Ehrlich strongly promoted the identical contentions with Montesquieu on cluster of positions. In his 1913 text, *Fundamental Principles of the Sociology of Law*<sup>6</sup>, Ehrlich asserted, "As law is essentially a form of social life, it cannot be explained scientifically otherwise than by the workings of social forces."<sup>7</sup>

<sup>2</sup> Rudolph Von Ihering, *Law As A Means To End*, (Isaac Husik ed., 1913), PDF <https://socialsciences.mcmaster.ca/~ihering>

<sup>3</sup> Rudolph Von Ihering, *The Struggle For Law*, 10-11 (John J. Lalor ed., 1979), (1915).

<sup>4</sup> Ihering, *Supra* note 2, at 187.

<sup>5</sup> C. K. Allen, *Law in the Making*, (7<sup>th</sup> ed., 1964) p.28; Dr. N. V. Paranjape, *Studies in Jurisprudence and Legal Theory*, (8<sup>th</sup> ed., 2016) p. 99.

<sup>6</sup> Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, (Walter Moll ed., 1936).

<sup>7</sup> Eugen Ehrlich, *Montesquieu and Sociological Jurisprudence*, 29 HARV. L. REV. 582, 584 (1916).

Another salient theme in Fundamental Principles<sup>8</sup> was Ehrlich's contention that social life is full of multiple norm-governed orders tied to social associations, which subsists independently of the state. The "living law," about what he is infamous for, interacts with the official law of the state. Such a law is often more efficacious than state law and is also a source of state law norms. It can also give rise to a plurality of coexisting legal and quasi-legal orders.

➤ **Leon Duguit (1859-1928)**

A French pioneer who made significant contribution to the sociological school of jurisprudence in early twentieth century, Duguit was influenced by the theory of Auguste Comte, according to whom the society and not the individual should be the focal point of law and the only right which man can possess is the right always to do his duty. This influenced Duguit's legal theory. Duguit propounded the doctrine of social solidarity which was based on the fact that interdependence of man is the essence of society as each individual cannot procure the necessities of life by himself. Duguit contended that law is a rule which men obey not by virtue of any higher principle but because they have to live as member of society.

He put forward the theory of justice and defines justice in terms of fulfilment of social needs and obligations. Duguit contended that law must seek to promote social solidarity so as to achieve maximum good of the society as a whole. State regulations should be oriented towards achieving the needs of social and economic justice for common good. According to him, legislators do not make law but merely give expression to judicial norms developed by the the social group.

➤ **Roscoe Pound (1870-1964)**

Roscoe Pound is recognized as the leader of the sociological school. He made tremendous advancement towards the accomplishment of his vast legal studies, excursions into legal history, mastery and application of philosophy to law, and his research into case law for purposes of understanding how law is actually functioning. A great advancement in modern times was furnished by Dean Pound to the subject of sociological jurisprudence. He stressed on the fact that law should be studied in the context of history, sociology, economics, psychology as well as the traditions, customs and need of each society. The American jurist is known for his prolific work – 'The Scope and Purpose of Sociological Jurisprudence'.<sup>9</sup> Roscoe Pound presented law in thoroughly functional terms:

'I am content to think of law as a social institution to satisfy social wants – the claims and demands and expectations involved in the existence of civilized society – by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society.'<sup>10</sup>

Thus, his philosophy entail 'law in action', as it concentrates on functional aspect of law. According to him the material function of law is to equalize the conflicting interest by satisfying maximum wants with minimum friction. Pound describe sociological jurisprudence as experimental jurisprudence, centered on application of law to the social realities of life. Thus, over the arc of history, Pound saw "a continually more efficacious social engineering."<sup>11</sup>

Roscoe Pound conceived law as a 'social engineering', as its primary purpose is to avoid conflicts of interest of individuals in the society. 'Interest' by him is defined as a claim, want or demand of an individual or group of individuals which a civilised society must take into consideration. Further Pound enumerated various interests and categorised them as (a) Private interest (interest of physical integrity, domestic relations, reputation, freedom of conscience, freedom of contractual relations etc.) ; (b) Public interest (State as guardian of social interest and interests in the preservation of the State); and, (d) Social interest (preservation of peace, preservation of social institutions, general morals etc.). Therefore, he based his theory of social engineering on the assumption that protection of interests is the main purpose of law and it is the duty of jurists and administrators to make a 'valuation of these interests'.

The significance of Pound's philosophy is that it inspires legislators, Judges and jurists to interpret law according to the needs and interests of the community through his 'law in action.' The movement of Realist School in America in later years owes its origin to Pound's functional jurisprudence and theory of interest.

#### IV. SOCIOLOGICAL JURISPRUDENCE AND REALIST THEORY OF LAW

The realist movement emerged around 1920s and 1930s to debunk formalist views of law<sup>12</sup> in United States where some American Jurist notably O.W. Holmes, Benjamin N. Cardozo and Gray raised their voice against legal conceptualism and stressed on the study of law as it actually functions. Realism is the modern branch of sociological jurisprudence which is centralised on decisions of law courts as realists believed that judicial decisions are not based on abstract formal law but the human prospect of the judge and the lawyer also has an influence on the courts decisions. Therefore, law emanates from judges. Karl Llewellyn

<sup>8</sup> Ehrlich, *Supra* note 6.

<sup>9</sup> Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, (pts. 1 & 2), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140 (1912).

<sup>10</sup> Roscoe Pound, *An Introduction To The Philosophy Of Law*, 47 (rev. ed. 1954).

<sup>11</sup> *Ibid.*

<sup>12</sup> Robert L. Hayman, *Jurisprudence Classical and Contemporary: From Natural Law to Postmodernism*, (2<sup>nd</sup> ed. 2002) p. 159-160.

asserted – some jurist refuse to accept realism as a separate school of jurisprudence and hold that at the best it may be called a branch of sociological jurisprudence.<sup>13</sup>

### ➤ **Meaning of Realism**

Roscoe Pound defines realism as, “fidelity to nature, accurate recording of things as they are, as contrasted with things as they are imagined to be, or wished to be or as one feels they ought to be”. Realism is centered on the actual working and effects of law. It rejects the belief of natural law which believes in unvarying principles of justice. Thus, realism is the observation of law in action. Karl Llewellyn asserted – “It is society and not the courts which gives rise to, which shapes in the first instance the emerging institution, which kicks the courts into action. It is only from observation of society that the courts can pick their notions of what needs the new institution serves, what needs it baffles. In any event, if the needs press and recur, sooner or later recognition of them will work into the law.”<sup>14</sup>

### ➤ **Sociological School of Law within Legal Realism**

Llewellyn considered law as a means to a social end and suggested evaluation of law in terms of its actual effects without giving much importance to formal conceptual rules. According to him, realism is not a separate school but it can be said as a branch of sociological school. Some other Scholars like Friedmann, Cardozo, conceived legal realism to be a movement and a modern philosophy of sociological school of jurisprudence.

Realists uphold only judge made law as genuine law and they do not give any importance to laws enacted by legislatures. Similarly, the exponents of sociological jurisprudence were though not exact in each sense but of a similar opinion. Eugen Ehrlich (exponent of sociological school) contended – ‘the center of gravity of legal developments in the present time or the past, lies neither in juristic science nor in judicial decisions, but in society itself.’<sup>15</sup>

The realists believe that certainty of law is a myth. Likewise Jerome Frank has stated – “law is what the court has decided in respect of any particular set of facts, prior to such a decision, the opinion of lawyers is only a guess as to what the Court will decide and this cannot be treated as law unless the court so decide by its judicial Pronouncement”.<sup>16</sup> Thus, the decisions made by courts, if not based on certainty of law or enacted legislations, have to be based on the needs and interests of the community. Another pioneer of sociological school Roscoe Pound whose philosophy inspires legislators, Judges and jurists to interpret law according to the needs and interests of the community through his ‘law in action.’

Benjamin N. Cardozo (1870-1938) made significant contribution to the development of American realism through his comprehensive analysis of functioning of judicial process. He strongly believed in adherence to judicial precedents but was of the idea that precedents may be relaxed or ignored where they are inconsistent with the sense of justice or with the social welfare. Likewise he asserted – ‘Society is inconstant. As long as it is inconstant, and to the extent of such inconstancy, there can be no constancy in law. The kinetic forces are too strong for us.’<sup>17</sup>

American Justice Oliver Windell Holmes (1841-1934) conceived law as a means to protect and promote the collective group interests as compared with the individual interests. According to him, while establishing a law and legal rules by which men should be governed, the lawyers and Judges must conceive the needs of the time, prevalent moral and political precepts, public policy and the public opinion. Likewise Holmes asserted – “life of law has not been logic, it has been experience”. Therefore he approached law in a pragmatic manner applying its working in the society. Holmes asserted that where there is a gap in the law, Judges are required to take account of precedent but where this is unclear, he must decide the best way to proceed and the result may be a decision which is in some way innovative but the fundamental principles are always part of the law.<sup>18</sup>

## **V. SOCIOLOGICAL JURISPRUDENCE IN INDIAN CONTEXT**

It would be necessary to assess laws existing during British India that is at the time before independence as well as in the present. Law at the time of pre-independence was suppressive and depraved to the sentiments of the Indian people. There were no moral principles of governing the society which resulted in conflict between different communities. Therefore, law during British India was formal, rigid, repressive, and punitive as reflected by the Austinian conception of imperative theory of law.

After India’s independence, a new Constitution was adopted which embodied the social and economic values. Being the supreme law of the land the Indian Constitution enumerates the fundamental rights and directive principles of State policy accomplishing an egalitarian welfare state.<sup>19</sup> The enactment of Zamindari abolition laws (land reform measures) led to several constitutional amendments as these laws were found to be violative of some fundamental rights (Article 31, 14, 19 and 21). These amendments led to setting up of landmark judgments based on socio-economic justice. Also these and other notable amendment helped in setting up of an egalitarian society.

<sup>13</sup> K. N. Llewellyn, *Some Reflections About Realism – Responding to Dean Pound*, 44 Har. L. Rev. 1234 (1931).

<sup>14</sup> K. N. Llewellyn, *The Bramble Bush: On Our Law And Its Study*, (1930) p. 55.

<sup>15</sup> *Supra* note 5.

<sup>16</sup> Jerome Frank, *Law and the Modern Mind*, (Brian H. Bix ed., 2009), (1930) p.46.

<sup>17</sup> Benjamin N. Cardozo, *The Paradoxes of Legal Science*, (1928) p. 10-11.

<sup>18</sup> Paranjape, *Supra* note 1, at 125.

<sup>19</sup> *Keshwanand Bharti v. State of Kerela*, AIR 1973 SC 1461.

Though socio-economic reforms, such as welfare schemes during 1950's, were in the interest of the welfare of the people, particularly, the indigent and deprived sections of the society, the Supreme Court maintained the sanctity of fundamental right to property, equality, liberty and freedom and rights granted to citizens under Article 19 and therefore struck down socio-economic legislative reforms. By the constitutional 42<sup>nd</sup> amendment act, 1976 and insertion of the word 'socialist' in the Preamble of the constitution, socialism got explicit mention in the Constitution which accrued the benefits to the society through legislature and Judiciary. This is clearly reflected in the Supreme Court's decision in *Minerva Mills Ltd. v. Union of India*, wherein the court observed:

“the significance of the perception that Parts III and IV together constitute the core commitment to social revolution and thereby together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution.... They are like twin formulae for achieving the social revolution. The balance between Parts III and IV is absolutely necessary to maintain harmony of the Constitution and it is the basic feature of the Constitution.”

Highlighting the need for a new sociological jurisprudential approach, the apex court and the courts below it has sustained this approach of social justice in various other cases later.

## VI. REALISM IN INDIAN CONTEXT

The Indian Jurisprudence does not formally support the realist legal philosophy and realism in its true sense is not accepted because of the reason that Indian social life is different from that of America. However, the Indian jurisprudence lays great emphasis on the functional aspect of law and relates law to the realities of social life. Where the realists contend that law is what the judges make, from the Indian perspective the legal system, although empowers the judges with extensive judicial discretion, does not provide them absolute powers in the formulation of law and that is Judges in India only have a constructive power and not a legislative power. The tool of public interest litigation under the Indian law has directly joined the public with the judiciary and has widened the scope of judicial activism to a great extent.

Indian jurisprudence rejects the realists' views that judge made law is the only real law and other laws are worthless, simultaneously it does not completely refuse the role of Judges and the lawyers in shaping the law. The power of judicial review and the doctrine of overruling its earlier decisions has enabled the apex court to effectuate the objective of socio-economic subject of the constitution through the process of judicial interpretation and use of its inherent powers. The Supreme Court in *Bengal Immunity case*<sup>20</sup> overruled its earlier decision in *Dwarkanadas v. Sholapur Spinning & Weaving Co.*<sup>21</sup> and observed that the Court is bound to obey the Constitution rather than any decision of the Court, if the decision is shown to have been mistaken.”

Adopting the same approach in *Keshav Mill v. Income Tax Commissioner*<sup>22</sup> the apex court observed that – the Court has inherent jurisdiction to reconsider and revise its earlier decision if it does not serve the interest of public good.

Chief Justice Subba Rao in the case of *Golak Nath v. State of Punjab*,<sup>23</sup> observed – “while ordinarily the Supreme Court would be reluctant to revise its previous decision, it is its duty on the constitutional field to correct itself as early as possible, for otherwise the further progress of the country and happiness of the people will be at a stake”.

In the emerging jurisprudence great emphasis should be on accountability of the judiciary to the people of India and law should not be a hindrance to social change.

## VII. CONCLUSION

Discussions of legal theory revolves around schools of thought defined by its exponents conflicting with opposing schools espousing contrary theories or sub-theories. Historical jurisprudence is forgotten but has played a key role without which further jurisprudential approaches might not have existed. Today, Sociological jurisprudence, though not explicitly mentioned, but its trace can be found in many constitutions and statutes. Some notable scholars like Llewellyn, Friedmann, Cardozo, were of the opinion that realism is not a separate school but it can be said as a branch of sociological school. The legal realists debunked the formalists' views.

Roscoe Pound pointed out, “the sociological jurist look more for the working of law than for its abstract content”. The proponents of sociological school conceive law as a social institution inter-linked with other disciplines having direct impact on the society. They uphold the view that law is designed on the basis of human experience in order to meet the needs of the society. Sociological school completely discards the abstract notions of analytical positivism. Similarly, realists of the opinion that the decisions made by courts, if not based on certainty of law or enacted legislations, have to be based on the needs and interests of the community. Therefore, the exponents of sociological jurisprudence were though not exact in each sense but of a similar opinion.

Indian Jurists S. Varadhachariar asserted – ‘there appears to have been a logical order in the historical evolution of the ancient legal system in which desire for justice and respect for law were greatly influenced by the public opinion.’

<sup>20</sup> *Bengal Immunity Ltd. v. State of Bihar*, AIR 1955 SC 661.

<sup>21</sup> AIR 1954 SC 119 (137).

<sup>22</sup> AIR 1965 SC 1616.

<sup>23</sup> AIR 1971 SC 1643.

The concept and principles of sociological jurisprudence have been outstandingly embraced in Indian law which can be seen by the judgments that are being delivered by the apex court. Also, different statutes has taken into account the sociological theory in one way or other. It can be very well said that sociological jurisprudence has been widely accepted on the legal edge of the country. In decisions by judicial institutions, it is frequently the case that search for new alternatives is possible. After all, it is likely true to say that judges correspond with, more than they differ from, people.

### VIII. Research Methodology

The project is based on the doctrinal method of research as no field work done on this topic.

#### ➤ Sources of Data

The whole project is made with the use of secondary source. Secondary data for the study were collected from books, journals, research articles, magazines, reports, newspapers and websites.

#### ➤ Mode of citation

The research has followed the blue book (19<sup>th</sup> ed.) format of citation throughout the course of this research paper.

#### ➤ Type of Study

This study is descriptive and analytical in nature based on secondary data as in this topic the researcher is providing the description of the existing facts.

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