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Paper : **Advanced Jurisprudence**

Module : **Sociological Perceptions of Law**

ज्ञान-विज्ञान विमुक्तये

Principal Investigator	Prof. Ranbir Singh, Vice Chancellor, National Law University Delhi
Paper Coordinator	Prof. Sri Krishna Dev Rao (Vice Chancellor, National Law University, Odisha)
Content Writer	Prof. B. Hydervali Professor of Law, National Law University Odisha
Content Reviewer	Prof. Gangotri Chakrabarty (Professor of Law, North Bengal University, Siliguri)

SOCIOLOGICAL PERCEPTIONS OF LAW

Description of Module	
Subject Name	Law
Paper Name	Advanced Jurisprudence
Module Name/Title	Sociological Perceptions of Law
Pre-requisites	Background of positivist thinking of law would help.
Objectives	Purpose of this module is to: (a) To understand the basic tenets of sociological school of law (b) To discuss how sociological school tries to balance conflicting interests (c) To examine the influence of sociological school in modern Indian Jurisprudence (d) To examine with the help of case laws views of the judges about the function of law in the society.
Keywords	Law, society, interests, conflict, balance

Introduction

August Comte was the first writer to use the term sociology which he described as a positive science of social facts. Subsequently writers and jurists tried to find a link between sociology and law. Gurvitch,[1] for example, said that the meeting point of sociology and law is sociology of law. Sociology of law should, however, be distinguished from sociological jurisprudence. The latter primarily studies law but in doing so it studies its relation with and impact on society; whereas sociology of law primarily studies society and studies law only peripherally.

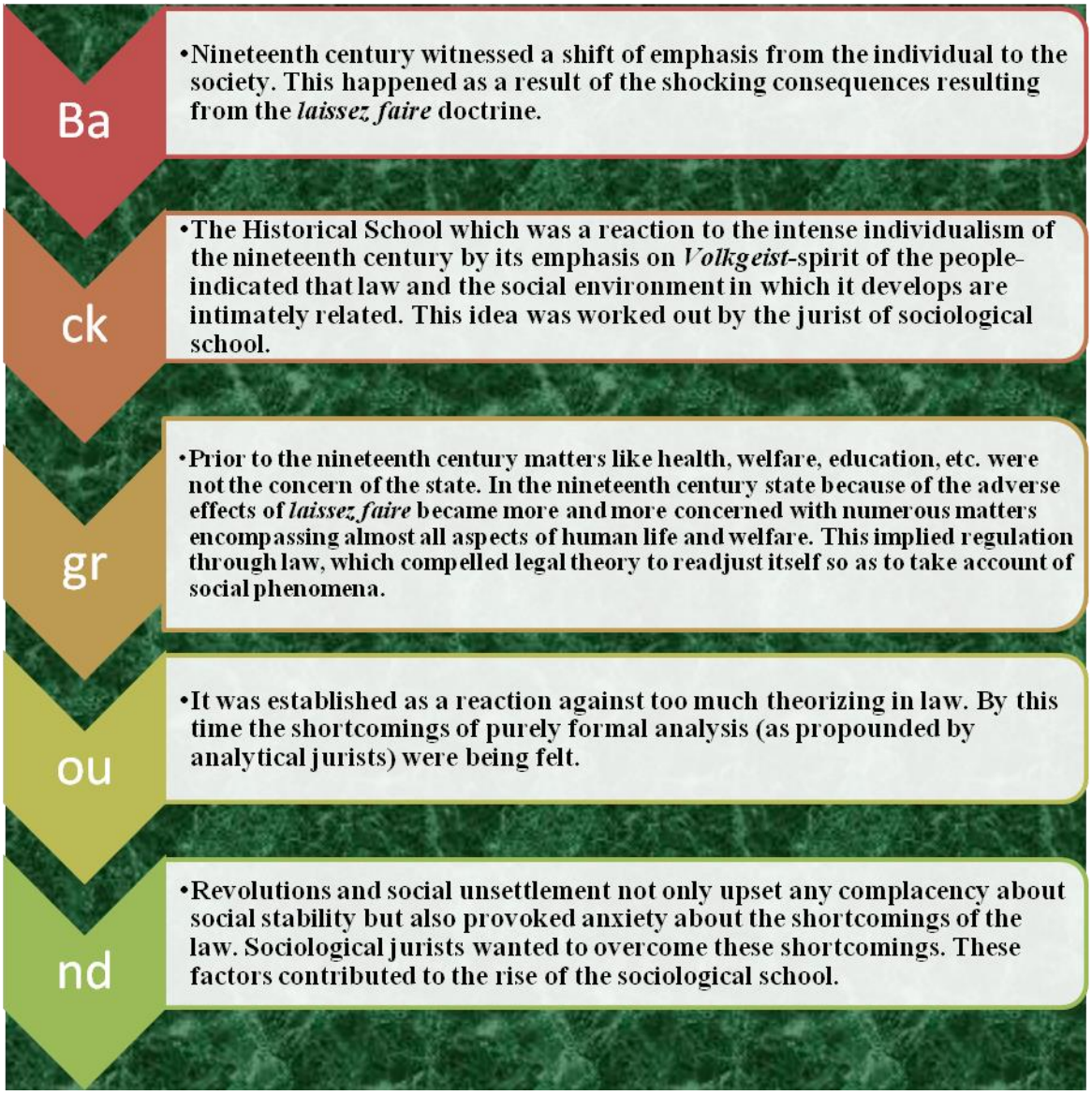
The sociological school considers law as a social phenomenon and examines law in relation to society. It takes a fundamental functional view of law; it is concerned not with social circumstances which call for and condition the working of legal institutions. Various factors paved the ground for the sociological school of thought in jurisprudence. Spencer had applied Darwin's theory of evolution to society. He compared social organism to biological organism and said that individual has to develop a sense of social solidarity; law is to take note of this and while assisting the individual in developing this sense of social solidarity propounded the organic concept of society and had developed the theory of General will. Even Bentham, who was an analytical positivist, had, by expounding the principle of utility, provided indirect support to the sociological formulation of law. In the nineteenth and the twentieth century sociological approach was developed and elaborated by the jurists like Duguit, Ihering, Ehlrich, Roscoe Pound[2] and others.

Background

The factors which led to the establishment of sociological schools are as follows:-

[1] Gurvitch A, Sociological law [Routledge and Kegan Paul Ltd1947]

[2] Ehlrich E, Fundamental Principles of Sociology of law p29 [1915-16]; Von Ihreing R, Law as a means to an end [transl. I Husik The Boston Book co [1913]Pound, Sociology of Law and sociological Jurisprudence p 5[1943-44

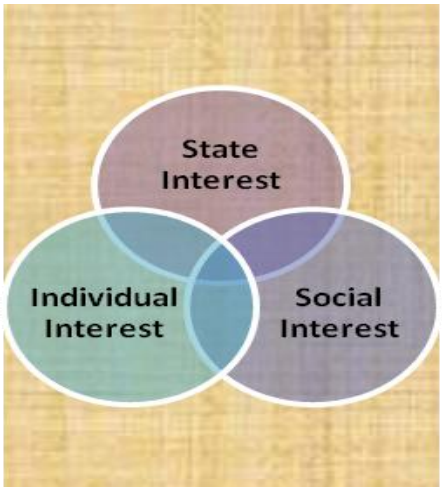


Ihering

Ihering (1818-1892) in his major work '*Das Zweek in Recht'* which has been translated into English as '*Law as a Means to an End'* gave expression to his views on Law and

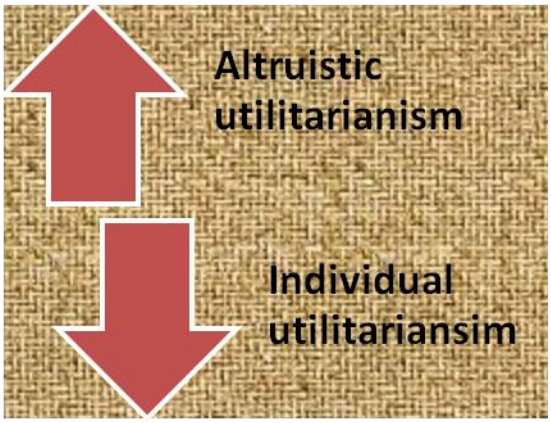
Jurisprudence. According to him the dominant notion to be found in the exercise of human will is that of purpose. Casualty in the natural world is governed by a *'because'.* A stone falls because without support, it must fall. He says: - "Human conduct is determined not by a 'because' but by a 'for' by a purpose to be effected, the 'for' is as indispensable for the will as is the 'because' for the stone. The stone cannot move without a cause; no more can the will operate without a purpose".

Law is but a part of human conduct, and in the idea of purpose Ihering found the mainspring of laws, which are only instruments for serving the needs of society. Their purpose is to further and protect the interest of society. In society there is an inevitable conflict between the social interests of man with each individual's selfish interests. To reconcile this conflict, he employs the method of reward *viz.,* by ensuring that economic wants are satisfied, and also by coercion. There may be unorganized coercion; as in the case of social conventions or etiquette, but law is specifically that form of coercion which is organized by the State. Ihering did not deny the existence of altruistic impulses but recognized that these would not suffice without the coercive form of social control provided by law. The success of the legal process was to be measured by the degree to which it achieved a proper balance between social and individual interests. In fact he divided interest under three broad heads, *viz.,* individual, social and state interest. Law, according to him, was to encourage social purposes by the lovers of social motion *viz*., coercion and rewards, duty and love is to establish a balance of interests.



The degree of success of law depends upon the degree in which such a balance is achieved. Law, according to him, never serves the interests of an individual as end in itself but only as a means to the good of the society and hence is a relative concept, No logical or abstract theoretical refinement of the purpose of law possible, since the purpose of law has to be in tune with the needs of a particular society at a particular time.

Ihering, however, gave very little indication of a scale of values with which to achieve a balance between conflicting interests. He refuted the individualistic concept of law which limited the function of law to the securing of civil liberty by protecting the rights of individual in consonance with those of others. In the words of Friedmann, "Ihering has not been able to solve the problem of the conflict between individual and collective interests". In an attempt to find harmony, Ihering goes some way towards an organic conception of the state and of corporate personality, seeing man in a twofold rule. But he gives no satisfactory answer to the question why altruistic utilitarianism should harmonies' with individual utilitarianism.



Ehrlich

Ehrlich (1862-1922) another eminent jurist of sociological school primarily expounded the social basis of law. For him law is derived from social facts and depends not on state authority but on social compulsion. Law, he said, differs little from other forms of social compulsion and the state is merely one among many associations, though admittedly it possesses certain characteristic means of compulsion. The real source of law is not statutes or reported cases but the activities of society itself. There is a 'living law' underlying the formal rules of the legal system and it is the task of the judges and jurists to integrate these two types of law. Commercial law, for instance, as embodied in statutes and cases, involves a constant attempt to try to keep up with commercial usage, for the '*Centre of Legal gravity lies of law not in legislation, not in judicial decision but in society itself'.* Hence great emphasis is placed on fact-studies as against analytical jurisprudence, in exploring the real foundations of legal rules, their scope and meaning and potential development. In fact, he distinguished between formal law and the living law. The latter, he said was continuously evolving. The function of the judge is precisely to determine the living law and in case of conflict between the formal law and the living law he is to be guided by the principles of justice.

Thus, it can be said that Ehrlich minimizes the importance of legislation as the sole formative factor in law and in some ways may be regarded a Savigny denuded of the Hegelian mystique. But there is far more in his approach than this, for he emphasized how law is, so to speak, distilled out of the interplay of social forces and activities. That there is much truth in this viewpoint can hardly be denied. The practices of the commercial world are often found to be gradually embodied in commercial law especially in the formative stage. Ehrlich recognized, however, that a legal system has an impetus of its own; a professional tradition which may operate for good or ill, and accordingly stressed the need for lawyers and judges to understand the social foundations of legal rules and thereby develop them on right lines. ‘‘So, too, by insisting on the fact that law was not a unique phenomenon, he enabled us to attain a better grasp of those spheres of activity which are becoming increasingly widespread in the modern state, where autonomous associations apply private ‘Legal System of their own almost independently of the ordinary legal process of the courts, as for instance in the case of trade or professional associations or trade unions exercising disciplinary powers”.

There is no doubt about the fact the Ehrlich’s work is full of stimulating suggestions for a scientific approach to law which relates the law more closely to the life of society but his works show some weaknesses also. Firstly, it gives no clear criterion by which to distinguish a legal norm from any other social norm. As Friedmann observes[3] ‘the interchangeability of both, which is an historical and social fact, does not diminish the need for a clear test of distinction”. Again the stress which he laid for the distinction of living and formal law is an exaggeration. As said by Dias ‘the distinction between formal and living law is necessary and important. But there is some danger of a merely verbal discussion as to whether both should be called ‘law’ or only one, and if so which. He deprived formal law of any creative activity and gave it too much the appearance of trailing in the wake of social developments. It is true that reforming legislation is sometimes the formal expression of a tide of public feeling, but it is also true that many norms of behavior have been given shape and direction by the constant enforcement of law.’[4]

Leon Duguit

Duguit (1859-1928) is a distinguished French Jurist of the sociological school. He took inspiration from Durkheim, who distinguished between two kinds of needs and aptitudes of men living in society. There are, according to Durkheim, on the one hand, common needs satisfied by men lending each other mutual assistance and by putting together their similar aptitudes (solidarity by similitude or mechanical solidarity), on the other hand, men have different aptitudes and diverse needs. They are satisfied by an exchange of services each using his own aptitudes to satisfy the needs of others. This division of labour is, according to Durkheim, the pre-eminent fact of social cohesion (solidarity by division of labour or organic solidarity). His emphasis on the doctrine of social solidarity as a fact and necessity of social life led Duguit to

[3] Friedman, Legal Theory, Page 251 (3rd edn., 1953]

[4] Durkheim, Law Division Du travail social 1891[3rd Ed 1911]

elaborate it further. Duguit transposes into the social, the idea of biological finalities and, as a result, biological values. In effect, he envisages as a factor of social values that finality of human activity which consists in realizing solidarity…….But that solidarity is, according to him, the law of the social body, law according to which the life of that body is maintained and developed. Consequently, these finalities consist in the adaptation of individuals to the maintenance and to the development of social life".

Solidarity or cohesion, according to Duguit, is the principal requisite of the existence of social life. Solidarity is nothing more or less than the fact or interdependence uniting the members of human society, and particularly the members of a social group by reason of the community of needs and the division of labour. Law is the instrument of social solidarity and cohesion. Because man cannot live apart from society and society involves discipline. Law is not a body of rights. The only real right of man in a society is to do his duty. Law is essentially an objective social fact concerned with the relations between man and man on the one hand and man and the state on the other. Law for Duguit is made by those with legislative power, the majority of society, but it ought to embody the fundamental rule of social interdependence. The state exists for the performance of public services not for the exercise of sovereignty. The outstanding fact of society as it appeared to him was the interdependence of men, an interdependence which must have always existed but which becomes increasingly more obvious and more complex as man's knowledge and mastery of the physical work increases. The social interdependence is not a theory, nor a conjecture but a fact, the all important, never to be forgotten *fact of human life*. All human activities, organizations should be directed to the end of ensuring the smoother and fuller working of men with men. This Duguit calls the principle of social solidarity.

Duguit's principle of social solidarity is however not free from criticism. Aware of the growing complexity of modern social life, Duguit attacks individualism as reflected in the conception of inalienable individual rights. He also rejects the alternative of strengthening the central power of the state. Instead, he advocates decentralized group government and the link between the different groups is to be an objective rule of law, the principle of social solidarity. This savours of natural law although Duguit emphatically rejects any such metaphysical conception as incompatible with scientific positivism, yet his ideal of social solidarity is as strong a natural law ideal as any ever conceived.

As Allen puts, "although Duguit disregards the ethical element in law, he is considered to be really postulating a content of ideal law" the natural law with valuable content.

Again the meaning of the term 'social solidarity' is not clear from the analysis of Duguit. We may admit that the mutual interdependence of men in society and the need to collaborate for the functioning of social life is a scientific fact. But as many of those who have examined the comparative precision of facts in the social and the natural sciences have observed, social facts

are much less clearly determined than natural facts and Duguit's solid facts are as one critic has observed, facts of a highly metaphysical orders.[5]

Roscoe Pound

Roscoe Pound (1870-1964) is regarded as one of the most noted American Sociological jurists of twentieth century. His "*Readings on the History and System of the Common Law",* "*The Spirit of Common Law," "Law and Morals", "Interpretation of Legal history"* etc. are the most original outstanding works in the field of legal philosophy in the United States.

Kohler's approach, in fact, inspired Roscoe Pound the most for propounding the theory of social engineering and the balancing of social interests. Kohler asserts that all laws are relative and conditioned by the civilization in which they arise. But the idea of law has to follow the universal idea of human civilization, and the meaning of civilization is the social development of human powers towards their highest possible unfolding. The evolution of civilization results from the struggle between the human mind, distinguishing itself form nature, and the object-matter of mature. The task of law following evolution of civilization-is both to maintain existing values and to create new ones for the further development and unfolding of human powers. Every civilization has certain *jural postulates* that are ideas of right to be made effective by legal institution. Legal materials must be shaped so as to give effect to those postulates and legislators, judges, jurists must mould the law in accordance with them. This analysis of Kohler has been incorporated by Roscoe Pound in his exposition about the sociological school. For Pound jurisprudence is not so much a social science as a technology and the analogy of engineering is applied to social problems. He laid emphasis to accumulate factual information and statistics and paid little attention to conceptual thinking; he called for a new functional approach to law based on sound theorizing as to its purpose in a particular age. For Pound, 'Law is the body of knowledge and experience with the aid of which a large part of social engineering is carried on. It is more than a body of rules, it has rules and principles and conceptions and standards for conduct and for decision, but it has also doctrines and modes of professional thought and professional rules of art by which the precepts for conduct and decision are applied and developed and given effect. Like an engineer's formulae, they represent not only experience, scientific formulations but also inventive skill in conceiving new devices and formulating their requirements by means of a developed technique'.

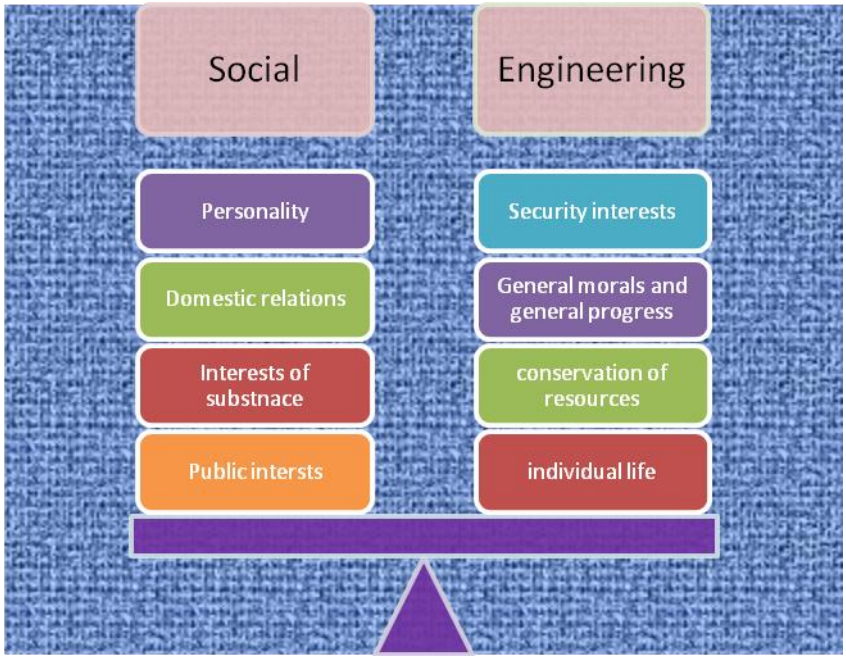
Following the idea of Kohler in 1919 Pound gave a list of *jural postulates*, for a civilized society.[6] These are ---

(1) Men must be able to assume that others will commit no intentional aggressions upon them.

[5] Elliot, Metaphysical orders, 37 Pol.SC. Q 639 [1922]
[6] Pound, Introduction to American law Pp 36-44 [1919]

(2) Men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated for their own use, what they have created by their own labour, and what they have acquired under the existing social and economic order.
(3) They must be able to assume that those with whom they deal in the general intercourse of society will act in good faith and hence-
  (a) They will make good reasonable expectations with their promises or other conduct reasonable created;
  (b) They will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto;
  (c) They will restore specially or by equivalent that comes to them by mistake or unanticipated or not fully intended situations whereby they receive at another's expense what they could not reasonably have expected to receive in the circumstances.
(4) They must be able to assume that those who are engaged in some course of conduct will act with due care not to cast an unreasonable risk of injury on others.
(5) They must be able to assume that others who maintain things likely to get out of hand or to escape and do damage will restrain them or keep them within their proper bounds. Pound says that we must observe the *de facto* claims and interests assert as worthy of protection by law and society. *Jural postulates* are to be derived from such *de facto* claims by impersonal synthesis-Jural postulates not 'of' law but 'for' law; jural postulates cover not all claims but substantially all claims- are variable not obsolete-are only working hypothesis-are not *A priori.*

Pound has also recognized Ihering's view of the law as a reconciler of conflicting interests but at the same time has given it certain distinctive features. For Pound law is an ordering of conduct so as to make the goods of existence and the means of satisfying claims go round as far as possible with the least friction and waste. Pound regards these claims as interests which exist independently of the law and which are 'pressing for recognition and security'. The law recognizes some of these, making them effective within defined limits and Pound has attempted to expound and classify the categories of interest which are thus acknowledge in a modern democratic society.



Pound's arrangement of interests is as follows.

A. Individual Interests---

These are claims or demands of desire involved in and looked at from the standpoint of the individual life. This includes----

(1) **Personality**--- This consists of ---

[a]the physical person;

[b]freedom of will;

[c]honor and reputation;

[d]Privacy; and

[f]belief and opinion

(2) **Domestic Relations**

(3) **Interests of Substance**---This includes interests of ---

a) Property,
b) freedom of industry and contract,
c) promised advantages,
d) advantageous relations with others,

e) freedom of association, and
f) continuity of employment.

B. Public Interests

These are claims or demands or desires asserted by individuals involved in or looked at from the standpoint of political life. There are two of them—

(1) **Interests of the state of juristic person.----** This includes—

a) The integrity, freedom of action and honour of the state's personality, and
b) Claims of the politically organized society as a corporation to property acquired and held for corporate purposes.

(2) Interests of the state as guardian of social interest.

C. Social Interests

These are claims or demands of desires of the social group. Social interests are said to include---

(1) **Social interests in the general security.**--This relate to ----
(a) general safety;
(b) general health;
(c) peace and order;
(d) security of acquisitions, and
(e) security of transaction.

(2) **Social interests in the security of social institutions.**----This comprises---
(a) domestic institutions,
(b) religious institutions,
(c) political institutions, and
(d) economic institutions.

(3) **Social interest in general morals.** ---This covers a variety of laws, of example, those dealing with prostitution, drunkenness and gambling.

(4) **Social interest in the conservation of social resources.**--- In covers---
(a) Conservation of natural resources; and
(b) Protection and training of dependants and defectives *i.e.,* conservation of human resources.

(5)**Social interest in general progress. ---** This covers---

(a) Economic Progress which include---
(i) freedom of use and sale of property,
(ii) free trade,
(iii) free industry, and
(iv) encouragement of invention by the grant of patents;

(b)Political progress which covers—

(i) free speech, and

(ii) free association, and

(c) Cultural progress which covers---

(i) free arts,
(ii) free letters,
(iii) free science,
(iv) promotion of education and learning, and
(v) aesthetics.

(6) Social interest in individual life—it involves—

(a)self-assertion,
(b) opportunity, and
(c) conditions of life.

Pound had not only listed the interest recognized by law but he has also considered the ways by which they are to be secured. This consists of the device of legal persons and attribution of claims, duties, liberties, powers and immunities. There is also the remedial machinery behind them, which aims sometimes at punishment, sometimes at redress and sometimes at prevention. Pound has also maintained that a balance of interest is to be brought about. Pound further says that the class to which an interest belong and its relative weight is subject to change from one class to another and form time to time depending upon political conception acceptable to a society at a particular time.

Pound's theory of law has influenced the lawyers, judges and the writers of twentieth century. As he has rightly considered law far more than a bundle of abstract norms, he considers it more as process of balancing of interest for removing conflicts and for rendering the greatest benefit with the minimum of conflicts. For him what is most needed is that jurisprudence should seek an improvement of the law in the light of the social needs of the time, so that law may procure the greatest good of the largest number in society.

It is, however, interesting to note that sociological jurisprudence neither begins nor ends with Pound. Roscoe Pound died in 1964 and after him modern jurists have further elaborated or varied Pound's basic classification of interests and further developed sociological approach. Thus, Prof Stone [7]build up on Pound's classification except for the elimination of the category of public interests as a separate category. Professor Stone is considered as a representative of modern sociological jurisprudence. One of the main faults of classical sociological jurisprudence was, he believes it *ad hoc* approach, the treatment of particular problems in isolation. "The sociological jurists of the future will generally have to approach his problems through a vast effort at understanding the wider social context". Stone indicates that, in spite of its difficulties and faults, the *Parsonian* 'Social system is the type of mode to which sociological jurist must aspire. A common malaise in sociological jurisprudence is its prevalent methodology of working outwards from legal problems to the relevant social science. Instead, what is needed is a framework of thought receptive of social data which will allow us to see 'the social system' as in integrated equilibration of the multitude of operative systems of values and institution embraced

[7] Stone, Social Dimensions of Law and Justice, Chaps 3-5 [1966]

within it". Paton also analyses the law on the basis of interests, dividing them into social and private interests.

Basic tenets of Sociological School

Following are the basic tenets or characteristics of sociological school---

(1) Sociological jurists regard the working of the law (that is, of the legal order, of the body of authoritative guides to decision, and of the judicial and administrative processes) rather than the abstract content of the authoritative precepts.
(2) Sociological jurists regard law as a social institution, which may be improved by intelligent effort. Hence it is task of the jurists to find out the best means upon sanctions.
(3) Sociological jurists lay stress upon the social purpose which law sub serves rather than upon sanctions.
(4) Sociological jurists look on legal institution and doctrines and precepts functionally. They regard the form of legal precepts as a matter of means only.
(5) According to this school, the main function of law is to fulfill the needs of society. Social requirements are accomplished by law. Law is also a social instrument for maintaining law and order in the society. Paton is of the view that law is a social machinery for securing order in the community. Since all the jurists of this school lay stress upon the functioning of law in society they are also know as pragmatists.

Sociological jurisprudence: Indian position

In the last three decades sociological jurisprudence has engaged in India at macrocosmic scale. The need of studying law on the nature of socio-economic reality is the cry of the day. Legal scholars, judges, jurists all have emphasized the importance of the relationship of law, society and social changes which are taking place so fast. A large number of progressive judges of the apex court of the country like justice V.R. Krishna lyer, Y.V. Chandrachud, P.N. Bhagwati, D.A. Desai, O. Chinnappa Reddy, Venkatchelliah all pleaded vigorously the adoption of sociological approach in the interpretation of law to writ the needs and necessities of the people of India. Justice Krishna Iyer exhorts judges not to act by hunch but on hard facts and concrete realities since the rule of law stemmed from rule of life. Since law is a social science, judges would not depend only on abstract principles or rigid legal cannons alone but on social circumstances, demands and needs of time.

Sociology of law

The French Sociological jurist Maurice Hariou observed that "too little sociology leads away from law, but much sociology leads back to it." And George Gurvitch rightly supplemented this statement by saying that "a little law leads away from sociology but much law leads back to it ". If one looks at the history of western sociology, it is clear that 'much sociology' did indeed lead its founders back to law. The structural significance of law, in the broadest sense, was most

clearly recognized by the founders of modern sociology like Durkheim, Weber and Marx. Their conceptual elaborations gave some kind of primacy to law as a social variable.

In many parts of the world, especially in U.S.A and Europe, Sociology of law has emerged as an autonomous discipline. A good number of jurists like Eugen Ehrlich (1962), Roscoe Pound (1959), Karl Lewellyn (1962), Julius Stone (1966) and J. Willard Hurst (1960-64) emphasized the fact that understanding of lawyer's law (that is legal processes as relevant to decision-makers or lawmen-judges, lawyers, law reformers and jurists) is almost impossible without a sensitive grasp of the implications of law as a social process.

In India, neither social scientists nor law persons are explicitly concerned with the emergence of a discipline of sociology of law. Although there is much talk of law and social change all around, there appear to be no sustained attempts at examining the potential and actual role which the legal process bears to initiation and attainment of social change. However, at least on the side of law teaching research, there are clear indications of growing appreciation of the social roles of legal processes and institutions. It is to be stated that how so ever the views of various sociological jurists may appear, they have a common point that law must be studied in relation to society. This view has great impact on modern legal thought. But it should not be taken to mean that other methods have completely ceased to exist. Still there are advocates of natural law though with a 'variable content', there are catholic jurists who pleaded for maintaining a close relationship between law and morals, but these approaches are ,in many respects, basically different from earlier approaches of this type on the subject and are influenced by sociological approach.