CHAPTER I

1. SOCIOLOGY OF LAW - A DESIDERATUM IN THE GROWTH OF PUBLIC INTEREST LITIGATION:

1.1 Studies in the philosophy of law and the principles of law are highly essential for proper approach to the purpose of law in the services of humanity to take out the society from the man made shackles and constraints arising from certain vested interest and motivations.

1.2 Eugen Ehrlich (1862-1922) regards law as dependent variable as it is society and its development modulate or shape the laws to come for the benefit of the mankind and as such Legal behaviours and its development do not depend on legislation, legal sciences or judges' decisions. Many of the values, performances and explanations of social groups are embodied in law in substantive rules well as in guiding procedural principles. A juristic act is never an individual, an isolated thing, it is a part of the prevailing social order.

1.3 According to Roscoe Pound (1870–1964) law should be studied in its actual working and not by its codification. The Marxian view of the law refers to the social and particularly to the class origin of the law and its use by classes in power for their vested interests.

1.4 George Gurvitch unfolds social problems by their systems, distinctions and genetics and it is the macrophysical aspect of sociology of law that studies the perpetual tensions and sharp conflicts. It is that disputes and conflicts which have some public significance and social importance call for immediate redress. There is no conflict between the philosophy of law and the Sociology of law, if the two cling to a radical empiricism with an institutional basis.2

1.5 From Homeric poems, Greek law began the legal order. Hellenistic period developed commercial institutions, king used to decide particular causes by divine inspiration and later by tradition of customery course of Action and thereafter by publication of results in enactments.

The Greek philosophy of law as found in the distinction between law and rules of law has significance for all stages of legal development.

1.6 Towards the end of the last century, a positivist social thinking tended to supersede the metaphysical, historical and the utilitarian analytical. These can be discovered by intelligent observation of social phenomena.

1.7 Roscoe Pound observed, inter alia, that "Philosophy of law is raising its head throughout the world, We are asked to measure rules and doctrines and institutions and to guide the application of law by reference to the end of law and to think of them in terms of social utility. We are invited to subsume questions of law and of the application of law under the social ideal of the time and place."\(^3\)

1.8 The law exists in order to keep peace in society, to keep the peace at all events and at any price. Roscoe Pound was found content to see in legal history the

\(^3\) An Introduction to the Philosophy of Law by ROSCOE POUND -page 23
record of a continually wider recognising and satisfying of human wants or claims or desires through social control, a more embracing and more effective securing of social interests, a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence - in short, a more efficacious social engineering.

1.9 Philosophically, the apportionment of the field between rule and discretion, which is suggested by the use of rules and of standards respectively in modern law has its basis in the respective field of intelligence and intuition. The former is more adapted to the inorganic; the latter more to life.

1.10 Apart from a prescription theory of law grounded on ethical aspect and on a set of principles, there are studies like Sociological jurisprudence which is closely connected with the Sociology of law, the aims of which are wholly descriptive in the form of identifying individual, social and public interests for decision on the basis of social policy taking above interests into account. The purpose of this sociology of law is to close the gap between what should happen and what in fact happens. It is an application of general principles of sociology to
social situations in which laws play an important role. Sociology of law explains legal phenomena in terms of behaviour of people in their economic, psychological and sociological aspects. Realists held that when we refer to laws, we are referring to the above behavioural aspects of human being. According to Oliver Wendell Holmes' remarks "The prophesis of what the Courts will do in fact . . . . . . . . . . are what I mean by law." Studies of 'Societal facts' and "psychological facts" are the determinants in framing a judgment on issues before the Court.

1.11 Wolfgang Friedmann's legal theory criticised Hart's . . Hart's legal philosophy and that of Hans Kelsen. He said that Philosophy of law is required to give directions and that the pure theory of law does not give guidance for the solution of conflicts between different ideologies. The development of the general theory of law covers the "applied sociology of law" as Donalk Black cells it. It is Donald Black who suggested that a major forces should be on the process of legal mobilization.

5. 'The Mobilization of Law' 12 J. Legal Studies 125(1972)
1.12 The understanding of the social phenomenon through the problems of the different communities of human being is essential in broadening the applicability of laws in the country. Behaviour in a game of chess, practice in utilising Saturday nights etc. towards relaxation are part of social rules and sometimes they form part of the legal system. Austin's view in holding law as the command of the sovereign backed by 'force' is not wholly accepted by Hans Kelsen, Alf Ross and other legal theorists.

1.13 Hart's analysis of law in terms of legal rules gives us a picture of legal system of rules, the unity of the system being due to the rule of recognition. Hart's positivism concerning judicial law making is that the court cases are decided by ascertaining what the law is through rule of recognition and applying it to the facts of the case. He also provided that sometimes cases are not clearly covered by any of the rules of law due to the 'Open texture of law' or 'penumbral' areas in borderline cases where judges have a limited jurisdiction to decide whether the rule is to be applied or not. The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules they get their authority
to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success. Since judicial decisions must be made even when guidance from within the law is lacking, judicial discretion must be conceived, in positivism as permitting judges to look outside the law for standards to guide them in supplementing old legal rules or creating new ones. In deciding hard cases, judges must get guidance from extra legal standards and that having a legal obligation is a matter of valid legal rule applying to a person in certain circumstances and these seem to a central tenet of Ronald Dworkin when he made an attack against Hart’s theory of law in sixties. Dworkins denies that everything is a part of a legal system and that judges must take into consideration the above extra legal standards as being rule of law towards requirement of justice on fairness or some other dimension of morality as nobody is allowed to take advantage of his own wrong or fraud. A legal consideration might be sometimes outweighed by social considerations, though contentious - Riggs vs. Palmer, as in this case Elmer Palmer was named as legates in his Grandfather’s will. But he (Palmer) fearing that the will would be changes, murdered the grand father
for which he was sent to jail. Though relevant statutes permitted in his favour, irrespective of the murder, but the Court did not allow it, here the law was not what the statute declared it to be.

1.14 Thomas Hobbes pointed out that certain laws of nature could be derived from certain features of human beings and their condition. Human intuition reveals 'that good is to be done and promoted and evil is to be avoided' (Thomas Aquinas). Positivists agree that extra legal moral standards may be appropriate in statutory and constitutional interpretation. According to Lon L. Fuller, law is an activity - "a product of a sustained purposive effort" and it is to be studied functionally and in part morally. 6 Promotion of justice and the promotion of ideals as being the purposes for the good of the people must be held by all the judges. In Plato's Republic, it is argued that justice is not to be counted a good thing if it is not beneficial.

6 Theodore M. Benditt - Law as a Rule and Principle - Problems of Legal Philosophy (1978) 73, the views of Lon L. Fuller in his 'The Morality of Law'. 
Law and obligation has a bindingness. Agreeing with Richard Taylor, Hart says after signifying sacrifice and renunciation that where there is social insistence necessary for the maintenance of social life, social rules impose obligations.

1.15 From the point of Hohfeld's (Wesley New Comb Hohfeld of Yale Law School) legal angles on distinctions as to legal rights or on different senses of those rights having jural opposites and correlatives it appears that claim-rights of one creates immunity on the other and so also are liberty and power creating privilege permission and liability on the other respectively and in that view all in rem rights are packages of in personam rights.

1.16 On the question of legal realism, the realist are of opinion that there are no binding legal rules at work in the process of judicial reasoning. Judges draw their general rules from statutes, judicial precedents, opinions of experts, customs and principles of morality and public policy. Legislations do not cover all the areas of possible controversies that the courts may be called to deal with. Rules being mental existents on past experience are made for human purposes by being continually
processed through judicial reasonings keeping pace with the gradual social changes. According to John Chipmen Gray, judicial reasoning is a deduction in form and judges apply legal rules to facts and logically draw a conclusion and give decision by an act of priori thinking. Hence, the judges do apply rules but only those that they themselves make. Jeremy Bentham also maintained that a good deal of laws is in fact made by judges though he thought that it should not be as all laws are of human creation and it should all be made by the legislation in accordance with the principle of utility. But contrary to above views, Sir William Blackstone held that a judge's task is to ascertain what the law is and to apply the same to the case before him. Judges in no sense make the law.

1.17 John Rawls stated that a society is well ordered when it is not only designed to advance the good of its members but when it is also effectively regulated by a public conception of justice. The fundamental social problems arise out of lack of co-ordination, efficiency and stability giving rooms for distrust, resentment, suspicion and hostility. It is these inequalities to which the principles of social justice must instantly
apply. The various conceptions of justice are the outgrowth of different notions of society, the background of opposing views of natural necessities and opportunities of human life. A proper balance between competing claims is by identifying the relevant considerations which determine the balance. The two principles of justice that each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others and that social and economic inequalities, are to be so arranged that they are both reasonably expected to be advantageous of everyone and attached to position and office open to all.7 The democratic equality between the least advantaged and those better off ensuring equal liberty and fair equality of opportunity to all is the requirement of social order and there should be equal prospects of culture and achievement for everyone similarly motivated and endowed. The idea behind the classical utilitarianism is to achieve the greatest net balance of satisfaction summed over all the individuals. Justice as fairness is to use the notion of pure procedural justice to handle the contingencies of particular situations.

7 John Rawl, with reference to his work - 'A Theory of Justice (1970) page 109'
The social system is to be designed so that the resulting distribution is just however things turn out. It is a certain form of thought and feeling that rational persons can adopt in maximising the good towards fairness in the outcome.

1.18 Sociology of law is thought of laws which work in society. It synthesises and progresses cumulatively out of correction, refinement and extension. It seeks to derive social change, social pathology, social control and group behaviour. Comte's (1798-1857) approaches to social order (social statics) and social progress (social dynamics) were to discover and work out the principles of development. Prior to above, Montesquieu (1689-1775) in his *L' Esprit des lois* traced the effect of social development on law. He stressed the influence of geographical and climatic conditions on law which could operate only through a medium of society. Jülicher (1818-1882) insisted that laws should be treated from the angle of purpose. It pointed out that the origin of laws lay in sociological factor. His theory of purpose was influenced by the writings of Bentham and Mill. Ehrlich's (1862-1922) thesis was to find out the 'living law of

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8 A member of German, Historical School - with reference to his work - 'Der Zweck in Recht' (Purpose in law)
of society outside the confines of formal legal material to bridge the inevitable gap between the norms of formal law and actual behaviour. This approach was more practical than Savigay. His works influenced the jurists to abandon abstract pre-occupation and to concern themselves with the problems and facts of social life. According to him, laws, to be more proper and beneficial should be studied in the context of society. Jeremy Bentham's utilitarian outlook on life took the function of laws based on the "promotion of the greatest happiness of the greatest number." Bentham got the utility principle from Humes. 'The public good' said Bentham ought to be the object of the legislator. His insistence was on law making to social ends. He preached that laws should be judged by their consequences. There had to be balances of individual interests with community welfare which he called 'felicific calculas'.

1.19 Roscoe Pound (1870-1964) hold that in order to achieve the purposes of legal order there has to be a recognition of certain interests, individual, public and social within legally recognised limits for securing

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9 Of the Harvard Law School. 'The Causes of Popular Dissatisfaction with reference to his work the Administration of Justice
resources, general progress, free trade, industry
invention, self assertion, opportunity etc. But these
interest, could not be pre-determined for society,
which is constantly changing and developing. This
whole idea of balancing is subordinate to the ideals
that are in view inter-dependence of men in the matter
of water, food, housing, clothing, recreation and so
on call for fuller co-operation between people towards
social solidarity.

1.20 Thus the nature of judicial process has to
traverse the courses of the (a) philosophy of law
emphasising on logical culmination, (b) pinning faith
on historical development (c) taking guidance from the
past and present practices and customs of the community
(d) with the method of sociology in which the ideals
of 'social welfare' and social justice are the most felt
necessities of the time in the prevalent moral and
political theories and intuitions of public interest in
India.

1.21 Public interest, public good and public purpose
are now dominating tests in a society under Rule of Law
which secured upliftment of people guaranteeing equal
opportunities and protections of law for people living in different situations of life. In maximising the fulfilment of the interests of the community and its members to ensure smooth running of the society, social justice including therein economic justice, distributive justice, corrective justice and also social security signifying cohesion of rival claims or interests between different factions of society is now the paramount objective in creating a welfare state in India.