

The Notion of Legal System

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Introduction

The notion of legal system means an idea or a belief or an understanding of the legal system. Legal system is not only the book law rather it is all about the procedure of law in action which varies from society to society. Law that is brought in action and practices is the legal system. It also incorporates the process of making of law and its operation. Law and legal system is only means for the justice and harmony in the society. The author in this article highlights the notion of legal system. It is all about the general conceptual framework about legal system. It summarizes the jurisprudential view, definitions of legal system by different legal schools and thoughts, criteria of legal system and elements of legal system.

The diversity of laws in the world is a fact. Each political society in the world has its own legal system, and it often happens that several laws co-exist within a legal system. In a federal state, in addition to a federal law, there may be laws of states, provinces or districts. There are moreover laws of communities that have no political organization at all, such as Canon law, Musim law, Hindu law and Jewish law. There is as well international law which relates to international commerce.¹

The diversity of law poses a problem since the laws of the world are expressed in many different languages and forms and since they have evolved in societies

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¹ S. R MYNENI, LEGAL SYSTERM OF THE WORLD, Asia Law House, Hyderabad, India, (2007).

where the social organization, beliefs and social manners vary. As there are classifications in different sciences, the laws can also be reduced to a limited number of families.²

Some authors maintain that laws do not necessarily belong to legal system. As a linguistic observation this is no doubt correct. The word 'law' is applied to rules of conduct which do not belong to legal systems. If philosophy of law was the study of the meaning of the word 'law' then it would not include the theory of legal systems as a major part. But legal philosophy is not and was never conceived to be by its main exponents an enquiry into the meaning of this or any other word. It is the study of the distinctive form of social organization. This social organization provides one of the important contexts in which 'law' is used and is particularly closely associated with the use of 'legal' and 'legally'.³ There are features of the laws, which can only be changed at the slow rhythm when the civilization of the country, the sense of justice of its citizens, its economic structure, language and social manners themselves are changed. The identification of laws into particular families of legal system should not be made on the basis of similarity or dissimilarity of any particular legal rules. Two laws can't be considered as belonging to the same family, even though they employ the same concepts and techniques, if they are founded on opposed philosophical, political or economic principles, and if they seek to achieve two entirely different types of societies. Before entering into the legal system it is necessary to define what 'legal' and 'system' is. Legal means allowable or enforceable by being in conformity with the law of the land and the public policy; not condemned as illegal whereas a system is an assemblage or combination of things or parts forming a complex unitary whole. It is also known as an ordered and comprehensive assemblage of facts, principles, doctrines, or the like in a particular field of knowledge or thought.

Legal system is the system of laws, rules, principles and institutions, norms which are adopted to get its objectives. In other word, legal system is an arrangement or organization of law, legal principles and experiences, practices and principles of justice, types of crime and criminals, investigation, collection of evidences, presentation of legal documents, prosecution, lawyer's representation, hearing, courts and deciding procedures, punishment method, appeal system and many other things homogeneous and heterogeneous like-

² Ibid

³ JOSEPH, RAZ, THE CONCEPT OF LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM (2nd ed), Oxford University Press, New York, 209, (1980)

law making, breaking, enforcing, prosecuting, defining, enforcing, implementing, interpretation, sentencing, working together for the rule of law in the state together with functioning and maintaining law and order, command, peace, justice, equality, morality, humanity, progress, prosperity, development, brotherhood, friendship, public solidarity and social harmony are the matters that concern legal system.⁴ The legal system is more than sum-total of laws or legal material; it represents the pattern of interrelation of this material and differs from them also in its overall purposes and functioning.⁵ As the railway system is not just the sum-total of tracks and rolling stock stacked together, the system is the pattern of their linkage and distribution. In areas rich in coal and iron, for instance, and around major ports, the network of railways will tend to be thick and complex, but less so in areas of desert; and the lay out will vary again in mountainous districts and over plains. With regard to a legal system, as a generalization it may be it may be stated that a pattern of linkage imparts unity to all its components, which can be described through the concept of validity and through the institutional structure.⁶

There is no universal legal system common to all societies. The legal system is based on the characteristics and the practices of the society. Western legal system is based on western thoughts and eastern legal system is based on its own thoughts and situations. Every legal system is functioning to achieve the goal of its law. Law is the foundation of legal system. Legal system is not only the book law rather it is all about the procedure of law in action which varies from society to society. Law that is brought in action and practices is the legal system.

To understand the notion of legal system we should have to understand four different aspects of legal system which are as follows: (1) Diversification in the notion of legal system which is the product of human civilization. (2) Autonomy of Legal System, (3) Elements of Legal System which helps to provide life to legal system and (4) Reception of rule in one legal system.

Diversification in Notion of Legal System which is the Product of Human Civilization

Legal system is one of the parts of the human civilization. The 19th century development of industrial revolution, great scientific discoveries, laissez faire

⁴ Shambhu Prasad Khanal, *Historical Development of Nepalese Legal System: A Study Within the Periphery of Jurisprudential Insight*, NEPAL LAW REVIEW, Vol 19, Number 1 and 2, Nepal Law Campus, Faculty of Law, Tribhuvan University, Kathmandu, Nepal. (2006).

⁵ DIAS, JURISPRUDENCE (5th ed) , Aditya Book Private Limited, Delhi, India, 60, (1985).

⁶ Ibid. 61

ideology in economy and politics vibrated the jurists against the classical natural law thinking.⁷ Natural legal system is based on reason. In the early period of natural law, law was taken as the synonyms with theology than it converted into social contract to modern natural law in positive law concept. This legal system includes morality, fairness, equity, justice, equality, liberty, rule of law, fraternity, separation of power, check and balance, divine law, law of reason, law of social contract, self preservation, self controlling behavior of human being etc.

The positivist approach viewed legal system as a system of law which is laid down or posited through making or enforcement by a sovereign authority. All the laws that are made and proclaimed by the competent authority are positive law whether it is good or bad for the law receiver. People should follow the law because it is the duty of them without commenting on it. It always focused on the law that is existed rather than ought to be. It attempt to define the law and legal system in the logical, clear, certain, coherent and separate with is and out proposition of law.

Historical legal system arose with the reaction of the unhistorical assumptions of the natural law theorists. As these were exposed as hollow and false, so the need was felt for a realistic investigation into historical truths. It attempted to found legal system based on past and existing circumstances. It believes that law is the matter of the unconscious growth. Any legal should follow the course of historical development. Customs not only precedes legislation, but is superior to it, and legislation should always conform to the popular consciousness. Law is thus not of universal application, it varies with people and ages. Historical or anthropological legal system, thus, viewed legal system as a system of law based on traditions, practices and livers of the people which are the result of past evolution or the spirit of the customary law. Law is not made but found is the key concept of historical legal system, however it is related to the legal history rather tradition of law.

In the 19th century, arguing that previous theories of legal system are inadequate to solve the legal issues of the society, sociological school of law defined legal system in a different way. According to this school, past thinking of legal system did not able to address the problem arises from the rapid increase in population, inequalities engendered by the industrial revolution. This school focused on the societal issues like health, welfare, education, economics should be the issues of the state and should address by the state. Legal system should be adopted

⁷ Hari Budhathoki, *Understanding Legal System from System Approach with Some Jurisprudential Aspects*, NEPAL LAW REVIEW, Vol. 18 , (2006).

by the state to address these issues. It focuses on the interaction of the law and social environment. Laws are means for achieving the certain ends. Law has the purpose. It has followed the foot of historical approach giving more concern for the function of law in society. This school takes law as the means of social control, peace, harmony, social solidarity and fraternity, social change, social stability, and social justice and legal system should be arranged to achieve these means. Marxist theory viewed human societies as systems but more controversial is his view of the interrelationship of the parts of those systems. Legal system as the superstructure based on the socio-economic structure of a society. Marx attached primacy to economic system. Law and legal system are the production of the economic system. In Marxist legal system, there emerges the classless society, where Marx and Engle expect the advent of utopia.

Realist approach is the revolts against the formulation. It highlights legal system as a system of law, advanced by courts i.e. logic and experience life of judges. There are two movement of thought under the realism; American and Scandinavian but they share the desire to introduce a commonsense approach to problems of and about law. Feminist Legal Methods are influenced by the critical theory. It seeks to analyze the contribution of law in constructing, maintaining, reinforcing and perpetuating patriarchy. Critical Legal Studies define law as politics. One of the principles advances of CLS is to demonstrate the need to integrate legal theory within social theory. The novelty of their thinking lies on the processes through which a particular social order comes to be seen as inevitable. Legal system is a discourse that concerns the basic terms of social life. Post-modernism argued that no truth is always existing which is changing and ever changing. The concept completely rejects all traditional philosophy, all western Meta-narratives and focused on super consciousness.

From the analytical standpoint a complete theory of legal system consists of the solution to the following four points.⁸

- The problem of existence
- The problem of identity
- The problem of structure
- The problem of content

Every theory of legal system must provide a solution of the first two problems, since existence and identity criteria are a necessary part of any adequate definition

⁸ JOSEPH, RAZ, THE CONCEPT OF LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM (2nd ed), Oxford University Press, New York, 1, (1980).

of 'legal system', it may give a negative answer to the last two questions. It may claim that there is no structure or shared content common to all legal systems. The examination of structure and content is fundamental also to the theory of types of legal system (which I how many name the analytic part of comparative jurisprudence).⁹

It is considered that every theory of legal system must provide a solution of the first two criteria since existence and identity are a necessary part of any adequate definition of legal system. But latter two are not common to all legal system. A legal system exists only when if it reaches a certain minimum degree of efficacy. Efficacy can be manifested by the obedience to the norm and sanctions. The criteria of identity of a legal system answer the question which laws form a given system. For this it offers criteria of membership or principle of origin.

Autonomy and Dynamism of Legal System

Legal system does not remain alone without the influence of the other social factors. As legal system as a part of the human civilization it is not possible to separate from any other factors of the society. It is related with all other factors which influence the human civilization. That is why we can easily say that autonomy of legal system is the relative thing. In the human civilization, legal system arose to manage and control the human behavior. Not only to control the human conduct, it is equally important to develop legal system for the continuation of human being and social system. Everyone can easily imagine that society without legal system based on certain norms and values could be brutal, immoral, uncertain and destroyable as well. Thomas Hobbes on this regard argued that life was solitary, poor, nasty, brutish and short. To secure the self protection and misery and pain 'man' voluntarily enter into contract and surrounded their freedoms to some 'mightiest authority' who could protect their life and property.

There is no discrimination on the law but the decisions of the courts are discriminatory. Execution of the law is discriminatory by the executor in many countries basically in underdeveloped countries. People are revoking to abide by the prevailing laws. Why such happens time and again? The simple answer is the legal system is not untouched from other elements that extraneous factors always influence the legal system. Influence of extraneous factors always hinders for the smooth running of the legal system and creates the losing faith of the people over the legal system. According to Joseph Raj, autonomy of the legal system is required for the smooth working of legal system.

⁹ *Ibid*

An approach of law and justice of legal system is a very important aspect. As already mentioned that legal system and other social sciences i.e. social, political, cultural, religious and other fields are interlinked and influences each other and legal system can't remain outside of these phenomena. Legal system and all these phenomena have close relations and make reflection and impact in each other.

Autonomous legal criteria are those derived from the content of laws, their interrelations, and their efficacy. Reliance on them presupposes that not only the internal working but also the precise boundaries of the law can be fixed on the basis of specifically legal considerations alone. But law is an aspects of the political system be it a state, a church, a nomadic tribe or any other. But its existence and its identity are bound up with the existence and identity of the political system of which it is a part.

According to R.M. Unger, law is autonomous in substantive, procedural, institutional and occupational (professional) sense. In substantive sense, an autonomous legal system does not codify particular theology; in procedural sense, law has its own procedure for its adjudication; in institutional sense, law is institutionally autonomous to the extents that its rules are applied by specialized set of institutions whose main task is adjudication used in other disciplines or practices; and in the sense of occupational, special groups manipulates the rules, staffs, the legal institutions and engages in the practice of legal argument, Therefore, the autonomy of legal system is essential for achieving its objectives and breaking the autonomy of legal system is valid if it contribute to achieve the objectives of its and this is the real composition of the relativity of autonomy of legal system.

The concept of autonomy is indicated above and Kelson's theory based on the pure theory of law refers to certain inherent limitations of the legal order. But it should be understood in conformity with its utility and purposes and should not be interpreted in limited sense in the name of its autonomy and pure theory only symbolizes its separate area and does not mean that the existence of other area and relation with this social science are meaningless.¹⁰

Dynamism of the law is another aspect of legal system. According to Savigny, 'Living law of the people' based on social behavior is the real law rather than the

¹⁰ Ambar Prasad Pant, *Jurisprudential Study on Some Fundamental Aspects of Legal System*, JUSTICE, Pairavi Prakashan, Kathmandu, Nepal

compulsive norm of the state. Norms observed by the people, whether in matters of religious habits, family life and commercial relation are law even if they are not recognized and declared or formulated of the norm of the state. There must be combination between law making and evolution of the society.

Legal system is not static system. It changes through time and period. Herbert Spencer, As a sociologist, did not feel the need to correct or improve society, for he felt that societies were bound to change automatically. Spencer took the theory of evolution one step beyond biology and applied it to say that societies were organisms that progress through changes similar to that of a living species. It was Spencer's philosophy that societies (like organisms) would begin simple and then progress to a more complex form. Not only Spencer but many theorist and jurists have come up with the idea that change of the society is the normal process and legal system should be developed to meet the changing need of the society. According to Durkheim, the societies having mechanical solidarity where egalitarianism is the basic character changes to the organic solidarity where excessive specification in every sector occurs. Homogeneity with the time span turns into a heterogeneity. Simple society becomes complex and social relationship of the people slowly deteriorate with the growth of individualism. This change ultimately should be the subject matter of the legal system of that particular society.

Legal system develops and grows as the society develops. It is believed that legal system functions efficiently if it embodies essential elements of a legal system. Such elements are many folds. According to Fuller inner morality of the law should be included in the legal system which are of eight different types i.e. generality, promulgation, prospective, generally prohibition of retroactive laws, intelligibility and clarity, avoidance of impossible demands, avoidance of contradiction, consistency of law through time such as avoidance of frequent changes and congruence between official actions and declared rules.¹¹

Legal Sub-stem as a Sub-system of Social System: According to Prof. Upendra Baxi legal system can be conceived as the aggregate of legal norms, social behavior of rules, statutes and institutions and may be equated with the social control system. As an important component of a social system, legal system functions together with the other system be influenced and by influencing to other system.

¹¹ *Ibid*

Elements of Legal System: For ages, human societies have always sought for means of ensuring social harmony and peaceful coexistence, and this has been done through the formation of laws. In our societies today, laws are useful as they act as deterrents and also for problem-solving. The objective of these laws, which form the legal system of a society, is to serve the best interests of the people and reflect their highest aspirations. Legal systems, like all other human creations, may or may not be useful, but they always produce unintended side effects. The parameters used to measure the side effects of laws are the human rights, living standards, and quality of life standards of the people, any or all of which may be unintentionally degraded when a law is enforced.

In a narrow sense legal system includes simple, comprehensive, certain, accessible, flexible and moral values. A good legal system should also be effective and equitable. If any of these elements is missing in a particular legal system, then it is not a good one.¹² Simplicity of a legal system means that the law should be written in a language that can be understood by a large section of people in a country. When the law is clearly understood, it becomes very difficult for people to abuse it. It also enables the people to have increased personal liberties when they clearly understand the law a good legal system is also comprehensive. Comprehensive means includes all or everything. Something that is detailed, broad in scope and content.

This means law should cover all aspects of life and also anticipate future problems. It should be all encompassing that is, complete and including everything that is necessary. Certainty is also another element of a good legal system. Law should state clearly what is prohibited and what is not. The law must be accessible and so far as possible intelligible, clear and predictable. These are characteristics which are the essence of certainty. Another element of legal system is its accessibility. It should be made available to the public. Free and easy access to primary law is of course a prerequisite for the interpretation and understanding of the law. Law has to keep up with social change which is called flexibility.

Law should not be too rigid to prevent change with the dynamic society. Circumstances, places, times and other factors should definitely be considered in the making of a law. The most important aspect of a society is its moral

¹² V.D MAHAJAN. JURISPRUDENCE AND LEGAL THEORY (5th ed), Eastern Book Company Lucknow, 2, (1987).

values. Moral values act as social deterrents and give the people the guidelines on how they will live in a society and the roles they are to play. A good legal system should therefore, not be in conflict with the traditions, cultures and customs of people in society. In a broad sense legal system includes four elements i.e. structure, objectives, functioning and capacity to adopt the change. Structure includes the legal norms, legal rules, law making agency, legal principles, law adjudicating agency and law enforcing agency. Objective of any legal system is to provide justice to the people.

Democracy, peace and order of society and rule of law are also the objectives of the legal system. Legal systems function in society to achieve the objectives and for the possible change of the society. Another element of legal system is to adopt the change through addressing the change and through maintaining the objectives.

Reception of Rules in One Legal System is the Global Phenomena

If there is no rule or legal gap in a particular society or country then they receive the law of other country. It happens when the new dimensions occur in the society or in newly built nation. Reception of foreign law is a common phenomenon. The reception of law is done for many purposes. The past few decades have shown an upward trend in the volume of legal transplantation. For most of the time and in almost all places, borrowing of law to one legal system from another legal system has become a major source of legal change. Borrowing comes in many forms. It may be from within a system, by means of analogy, negligence in torts, negligence in contracts, or from another legal system. Borrowing may be perceived as a complex entity. Receptions come in the form of taking over single rules to sometimes a whole system. Most of the literature presumes that the efficacy of the law is the determinant and dominant factor in identifying which law has been transplanted and from one place to another. The newly independent state received foreign rules to fulfill the legal gap under the new system. Reception of law happens when-

- Some countries received because the new leadership was trained and influenced by the legal system of the country from the laws were received.
- Some countries received because their legal development was at the infant stage and unable to meet the changing need of the time.
- Some countries received because they had scarcity of potential manpower to make the law needed.

- Many countries got the legal system imposed by the foreign country, while the national leadership worked as foreign agent.¹³

Conclusion

Legal system is the sum total of laws as described by the Austin and Bentham. But Dias criticizes that legal system is more than a sum-total of laws or legal materials; it represents the pattern of interrelation of laws and its purposes and functioning. A legal system is a norm, institutions and processes made by a competent and legitimate authority which controls the behavior of persons in an autonomous and legitimate political society. Legal system is the legal framework of the country where there are certain law creating institutions, law enforcing and adjudicating institutions.

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¹³ Bishal Khanal, *The Concept Received but the Content Ignored: A dilemma with the Legal System of Nepal*, NEPAL LAW REVIEW, Vol.18, (1998)