Treatise on Sociological Jurisprudence: Oriental and Occidental Perspective

Sujit Sapkota
B.A. LL.B Runnsing (TU)
Email: sujitsapkotanep7@gmail.com
Shiddhartha Katuwal
B.A.LL.B Running (KSL)
Email: 4ramsita@gmail.com

Article History : *2025 Septermber 3*

Abstract

Jurisprudence is an ocean of legal philosophy or thought which depth can never be discovered. The formal categorization of jurisprudential ideas in forms of six schools of thought is merely an attempt to a systematic jurisprudential study. In this regard, this paper tries to examine the philosophy or notion of one of those schools of thoughts i.e Sociological school of thoughts from multi-dimensional perspective particularly perceiving it from the lens of oriental and occidental society. In our jurisprudential schooling of any levels, we are rarely informed about the oriental jurisprudential development particularly while being taught about six schools of thoughts which are foundational stone of jurisprudence. The occidental sociological jurisprudence is indeed systematized and it has formal development in particular framework of time but saying this we can't overlook the oriental sociological jurisprudence which developed in our soil, civilization in various point of time. Occidental sociological jurisprudence can be easily traced out from any jurisprudential writing but tracing out oriental jurisprudence isn't as easy as that. The paper aims to introduce the uninformed oriental sociological jurisprudence along with examination of development of occidental sociological jurisprudence along with their contributors also with special reference to Nepalese sociological jurisprudential development with constructive role played by judiciary in its development.

Keywords: *Society, Loklajja, Social epistemology, Social Interest, Social engineering*

1. Introducing Jurisprudence

According to Karl Georg Wurzel, "Jurisprudence was first of the social sciences to be born."[230] Jurisprudence is eye lens or retina to see law and society as well as legal system in holistic sense. It is the tool that balances norms and values of law and society because it is the

[230] *Science of Legal Method: Selected Essays by Various Authors* 289 (Ernest Bruncken trans., The Boston Book Co. 1917).

heart of legal system as well as mirror of civil society.[231]In other words, Jurisprudence study is' thought about thought.' "Its overall aim is no to teach students what they need to know, but how to think profitably for themselves and to educate and equip to be efficient lawyers."[232] Jurisprudence has general framework like a cabbage which has a round shape in general but is composed of layers and layers. A cabbage is well-known for its layers and price is determined by layers. Similarly, Jurisprudence is composed of layers in forms of its school of thought, trends, approaches etc.[233] Even a single layer is a fabric of numerous philosophers and contributors. For example: Sociological Jurisprudence is fabric of philosophers such as Pound, Duguit, Erlich, Ihering etc. among others.

"It is subject that seems remote from daily practice of most lawyers since most members of profession dismiss it as academic & impractical yet ultimately survival of our legal principles depends upon lawyer building rational system of law based on truth and rightness."[234]

Instead then representing several approaches to a single objective, the various schools of jurisprudence such as Natural, Analytical, Historical, Sociological, Realist, and Socialist represent distinct objectives. It is not merely a case of six blind men disagreeing in their descriptions of an elephant instead there is rather a genuine difference of opinion as to which of the animals is the elephant. The first and most enduring difference among the schools concerns to what law actually is. Then, naturally, they differ as to what jurisprudence is whether it is a science, a philosophy, a general attitude, a system, a theory, or a method?

"The current names of the schools do not always make the issues among them clear. There is nothing in the study of history or philosophy that excludes analysis or a consideration of the social ends or other ends that the law serves or should serve."[235]

2. Oriental perspective on sociological jurisprudence

Upon every philosophical thought we perceive it from the lens of the development and contributions of western school of thought upon it and often forgot or to be honest we neglect the prosperous and rich eastern or oriental school of thought particularly terming it as 'myth'. In this regard, upon the jurisprudential development too we are confined in the schooling of six school of jurisprudence developed in western civilization. Sociological jurisprudence, the living and most practical school of jurisprudence of all times and all places have been deeply rooted in oriental civilization and heritage since time immemorial.

---

231 Krishna Prasad Basyal, *An Introduction to Jurisprudence and Its Nature: A Brief Study*, 13/14 *Nepal Bar Council L.J., at* 242 (2013/14)

232 R M W Dias, *Jurisprudence* 15 (5th ed., Aditya Books Private Limited 1994)

233 Kamal Raj Thapa, *The Cabbage We Know as Jurisprudence: A Composition of One Layer Upon Another*, 2 *KSL L. Rev.* 1, at 40 (2013)

234 Jerome Hall, *The Challenge of Jurisprudence to Build Science and Philosophy of Law*, 37 *Am. Bar Ass'n J.*, at 23 (1951)

235 Nathan Isaacs, *The Schools of Jurisprudence: Their Place in History and Their Present Alignment*, 31 *Harv. L. Rev., at* 373 (1918)

In oriental society vedic tradition, we say 'सर्वे भवन्तु सुखिन' which reflects broader concept of praying for prosperity, happiness and wellbeing of every being with the notion of social welfare, social interest minimizing of all sorts of pain and fiction. It doesn't promote individualism and individualistic thought of being concentrated upon individual interest because for attainment of social welfare and protection of social interest we must safeguard interest of every being and ensure none may be part any sorts of sorrow or grief inflicting pain upon a being. Eastern sociological jurisprudence fundamentally focused in 'social epistemology' of our society which believes in the philosophy of 'Collectivism.' In this sense, our sociological jurisprudence sees the broader picture of majority interest where the individual interest is vested.

Similarly, the eastern notion of sociological jurisprudence can also be discovered from the philosophy of two Chinese philosopher Lao zi and Zhuang zi's which represents Daoism or Taoism philosophy. Also termed as, Tao-te-ching (Dao-de-ching).[236] The core message of this philosophy was to let things, events or affairs take their natural course. It is jurisprudential notion where nature (स्वभाव) should not go beyond the nature (प्रकृति). In case of contradiction, it may result in destruction. It connotes the fact that eastern sociological jurisprudence does not discard fundamental notions of natural law. In other words, nature is integral part of eastern sociological jurisprudence.

Likewise, the philosophy of Confucianism and Buddhism are integral part of eastern sociological jurisprudence. According to Confucius, "To be able under all circumstances to practice five things constitute perfect virtue and these five things are gravity, generosity of soul, sincerity, earnestness and kindness"[237] These virtues if taken into consideration during legal process whether it may be legislation, adjudication of dispute etc contributes in providing a socially relevant and acceptable outcomes concerning the societal structure, norms and values of particular society.

Also, The light of Asia, Gautam Buddha, who preached the value of peace all around the world insists on the idea that "the perception demonstrates as the word; the word exhibits as the action or deed; the action develops into habits and habits shape character, so carefully observe thoughts and their paths and allow them to arise from love that is developed out of compassion for all living things."[238] For example: The thought or notion of treating everyone without equality has resulted in legislation or establishment of social values based on concept of equality among all without any forms of discrimination on any ground.[239]

One of our four Vedas, yazur Veda has emphasized on the fact that Unity and amity are the basis for social solidarity or coherence and maintenance of social harmony.[240] Especially in

---

236 Yubraj Sangraula, *Decolonizing Jurisprudence with Asian Context* 141 (Lex and Juris Publication 2023)

237 Roshan Kumar Jha, *The Renaissance of Nepali Legal Philosophy*, 43 (Pairavi Publication, 2081)

238 ibid

239 Article 18 and 24, Constitution of Nepal

240 मित्रस्य चशुषा समिक्षामहे । (३६/१८ यजु)

society with lots of diversity the social unity and friendship among the people becomes determinant for the maintenance of social solidarity. Social solidarity is pre-requisite for sake of protection of social interest in the society and its foundational stone is laid by the practice of being united and maintenance of friendly relations for a common goal and aspiration of social justice.

In Manusmriti, Manu has described fully awakened state as satya Yuga, three-quarters awakened state as Treta, the half awakened state Dwapara, and the one-third awakened State as kali.[241] The word "awakened (जागृत)" refers to conscious mind. The state of being "awakened" is state of knowledge. Knowledge transcends logic and intellect. Consequently, as the conscious mind weakens in people, social problems begun to arise in the society.[242]This is our social reality because with the passage in time there has been arrival of various social problems in different forms in different phase of time. From this vedic notion we can discover the fact that society is dynamic and so is the law. Law changes society and society changes law. Hence, we must develop such a law and legal system which can quickly respond to every form of social problems arising in society with change in time with not being static and being familiar with social reality and structure of society.

Social Justice is also taken as fundamental part of Eastern sociological jurisprudence with the notion of ँसर्वजन हिताया सर्वजन सुखाया' preached in Buddhism philosophy. It evaluates how the regressive status quo changed into progressive status quo.[243]In the narratives particularly of Nepalese people they say, ँठुलालाई चैन, सानालाई ऐन' which means law is privilege to elite class and sanctioning to marginalized class. Law is visualized as tool to serve economic and political elites of society.[244] It primarily obstructs the notion of social justice. Logic can be taken as method to evaluate this circumstance. In theories of perception the two kinds of perception exists i.e Exteroception and Proprioception. Exteroception tells us about the world outside of our bodies and Proprioception (Interoception) tells us about what is going on in our bodies.[245]Now, with this regard in the outer world law is believed not to have been accessible to weaker or marginalized group of people of society because of issue like corruption, delay justice, Lengthy and complex justice mechanism of judiciary. Thus, Extroception make people cognation to make narratives law is not for marginalized group or general public.

In the oriental society, the particular act which is against norms and values of society is taken as 'Loklajja' (लोकलज्जा). This social reality inspired the construction of sociological jurisprudence even of modern society. For example: Criminalization of polygamy.[246]This act of

---

241 अन्ये कृतयुगे धर्मास्त्रेतायां द्वापरेऽपरे । अन्ये कलियुगे नृणां युगह्रासानुरूपतः ॥ (मनु १/८५)

242 Dilliram Gautam, *Eastern Thought and Source* 120-21 (Lex and Juris Publication, 2076)

243 Supra note 7, at 430

244 Elite capture of creamy layer of society with regard to inclusive principle of proportional representation election system , (Balkrishna Neupane vs Election commission et.al, 079-WC-0053, Judgment on 2080/11/20)

245 Yubraj Sangraula, *Jurisprudence: The Philosophy of Law* 6 (Lex and Juris Publication 2018)

246 Section 175, National criminal code,2074

criminalization is not merely because it is command of sovereign or being act prohibited by criminal law of a nation instead there is inherent notion of sociological jurisprudence to perceive it as immoral and anti-social act and carry out social reformation upon it, ending social disparity and protection from social malpractices or evils to the people of society.[247]

In oriental society, the legal culture seeks functionality of particular law. The term Social ownership (सामाजिक अपनत्व) examines whether or not the particular law in living in the society or it is dead law.[248]Likewise, social sanction social deviance results in social boycotting (सामाजिक बहिष्करण) in the oriental society.

3. Occidental perspective on sociological jurisprudence

Law in all its sense is studied as specialized phase of what in a larger view is science of society.[249] One of the most characteristic features of the twentieth-century jurisprudence was the development of sociological approaches to law. [250] "Sociological jurists tend to be sceptical of the rules presented in the textbooks and concerned to see what really happens, 'the law in action.' Sociological jurists also tend to espouse relativism. They reject the belief of naturalism that an ultimate theory of values can be found, they see reality as socially constructed with no natural guide to the solution of many conflicts. Sociological jurists believe also in the importance of harnessing the techniques of the social sciences, as well as the knowledge culled from sociological research, towards the erection of a more effective science of law. Lastly, there is an abiding concern with social justice, though in what this consists, and how it is to be attained, views differ."[251] The various factors which led to the establishment of Sociological school of jurisprudence,[252] particularly in context of occidental society can be enumerated as:

a) In 19th century, the laissez-faire philosophy shifted focus from the individual to society.
b) The emergence of historical school of thought as a response to extreme individualism of 19th century emphasized on volkgeist (Common spirit of people) showed closed relationship between law and social context in with it emerges. Thus, the sociological school of jurists developed this concept further.
c) The state did not have jurisdiction over issues like health, welfare, education, etc. before 19th century. Due to the negative consequences of laissez-faire, the state in the 19th century grew increasingly concerned with a wide range of issues that touched on practically every facet of human life and well-being. As a result of this implied legal regulation legal theory was forced to adapt in order to account for social realities.

---

247 Justice Tek Prasad Dhungana in Madan Bahadur Malla vs Government of Nepal, 078-CF-0006 , Judgment on 2081/01/06

248 Section 7(1), Social behavior Reform Act, 2033 (participation of only 51 people in weeding procession)

249 Roscoe Pound, *Sociology of Law and Sociological Jurisprudence,*5(2) U. Toronto L.J. 1 (1943)

250 R. Cotterrell, *Law's Community: Legal Theory in Sociological Perspective*, 25 J. L. & Soc'y 171 (1998)

251 M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* 701-02 (9th ed., Sweet & Maxwell 2021)

252 Nomita Aggrawal, *Jurisprudence (Legal Theory)* 324 (11th ed., Central Law Publ'n 2019 reprinted 2021)

d) It was developed as a response to excessive theorization in law. By this point, analytical jurists' shortcomings of simply being formal analysis were becoming apparent.

e) In addition to upsetting complacency regarding societal stability and revolutions, social unrest also sparked fear about the flaws of law and legal system. The goal of sociological jurists was to address these issues which led to emergence of this school of thought.

Developmental stage of sociological jurisprudence[253]

In context of western sociological jurisprudence it emerged through some of the major stages which can be briefly stated as:

a) The mechanical stage

This stage can also be termed as Empirical scientific approach to law. Auguste Comte (1789-1857), Comte, the founder of sociology was a mathematician. "The mechanism of the physical world was the main focus of scientific thought throughout the first part of the nineteenth century. The concept of mathematically demonstrable principles that were thought to govern the natural processes captivated the men's minds. As a result, it was common to approach things from a quantitative and physical perspective. Men looked for the mechanical or mathematical principles that underpinned the creation of everything and guided it throughout its existence. Because of the impact of the historical school, which dominated the field of law science at the time, this way of thinking was particularly suited to jurisprudence and hence persisted there for a longer period of time than elsewhere."[254]

According to Comte, "human understanding widens with the mental developments and the law takes shape to suit the needs of society in four stages, namely, (1) Primitive stage, (2) Medieval stage, (3) Metaphysical stage and (4) the Modern scientific (Positive) stage."[255]

During the first stage, theological men think that God controls and regulates all human activities and attempt to explain things by referring to supernatural forces like the sun, moon, sea, seasons, etc. The God theory and natural forces are personified in terms of absolute power in the second stage. The metaphysical stage discards these theoretical considerations, and the scientific stage ultimately places more focus on empirical observation and the investigation of the relationships between observable events. Comte therefore held that empirical observation, verification, and reasoning are necessary to explain social realities, just as they are for the physical universe.

b) The Biological stage

This stage has been called as biological stage due to impact of Darwinian evolutionary theory. Evolution became the main concept in scientific thinking in the last third of the nineteenth century due to Darwin's notable contribution upon that point of time. The

---

[253] Roscoe Pound, *Jurisprudence* vol. I, at 298 (St. Paul, Minn.: West Publishing Co. 1959)

[254] Ibid 299-300

[255] N.V. Paranjape, *Studies in Jurisprudence & Legal Theory* 93 (9th ed., Cent. Law Agency 2019 reprint 2022)

concept of evolution infiltrated and transformed philology from the natural sciences. It was then used to examine the development of religious and social institutions. In the end, it became jurisprudence. A biological science of the state and a biological science of law have replaced the attempts to develop a physical science of the state and of law. The mechanical sociology was replaced by a biological sociology.[256]

According to Herbert Spencer, "social phenomena are biological processes that adjust to the shifting demands of society. He maintained that in order to meet the evolving requirements of a progressive society, the law must change and adapt. Conflicting interests of society's members are resolved and different groups are kept within their bounds for the benefit of society as a whole through the instrumentality of the law."[257]

c) The psychological stage

According to Dean Roscoe pound, "the third stage of development of sociological jurisprudence is more significant development in the science of law, the psychological stage of sociological jurisprudence. Three successive influences turned the attention of sociological jurists toward psychology in a period of later half of 19th century and first quarter of 20th century. First was study of group psychology, which led to a psychological movement in jurisprudence and in politics. Second, there was a complete change of method in the social sciences generally which resulted from the work of the American sociologist, Ward. Ward urged that 'psychic forces are as real and natural [i. e. significant] as physical forces and are the true causes of all social phenomena.' Third came Tarde's working out of the psychological or sociological laws of imitation and his demonstration of the extent to which imitation governs in the development of legal institutions."[258]

Ottovon Gierke (1841–1921) criticized the historical school's conventional wisdom, which placed too much stress on the metaphysical application of the law and emphasized the value of group personality in defending shared interests. As a result, it became clear that the psychological and functional aspects of law are closely related. According to George Jellinek's (1851–1911), Social psychology theory of sanction, the law establishes the standards for men's behavior and is derived from an outside force.[259]

d) The stage of unification

The integration of the sociological approach with other social sciences is the final phase in the development of sociological jurisprudence. The unification of sociological methodologies was the first part of this new stage, and the unification of the social sciences was the second. It became clear that many social sciences reflect various facets of human society. As a result, they complement and enhance one another, and because law is a

---

256 Supra note 24, at 303-304

257 Supra note 26, at 93

258 Supra note 24, at 312-313

259 Supra note 26, at 93

powerful tool for social control, it is also inextricably linked to many socioeconomic and cultural facets of society. Here, the law is a tool for social control that should be viewed in the context of society as a whole. It attempts to manage behavior and resolve conflicts of interest.[260]

Today's sociological jurists maintain that the all the social sciences are to be united and that a completely independent, self-serving, and self-centered science of law is impossible. They insist upon the fact that the legal system is impossible to comprehend without considering social phenomena in their whole.[261]

Facets of sociological Jurisprudence

Sociological Jurisprudence, also considered to be 'Functional school of jurisprudence' regards law to be social phenomena and tests it in relation with society particularly in a way how law changes and how society changes law. "Jurisprudence of law and society believes that law is cement of society which ties up society and societal interests."[262]

Law is based on social facts and elements regulated by state power and state mechanism. From the perspective of sociological law, it is a subject to construct law, maintenance of order with human interest of Society and needs involving social norms and values. In this respect, law construction is not directed and guided by any external force but it is originated in the society and is the outcome of social needs. Society is known as a workshop where legal validity is tested. The state doesn't construct law but promulgates it. It is essential to know that society is a factory to produce law which is an accepted value in the sector as a law. In fact the sociological concept of law denotes that the construction is not to frighten people or create pressure but for social solidarity and to keep balance among the needs, wants and welfare of different people in the society. According to this philosophy, the real impact of implementation of law should have a positive effect in the society so that it can be supposed to be the practical and actual law-constructing adjustable law in the society, it is the responsibility to develop and empower and manage society improving the human behavior organization and social environment regarding social norms and values.[263]

"Behind any legal rights there exist certain interests, social and individual, which the law recognizes and makes into legal rights. Historically, the practice of the law, in both the Common Law through the various writs and in the Roman Law by means of the 'legisactiones', was to identify legal rights with the existing remedies; if there was no remedy given by the law,

---

[260] Ibid at 94

[261] Supra note 24, at 328

[262] Gyaneshwor Parajuli & Bimal Lamichhane, *Social Function of Law from Jurisprudential Outlook*, 41 Nepal L. Rev., Vol. 28, No.1&2, at 157 (2018-2019)

[263] Krishna Prasad Basyal, *Concept of Sociological School Theory in Nepalese Context* 16 Nepal Bar Council L.J. 64-65 (2017)

there was no legal right. Logically, the process should be reversed, in the viewpoint of the Sociological School, and the inquiry should first be, what are the claims, the wants, the demands which the social group may make in order for its continued existence; and next, how far may the individual interests be recognized as appropriate thereto; the latter become legal rights if they should be recognized as appropriate, Under this method, the so-called 'natural rights' of the old legal philosophy are identical with the interests under the new philosophy of law, with the exception that in the latter's viewpoint there are no legal rights antedating the law; create the law the legal recognizing right, the and latter delimit- does not create the law. There is, consequently, a continual progression or advancement in legal right, according as the law becomes able to give effect to an ever-increasing enlargement of interests themselves."[264]

Another of this school's most crucial and significant tenets is the use of sociological research as a basis for legislation, whether it is created by the legislature or the court.[265] , the courts have ruled that these attempts to modify the law to new circumstances are unconstitutional because they are unaware of the altered social and economic circumstances that have given rise to these laws.[266]

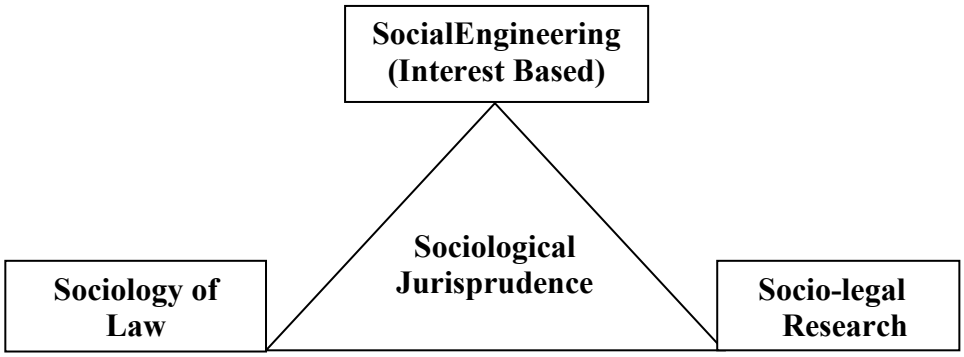

Fig: Facets of Functional Jurisprudence

Sociology of law

Sociology of law, facets of sociological jurisprudence which emphasis on the fact that society changes faster than law. In other words, it stresses on the conception that society changes law. Sociology of law is scientific study of legal behavior. It is study of relationship which legal system of society has within its sub system. The bond of relations between

---

264 E. F. Albertsworth, *Program of Sociological Jurisprudence*, 8 A.B.A. J. at 395 (1922)

265 ibid

266 Court can't act as social engineer instead of legislator even for sake for reformation of existing law with disparity in between man and woman with regard to notion that only women can be victim in sexual offences.
(Shyam Krishna Maske Vs. GON,OPM and COM et.al , NKP 2068, VOL 4, DN 8489)

sociology and law are indeed deep and organic.[267] In essence, law is a man of affairs who has been given a piece of the machinery that regulates social relations and interactions.[268] The following are functions of sociology of law[269]:

a. Grasping law in its working
b. Expert advice for social engineering
c. Shape its studies to make them useful for practical application
d. Struggle with social reality

Sociology of law is contributed by scholars and philosophers like Auguste Comte, Eugen Ehrlich, Emile Durkheim, Leon Duguit etc.

A. Auguste Comte (1786-1857)

He was French philosopher and father of sociology who coined the term 'sociolgy' for the first time in 1838 AD. He implied scientific method to study sociology which is termed as 'Scientific Positvism.'

According to him, "When society is directed by scientific principles, it can advance just like any other entity. All other metaphysical considerations should be removed from its scope, and these principles should be developed through factual observation and experimentation. He went on to say that since man is fundamentally a social creature and all of his urges come from his social life, which is subject to legal and governmental regulation, he cannot exist in solitude."[270]Therefore, 'society' should be center of attention of law and not the 'individual'.

Comte stressed that "there are four means of social investigation, namely, observation. Experiment, comparison, and the historical method; and that it is last which is specific to sociology. The data of this latter method was to be gathered through observation and examined in light of established human nature laws."[271]

B. Eugen Ehrlich (1862-1922)

Ehrlich was an eminent jurist who focused on explaining the social foundations of the law. According to him, social realities form the basis of law, which is based on social pressure rather than governmental authority. Despite having certain distinctive tools of coercion, the state is only one among many associations, and laws are not all that different from other types of social coercion. It is the responsibility of judges and jurists to reconcile the formal norms of the legal system with the "living law" that underlies them. As opposed to analytical jurisprudence, fact-studies are therefore given a lot of weight when examining the true underpinnings of legal principles, as well as their application, significance, and future prospects.[272]

---

[267] Nutan Chandra Subedee, *Sociology of Law: An Overview of Conceptual Framework*, 37 Nepal L. Rev., Vol.24, No 1&2, at 95 (2012)

[268] Roger Cotterrell, *The Sociology of Law: An Introduction* 4 (2007)

[269] Adam Podgórecki, *Law and Society* 7-10 (1974)

[270] Supra note 26, at 96

[271] Supra note 22, at 702-703

[272] Supra note 22, at 713

According to him,"Centre of gravity of legal development is neither legislation nor precedent, but in society itself."[273] Ehrilch regarded formal law (written law) like legislation precedent as norms of decision by court and living law (normative law) as norms of conduct of social life.[274] He said people aren't informed of formal law and it becomes living if interpreted on the basis of social issue arising in court, otherwise people will forgot it. He emphasized on research to fulfill loopholes of legislation.[275]

C. Emile Durkheim (1858-1917)

Durkheim, the famous French sociologist, is another of the major figures of sociology to have taken a strong interest in legal problems. He was one of the early philosophers about the criminal process: he wrote on punishment, on the law of contract and particularly in 'The Division of Labor in Society', devised a typology of the growth of the law which has had a major influence on future sociological and anthropological thought. According to Durkheim, a society's legal system serves as its yardstick. He believed that 'the principal forms of social solidarity are reproduced' by law.

Durkheim identified two fundamental forms of societal cohesion, or what he called solidarity: organic solidarity, which is found in more diverse and heterogeneous modern societies that rely on the functional interdependence created by the division of labor, and mechanical solidarity, which is found in homogeneous societies. Repressive and restitutive laws are associated with various forms of integration. Law is basically criminal in a society built on mechanical solidarity. As the legal system gets more differentiated, the way society responds to crime becomes less important, and the primary method of settling conflicts is restitutive sanctions.[276]

D. Leon Duguit (1859-1928)

Early in the 20th century, French jurist Leon Duguit made a significant contribution to social jurisprudence. Auguste Compte's conception of law, which rejected men's individual rights and placed them behind the interests of society, had a significant influence on Duguit. Durkheim's 'Division of Labor in Society' also had an impact on Duguit. In actuality, he considerably developed Durkheim's original social solidarity theory. The foundation of Duguit's social solidarity theory is the idea that human interdependence is what makes society what it is. Each person's existence is a result of his or her social membership. Life's essentials cannot be obtained by any one person alone. As a result, everyone must rely on one another to meet their requirements. The ultimate goal of all human endeavors is to guarantee men's dependency. Duguit added that the law accomplishes the same goal. He made the argument that people follow the law because they must live as members of society, not because it is a greater ideal.[277]

---

[273] Eugen Ehrlich, *Fundamental Principles of Sociology of Law* 37 (1936)

[274] Section 172(1), National criminal code, 2074, Privilege to do Incest marriage as a customary practice (but it was in practice way before since immemorial before law adopted it).

[275] Sapana pradhan Malla Vs. OPM&COM (NKP 2065, VOL 11, DN 8038)

[276] Supra note 22, at 709

[277] Supra note 26, at 101

He disregarded the conventional idea of right and concentrated solely on duty, believing that a man's only right is to carry out his responsibilities. Additionally, he did not distinguish between public and private law because all laws are intended to promote social cohesion. Since states are human organizations, he rejected the idea of state sovereignty and views them as nothing more than an expression of the desire of the people who rule them. The state exists to carry out social solidarity functions, not to exercise sovereign power. Additionally, he disapproved of the idea that legal personality is a myth as it is not grounded in social reality. [278]

"If laws were so petrified and static that they couldn't handle the constant challenge of revolutionary or evolutionary changes in society, it would be tragic."[279] Hence Sociology of law helps in avoiding the possible tragic or revolutionary situation resulting from static law not responding to the dynamic society.

Social Engineering (Interest based)

It is based on conception that law changes faster than society. It stressed the fact that it's the law which changes the society not society which changes law. Law is taken as mechanism of social control.[280] It is functional study of law applied to make law an efficient and effective tool of social control for harmonizing the dissecting interest (Conflict of interests) of individual in the society. It can also be denoted as Interest based proposition in a sense that the interpretor of this proposition particularly two philosopher Rudolf Von Ihering and Sir Dean Roscoe pound interpreted it in terms of 'Interest'

1. Rudolf Von Ihering (1818-1892)

Ihering is contributor of Interest based sociological jurisprudence or 'Jurisprudence of Intrest' because he emphasized on fact that law alone is not means of social control instead his philosophy of 'Social Utilitarianism' i.e pursuance of pleasure and avoidance is highlighted a major tool of social control. It may be said to have been similar with 'Interest' based philosphy of Bentham but bentham perceived it in form of command whereas Ihering emphasized on social utility. He perceived the fact that human being is guided by purpose and the means of attainment of that purpose is law. The purpose or interest may be termed as: Selfish (Private and egoistic) and Unselfish (Public and Ultrustic). This brings the conflicting interest in society which can be broadly categorized as: a) Individual Interest b) Social Interest and c) Individual interest. Similarly, the methods to balance these conflicting interests are provided as: a) Reward and punishment (Coercion) b) Duty and love. Here, Coercion can further be classified as: a) organized and unorganized coercion. Justice Administration through law implemented by state is form of organized coercion. Similarly, Social rules and morality are form of unorganized coercion. Duty and love are social purpose or end of law.

---

[278] Léon Duguit, *The Law and the State*, 31 Harv. L. Rev. 1, at 1 (1917)

[279] W.Friedman, *Law in a Changing Society* 525 (2d ed.2001)

[280] Section 249a, National criminal code, 2074 (loan sharks – 'mitar byaj' crimnalized)

According to Ihering, "Law is sum total of various conditions of social life determined by coercive force of state." In other words, the purpose of law is to serve the common good, not the interests or goals of any one person. The state has an obligation to advance social interest by preventing conflicts between private and public interests.

. He also advocated for the fact that Law is result of constant struggle which he identified in terms of 'Living law' which was later developed by Eugen Ehrlich.

2. Sir Dean Roscoe pound (1870-1964)

Sir Dean Roscoe pound is major exponent of 'Interest based Social Engineering theory'. His legal philosophy emphasized on Functional aspect of law i.e 'law in action' rather merely an abstract content. That's why his approach has been termed as 'Functional school'[281]He considered law as means of 'Social Engineering' and lawyers are social Engineers through which the end of law of maximizing wants and minimizing the Friction can be achieved in course of balancing conflicting interest of the society.

Ihering's idea of the law as a mediator between opposing interests was adopted by Pound, who also gave it some unique characteristics. According to Pound, the law is a set of rules for behavior that ensures the means of resolving disputes and the goods of life circulate as much as possible with the least amount of waste and friction. According to Pound, these claims are interests that are 'pressing for recognition and security' and that exist outside the bounds of the law. Some of these are recognized by the law, which grants them legal force within certain bounds.[282]

He further classified those interests into 3 types: a) Private interest[283] b) Public Interest[284] and c) Social interest. Reconciliation, harmony, and compromise between divergent demands and interests are all part of the process of interest balancing. A significant portion of social engineering is carried out with the help of the body of knowledge and experience known as law. The goal of social engineering and interest balancing is to create an effective social organization.[285] Pound says, "like an Engineers formulae, law represents experience, scientific formulations of experience and logical developments of the formulating their requirements by means of a developed technique".[286] Apart from the 'Interest' and 'Social Engineering' theory of pound, he also developed the concept of 'Jural postulates' which is basically assumptions made my man in a civilized society upon which its ordering rest and these assumptions are also for evaluation of conflicting interest in due order of priority[287]. The five Jural postulates provided by Pound in 1919 are[288]:

---

281 GW paton, *Textbook on Jurisprudence* 22 (4th ed. 1972)

282 Supra note 22, at 715

283 Article 17 (Right to Freedom), 28(Right to privacy), Constitution of Nepal

284 Article 25(2), power of Eminent domain and police power, Constitution of Nepal

285 Supra note 33, at 150

286 DR. S.R. Myneni, *Jurisprudence (Legal Theory)* 511 (2d ed. 2012)

287 Supra note 26, at 108

288 Roscoe Pound, *Jurisprudence* vol. III, 7-8 (St. Paul, Minn.: West Publishing Co. 1959)

a. **Jural Postulate I:** Men need to be able to presume that people in a civilized society won't intentionally harm them.[289]

b. **Jural Postulate II:** Men must be able to presume that they can utilize what they have learned and appropriated for their own use, what they have made through their own labor, and what they have obtained under the current social and economic order for constructive purposes in a civilized society.[290]

c. **Jural Postulate III:** Men must be able to trust that those they interact with as members of a civilized society will act honorably.[291]

d. **Jural Postulate IV:** Men must be able to assume that others who follow certain behaviors will take adequate precautions to avoid posing an unreasonable risk of harm to others in a civilized society.[292]

e. **Jural Postulate V:** Men must be able to assume that people who maintain objects or employ agencies that are harmless in their intended use but harmful in other contexts and who have a propensity to use them improperly will restrain them and keep them within their appropriate bounds.

These postulates have a relative and dynamic character. Accordingly, Roscoe Change's legal postulates offer standards for a moral and civilized existence and aim to achieve a balance between idealism and reality as well as the authority and social responsibility of individuals in the community.[293]

Socio-Legal Research

Socio-legal Research is another facet of sociological jurisprudence which emphasis on fact that research is necessary upon existing law to make it more living and scientific being relevant to contemporary society and social necessity.[294] Legal scholarship, like the status of Marxists, may be allowed to deteriorate if our many laws were flawless and social Control was automatic. However, in a changing community, our laws cannot be absolute and faultless. They are not always even understandable, and even when they are, they are not always made in an understandable fashion.[295] Hence, Socio-legal research is necessary to fulfill legislative limitations or shortcomings.

4. Nepalese Constitutional and Legislative or statutory provisions

Legislation and statutory provisions of Nepal are quite progressive in the eye of sociological Jurisprudence. In fact, the present constitution is progressive to greater possible

---

289 Section 177 and 179 National criminal code, 2074 (Intentional and provocation Homicide criminalized)

290 Copyright Act, 2059

291 Section 9 Civil code, 2074 (Act causing Nuisance to other not to be done)

292 Section 182 and 183, criminal code, 2074 (Reckless and Negligent killing criminalized)

293 Supra note 26, at 109

294 Supreme Court of Nepal directed to form a committee to carry out social-legal research upon the same sex marriage and other rights of LGBTIQ community in Nepal and recommend government (Sunil Babu panta Vs.GON, OPM and COM , NKP 2065 Vol 4, DN 7958

295 B.A. Wortley, *Some Reflections on Legal Research after Thirty Years*, 24 J. Indian L. Inst. 175 (1982)

extent in institutionalization of Sociological Jurisprudence in it. Starting from its, preamble proviso of ending feudalism and establishing socialism oriented state protecting the wider range of socio-cultural diversity, social solidarity and social unity by ending all forms of disparity including the social through the means of inclusive, proportionate and participatory principle in order to build equitable and egalitarian society.[296] Likewise, Citizenship based on gender identity[297], Fundamental rights like Right of senior citizen[298], Education[299], health[300], women[301], children[302], Social justice,[303] Social security,[304] Dalit,[305] equality with notion of equity[306] etc has been enshrined in Constitution. Similarly, constitutional commissions like women, Dalit, Tharu, Madhesi, Muslim, Indigenous nationality and inclusive has been provisioned in the constitution.[307] Also, concept of Public Interest Litigation (PIL) has been provisioned.[308]

Recently Legislation Act, 2081 was legislated by Federal parliament of Nepal. One of the legislative wisdom for issuance of this act is to increase people participation or participation of general public upon the process of legislation.[309] Law for its social acceptance or ownership requires social authentication in addition with formal authentication of president which can be obtained only through extensive people's participation in legislative process. Likewise, Act against public interest is prohibited by law.[310] There is equal right to partition between son and daughter.[311]Social evils like slavery, chaupaddi system has been criminalized.[312]Social malpractices like Dowry system, polygamy and child marriage has also been prohibited by law.[313] Marital rape has been defined as offence and penalized.[314]

Numerous legislation have been done in order to enshrine the spirit of sociological jurisprudence whether it may that of social interest, social control, social welfare, social change and social engineering . Some of them are: Birta (Abolition) Act 2016, Contangious Disease Act 2020, Land Act 2021, Public Road Act 2031, Black Marketing and other Social Offences and Punishment Act 2032, Birth Death and other Personal Events (Registration) Act 2033,

---

296 Preamble, Constitution of Nepal
297 Article 12, Constitution of Nepal
298 Article 41, Constitution of Nepal
299 Article 31, Constitution of Nepal
300 Article 35, Constitution of Nepal
301 Article 38, Constitution of Nepal
302 Article 39, Constitution of Nepal
303 Article 42, Constitution of Nepal
304 Article 43, Constitution of Nepal
305 Article 40, Constitution of Nepal
306 Article 18(3), Constitution of Nepal
307 Part 27, Constitution of Nepal
308 Article 133(1), Constitution of Nepal
309 Preamble, Legislation Act, 2081
310 Section 6, National Civil code, 2074
311 Section 205 and 206 , National Civil code, 2074
312 Chapter 10, offence relating to discriminating and degrading treatment, National criminal code, 2074
313 Chapter 11, offence relating to marriage, National criminal code, 2074
314 Section 219(4), National criminal code, 2074

Social Welfare Act 2049, Legal Aid Act 2054, Child Labor (Prohibition) Act 2056, Bonded Labor (Prohibition) Act 2058, Income Tax Act 2058, The Prevention of Corruption Act 2059, Poverty Alleviation Fund Act 2063, Citizenship Act 2063, Company Act 2063, Senior Citizens Act 2063, Human Trafficking and Transportation (Control) Act 2064, Caste based Discrimination and Untouchability (offence and Punishment) Act 2068, Bank and Financial Institutions Act 2073, Right Act relating to rights of disable person 2074, Labor Act 2074, Local government operation Act, 2074, Labor Act 2074, Public health service Act 2075, Compulsory and Free Education Act 2075, Right to Housing, Consumer protection Act 2075, Safe motherhood and reproductive health Act 2075, Children Act 2075, Crime Victim Protection Act 2075, Social Security Act 2075, Employment Act 2075, Right to food and Food Sovereignty Act 2075, Environmental Protection Act 2076 etc.

5. Role of Judiciary

Nepalese judiciary in several occasions has done progressive interpretation upon the promotion of social interest, identification of social need and necessity and issuing directive orders according if not due to the notion of judicial self-restrain and separation of power, it has definitely raised the concern of government upon such realizations. Among such various instances, Supreme Court of Nepal in case of Surya Prasad dhungel Vs. Godawari Marble Industry[315] identified the endangered situation upon human life due to polluted environment and directed to make provision relating to protection of environment resulting in promulgation of Environment protection act, 2053 then for larger social Interest.

Likewise, In case of Mira Dhungana et.al vs. HMG[316], Supreme Court of Nepal directed to make necessary provision upon the social issue of marital rape which resulted in its criminalization upon No.1 of chapter of Rape of then Muluki Ain, 2020. In case of Annapurna Rana Vs.Gorakh Shumsher JBR[317] , the court recognized the practice of living together relationship in changing social context being subject of personal liberty and held the subject of virginity test of women for purpose of identification of whether or not married violates right to privacy in modern society where sexual relationship before is subject of private affairs of women.

In case of Dil Bahadur Bk Vs HMG[318], Nepalese Apex court directed criminalizing practice involving social evil in name of chaupaddi system and raise social awareness in order to prohibit it. Supreme Court of Nepal in case of Lakpa Sherpa Vs Government of Nepal[319] held that in changing social context where Modus operandi of crime is also changing, even women can rape women artificial sex toy. In another case of Arjun Aryal vs Government of Nepal,[320]supreme court of Nepal with regard to practice of Animal sacrifice (Bali pratha) stated that with dynamic society law must also be dynamic it can't be status quo in name of usage.

---

315 NKP 2052, Golden Jubilee issue p.169, (Judgment on : 2052/07/14)

316 Writ no. 55 of year 2058 (Judgment on: 2059/01/19)

317 NKP 2055, VOL 8, DN 6588

318 NKP 2062, VOL 4, DN 7531

319 NKP 2073, VOL 9, DN 9684

320 NKP 2073, VOL 9, DN 9686

Also, supreme court of Nepal under Public trust doctrine upon the construction of Nijgadh International Airport, Bara directed to carry out proper feasibility test upon the proper environmental damage due to developmental activity in case of Prakash Mani Sharma vs Government of Nepal.[321] In case of Santosh Kumar yadav Vs Government of Nepal[322] Supreme Court identified the essence of Romeo-Juliet law with the changing social context of statutory rape and rape jurisprudence. Likewise, in case of Adhip pokharel Vs Immigration department et.al[323] Supreme Court validated same-sex marriage and raised the concern of Ministry of Law, justice and parliamentary affairs regarding use of Gender neutral words or phrases in existing law especially with regard to the rights of LGBTIQ community.

6. Conclusion

The sociological Jurisprudence regardless of oriental or occidental has society as its focal point and it revolves around the very focal point. In other words, 'Ubi societas, ibi jus' (Where there is society, there is law) and 'Ubi jus, ibi societas' (where there is law, there is society) is point of intersection of oriental and occidental Sociological jurisprudence in a sense that law doesn't operate in vacuum.

The mere existence of law isn't the ultimate end that's why Sociological jurisprudence is the tool that helps in making the law functional making it only the means for attainment of social justice, social peace and order as a whole through the means of effective social control. In this regard, oriental sociological jurisprudence insists upon the social sanction whereas occidental sociological jurisprudence is more or less based upon political and legal sanction provisioned by sovereign but it must be clear that the political and legal sanction isn't the byproduct of will of sovereign but is guided by social necessity and dynamics which makes the law and legal system living.

Hence, Sociological jurisprudence in both oriental and occidental society is study of holistic form of social interaction, social relations, social norms and values of people of society which ultimately contributes to the development of law in society whether it may be social law or formal law made by legislative organ of the state.

[321] 076-WF-006 Decision on 2079/02/12

[322] NKP 2080, VOL 1, DN 11015

[323] NKP 2080, VOL 5, DN 11097