UNIT 7 ROLE OF THE LAW IN SOCIETY

Structure

7.1 INTRODUCTION

Societal transformation is influenced by the changing nature of the customs. It also impacts the law in the context of modern political institutions. Intersections of law and society are complex in nature. Intellectual traditions across the globe have probed these complex connections in the shifts related to society, laws and customs. This unit attempts to explore some of those rudimentary, social sciences based, interdisciplinary, conceptual readings on the interlinkages between society and law. You will learn about the fundamental debates on sociology of law. It also analyzes the sociological and social theoretical engagement relations on societal-legal relations. At the same time, it maps theinterlinkages of societal and legal transformations. Thus, the unit deals with the debates on sociology of law.

7.2 LEARNING OUTCOMES

After studying this Unit, you shall be able to:

- Learn fundamental debates on sociology of law.
- Know the debates around the disciplines, sociology and law.
- Learn the sociological and social theoretical articulations on society and law
- Engage with the perspectives on societal and legal transformations

7.3 BASIC PREMISES

Relations of society and law needs to be understood within the larger context social science approaches and perspectives based on humanities. Interdisciplinary understanding is deployed by scholars to map the complex linkages between society and legal transitions. Sociology of law produced important readings related to the connection between societal changes and emergence of legal cultures. Before delving into the specificities of sociology of law, historical understanding of sociology of law will help understand the diverse interpretations and its background related to social and political churning in relation to the production of legal knowledge.

Sociology of law is considered as an important sub-discipline within the grand intellectual culture of hegemonic sociology. Italian philosopher, Dionzio Anzilotti introduced this category in the year 1892.There are different interpretations regarding the definitional understanding of the sub field "sociology of law." For Javier Trevino, legal sociology is "an academic specialty within the general discipline of sociology that attempts to explain the relationship between law and society, the social organization of the legal institution (order or system) ,the social interactions of all who come in contact with the legal institution and its representatives (police, lawyers, judges and legislators) and the meaning that people give to their legal reality."(Trevino, 2001) Sociology of law thus produce the context based and empirically rich accounts of law. Sociologists who belong to the sub-field of sociology of law read law as a social construct and attempted to delineate the nuanced connections between society and law.

Historically, sociology of law is considered an offshoot of the "sociological movement" within the discipline "law" in the background of post-second world war United States. Law is therefore read as a social phenomenon and sociology of law engages with the legal knowledge and sociological knowledge. Sociologists study how the intersections between society and law get reflected in the political and social transformations. There are different opinions related to the connections and conceptual departures related to sociology and law. Broadly, both sociology and law reflect on the larger fields that determine individual, societal expectations, communities and law. Sociology of law is knowledge emerged in response to transforming, social and political currents. The critique is that sociology of law confines itself to the theoretical realm in the field of dominant sociology and does not explore law as an evolutionary dimension of various societies across the globe.

Sociology of law, for Georges Gurvitch, "is that part of the sociology of human spirit which studies the full social reality of law, beginning with its tangible and external observable expressions in effective collective behaviors (crystallized organizations, customary practices and traditions or behavioral innovations) and in the material basis." (Gurvitch, 1942:61) It deals with "external symbols or legal procedures and internal meanings." (Brett,1944) Law therefore is theorized as a social system. Sociologists specialized in the field of sociology of law explore "social character of law". Sociologists thus examine the various facets that determine legitimacy, legislation, judiciary, culture of legal profession etc.

There are different readings related to the emergence and transformation of law in sociology in particular and social theory in general. Law, for Karl Marx, is very much integral to bourgeoisie state. Ruling classes are analyzed central in the production of legal concepts. "Retributive" legal systems, for Emil Durkheim, are very much related to the mechanically solidarity-based society. Durkheim analyzed law in the organic solidarity-based societies as "restitutive" in its modalities. Such accounts read law as a social fact. Max Weber analyzed the limited facet of juridical view that has problems in assessing the impact of law over the society.

One of the central concerns of sociology of law is whether it can pave way to social engineering through transcending the hiatus created by "law in books" and "law in action". It attempts to map when a norm is transformed into law, whether it will be recognized by the political institutions or not. It queries whether the state engages with it in systematic manner or not. Sociologists considered sociology of law as a means to overcome the inherent problems within various laws that act as hindrance to dynamic operations of various societal aspects.

According to Max Weber, "When we speak of "law", "legal order" and "legal professions", close attention must be paid to the distinction between the legal and the sociological points of view." (Weber, 1992:1). Lon Fuller further analyzed that "By speaking of law and society we may forget that law is itself a part of society." (Fuller,1968:5). Modern and postmodern readings within the sociology of law engage with the various, theoretical and empirical discourse in the field of social sciences.

Check Your Progress:1

1.*Write about emergence of sociology of law in your own words.*

2. Write Marx's and Weber's perspectives on law and society?

7.4 SOCIAL THEORETICAL DOMINIONS ON SOCIETY AND LAW

Social theory of law departs from the foundational understanding of sociology in particular and social sciences in general. Social theoretical perspectives on law delineates legal doctrine. "...social theory has its roots in legal theory, and the agendas of classical social theory are tied up with jurisprudence. Contemporary social theory is struggling with many of the same issues as contemporary legal theory is, but now with the differentiation of disciplines, each field is more likely to go it alone. If legal theorists and social theorists followed the development in each other's disciplines more closely we might avoid some blind alleys that the other discipline has already discovered, and we might learn something in the justifications that would otherwise go unnoticed." (Scheppele,1994:401)

Legal doctrine encompasses laws, procedures, principle, normative-conceptual stakes and values. It addresses questions like - what constitutes the notion of "legal" to different aspects of life and practices? A doctrine becomes legal "when it is created, interpreted or enforced in certain socially established ways, through the recognized procedures and agencies". It is noted that western legal frameworks are hegemonic and thus non-western legal approaches have to be understood differently. Culture of the law needs to be studied as well. Societal and political context of legal development is central to the understanding of the contestations between the national and global, legal developments.

Globalization has drastically changed the enclosures that determine law and global-local society. (Halliday and Pavel, 2006:447-470). Scholars such Walden Bello analyzed the changing global scenario in the context of deglobalization (Bello,2005). Globalization is pivotal in erasing the various boundaries that differentiate various states across the globe. Law becomes the weapon of the neoliberal nation-state in the capitalistic phase and it supports such state in engaging with the social and political crisis driven by the withdrawal of social security. Social theorists have studied how such neoliberal liberal, political institutions in the capitalistic era regulate the upsurge of the social movements that protest against the repressive, neoliberal forms of capital.

7.4.1 Indian Society and Legal Transition

Colonial and postcolonial legal transformations have impacted India in different ways. The change in law since traditional India to modern India through the conduit of colonialism determine the nature of law and society in India (Baxi, 2009). Scholars of legal transformation have probed the nuances of these transitions. Colonialism is valorized in certain writings of scholars such as that of Anil Seal(Seal,1068). Modernity is analyzed as an offshoot of colonialism that have impacted the majority of the people in positive fashion. However, there are scholars who argue that colonialism still exists in multiple ways in the legal changes that happened in the post-independent India.

Check Your Progress:2

1. *Write on the interlinkages of social theory, society and law.*
2. *Write a short note on Indian society and its relation to legal transition.*

7.5 UNDERSTANDING LEGAL TRANSFORMATION

Genealogy of the pre-colonial, colonial and postcolonial construction of law is embedded in the conflictual realm that exists between Indian conventional laws and juridical texts. Construction based on the binary opposition such as native/foreign operates quite differently in such articulations. Questions of mapping the nature of law become so tedious that "those of us who have learned humility will have given up the attempt to define law." (Radin, 1938:1145) On definitions of law, it is observed that "nothing concise enough to be recognized as a definition could provide satisfactory answer." (Hart, 1961:16). Law thus becomes difficult to be defined. (Deva, 2009:1).

Understanding law in the context of the west therefore is read in the backdrop of institutions like "modern centralized state and its instrumentalities" and such scholastic manoeuvres lack the conceptual acumen to unfold the "non-modern social systems such as those of peasant civilisation as tribes." (Deva, 2009:1-2). Some of social science approaches therefore reduced the ambit of law "by defining the forces of law in terms of central authority, courts, codes and constables, we must come to the conclusion that law needs no enforcement in primitive community and is followed spontaneously." (Malinowski cited in Deva, 2009:2). Cardozo emphasized that, "The normative element, The regularity element, Courts and the enforcement thus is central to such understanding of law. (Cardozo, cited in Deva, 2009). Therefore, the social codes reproduce the spaces and practices of values and norms and its impact on society. Social codes are categorized through its group over the manners, etiquettes, customs etc. Each social code is operationalized through sanctions. Social spaces are constrained through social institutions. Social boycotting and isolation are central to the langue of the power structures. Categorization of the penal cultures through the constructions of primitive and modern have to be analyzed in distinct fashion. Protean nature of the "law is the structured and crystallized form of norms and values that are really enforced but remain hidden from the public eye" (Deva,2009:2-3).

Understanding of social legislation is judged through its impact on personal laws and how it is received in highly, retrogressive social-political spaces. Complexities of such are not so easy transitions which have tried to capture through the epistemic/ approaches praxis-oriented hiatus via positioning paradox between "law in books" and "law in action". Scholars therefore return to the quandaries related to legal knowledge. How dominant social scientific understanding captures these nuances related to law?

Sociological understanding of law "still has no clearly defined boundaries. Its various exponents are not in agreement as to its subjects, or the problem of requiring solution, or its relation with the other branches of the study of law." (Gurvitch cited in Deva, 2009:3) Jurists of analytical school such as Austin observed that law was the command of sovereign and 'juridical empiricist school' justified the "unwritten and flexible law". These schools therefore opposed the efforts that deepened the understanding related to law and societal mechanisms. (Deva, 2009:3-4).

History of the social science understanding reveals that there was criticism against categorizing discipline within social sciences like that of sociological understanding on law. However, doctrinal and non-doctrinal methodological dilemmas can be explored through the transformation of juridical thinking and its approach towards sociological jurisprudence. Ehrlich asserted that "at the present as well as any other time, the center of legal development not lies in legislation, nor in juristic science, nor in judicial decision but in society itself." (Ehrlich, cited in Deva, 2009:4) Among the significant interventions from India is by Upendra Baxi who states - "at almost every point in …survey, we have lamented the paucity of sociological research into legal processes and institutions." (Baxi cited in Deva, 2009:7). Scholars in India re-articulated the question of elitist, social closure of law by arguing that "their anticipatory socialization and reference group behavior make them prone to think and act in the same way as the well-to-do people." (Deva, 2009:8).

Cynicism related to the modern legal institutions among the people has provoked scholars to think whether "the degree of success of implementation of laws and efficiency of the functioning of legal system in India do not seem to have been studied systematically and adequately by the sociologists so far. Nor has the impact of social legislation empirically." (Deva, 2009:9) Deva further observed that "establishing a meaningful and efficient communication network between the legislation and the judiciary and the public also is an essential task in which work in the field of sociology of law can contribute a great deal." Some of the social science understanding therefore emphasized the inclusion of sociology of law in the field of legal reform. (Deva, 2009:9:14)

Post-colonial India "does not seem to have appreciably from what it was during British rule. The foundation of this legal system were laid around 1860 when such basic laws as the Civil Procedure Code, the Criminal Procedure Code and the Law of Evidence were put in place."(Deva, 2009:9,22) Some of the proclivities of the Fourteenth Report of the Law Commission pointed out the deficiency in the legal system (Fourteenth Report of the Law Commission, cited in Deva, 2009:22) It reports that people in India are generally ignorant about basic laws, legal system and procedures. Moreover, the court language is not understood by the majority of the people. Technical aspects are emphasized in the cases than the substantive facets of the disputes. Lawyers and touts are more inclined towards protraction of litigation than the settlement of the disputes. Innocent people are oppressed by the dominant sections through their appropriation of the court realms and further it led to the diffidence among people. Majority among the citizens cannot afford legal services. Other issues related to excessive litigation, backlog of pending cases, undetected nature of cases related to perjury and forgery (Fourteenth Report of the Law Commission cited in Deva, 2009:22).

It is further noted that "A pernicious feature that has come to the fore in the post-independence era is that of enacting too many laws and subjecting them to numerous amendments from time to time. This has created a thick jungle of laws that it is difficult for anyone to find his way. (Deva, 2009:22) For the marginalised sections of society, "social legislation seems to remain primarily symbolic and ritualistic. It is doubtful whether it has been successful in reaching its objectives." (Deva, 2009:23). Land reform laws, for instance, suffers from weakness. (Baxi cited in Deva 2009:23). Justice V.R. Krishna Iyer observed that "we must not only tighten our nuts and bolts and press the accelerator but redesign the project to replace a ramshackle machine. The renovation and re-organization of the judicial-set up involves the sophistication of the machine incorporating modern advances in technical knowledge, so that delay killing devices may harmonies with better functional performance, the humanization of the system may find application in judicial process." (Iyer cited in Deva, 2009:25). Former President K.R.Narayanan observed that "a reform that can be undertaken is to simplify the legal procedures involving litigation and the disposal of cases. Law's delays are proverbial and it is in this field that reforms are urgently needed not only to reduce the mounting cost of litigation but to see that justice is not denied to people." (Narayanan cited in Deva, 2009:26). Decline in sound legal culture is due to "lack of political will, flexibilities, loop holes' which are becoming impediments for the effective deployment of legal institutions and practices. (Deva, 2009:28).

Looking into questions like what happens when the legal system shifts from colonial era to that of post-colonial India? Does it cause any behavioral and attitudinal shift towards the law? Baxi analyses the manner in which exclusion of the people operates because of their lack of knowledge about the law. Revivalists and modernists are compared in order to understand the nuances of their approach towards law. Some of the quandaries that haunted them is about the nature of the law and its inclinations towards peasants and religious questions in the Indian context. Another issue discussed was the continuation of connections between British Indian legal system and Indian legal system. Baxi analyzed that the anxieties of the hegemonic sections related to legal transitions is related to vested interests of those in dominant, power structures. Dependence/autonomy were explored as colonial baggage on relation to such transitions. Culture of protest and disobedience, according to Baxi, were central to the legal constructions. It is further observed that top to down model is part of the British Indian legal system (Austinian type) and it created its own trajectories. Thus, "law-making remains, more or less, the exclusive prerogative of a small cross section of elites. This necessarily affects both the quality of the law enacted and its social communication, diffusion, acceptance and effectivity. It also reinforces the highly centralized system of power." (Baxi, 2009:49).

Indian intelligentsia could not engage with this transition in constructive fashion. For Baxi, "Even the neo-Gandhian thought, including Sarvodaya school has not moved beyond the inspiring but programmatically sterile grandiose conceptions of lokshakti (people's power) and lokniti (people oriented-politics)." (Baxi, 2009:49-50). Their incompetence thus strengthened the colonial rationale that "only enlightened groups should have a say in the (legal) process." (Baxi, 2009:50). Thus "Indian legal system also follows the colonial model of reactive mobilization of the law rather than the proactive mobilization. In the former (British Indian legal system), the citizen is left to initiate the legal process by filing the complaint; in the latter the state agencies initiate the legal process. Laws that attack certain segments of the social structure in the title of justice and equity obviously need proactive mobilization." (Baxi, 2009:50-51) According to Baxi, "access to law means not just access to courts as the lawyers generally think about it. It means, in a broader and socially more relevant sense, access to law makers, to dispensers of legal services (legal profession) and to normative and institutional information concerning the legal system." In addition to that "in all these dimensions of access value, we find that the ILS is based on rather clear violation of democratic legality." (Baxi, 2009:51) Therefore, "one major way in which Indian legal system violates the principles of democratic legality is that information concerning the norms of law is not accessible easily even to those who are affected by the law." (Baxi, 2009:51) Baxi observed that "normative law is virtually inaccessible to the most underprivileged and vulnerable groups in Indian society. Legal illiteracy of the beneficiaries of the law thus contributes to its ineffectiveness." (Baxi, 2009:53)

Citizen's access to legal services thus is analyzed in relation to their consciousness about the legal levels and substantive intervention. Profit oriented approach of the lawyers is analyzed as continuity of the colonial insistences related to exorbitant court fess. (Baxi, 2009:45-59) J.Duncan M.Derrett demonstrated the struggles of the British administration and their tedious engagements with the orthodox realm of shastras. (Derrett,cited in Deva,2009) Rights related to revenue matters impacted the diverse group of colonizers. It resulted in "the intellectual gap between judgements delivered in the high courts, where some judges were English barristers standing, and the country vakils who were supposed to advise their clients according to them was, and to a large extent remains, marked."(Baxi, 2009:63). It is further observed that "judicial hierarchy was developing, a striking dichotomy emerged between court law popular law, interacting components we have already observed for somewhat earlier period." (Baxi, 2009:63). Derret explored the dominant, Brahminic culture that impacted the administration. It noted that "the Hindu system gave everyone his place in every possible contingency; individuality was not prized, disobedience was anathema; functions were fixed by the caste system; and sources of pressure (outside the wild and barely Hinduized tribes) were many."(Baxi, 2009:63) Cooption of the dominant castes and the interplay of homogeneity and heterogeneity of communities connected law were explored by Derrett and it is linked to the misunderstanding of the law from the outside and the indigenous understanding.

Derrett also unfolded how these legal transitions resulted in the gradual decay of the personal laws. Psychological hiatus created through the perceptions of foreign and native law is also analyzed in this context. Gradually, it resulted in the confluence of English type laws and personal laws. Legal authority of Shastras was central to such legal transformation. It also led to the clash between textual laws and non-textual, customs. (Derrett, 2009:60-72). Economic life is also analyzed as something that needs to be understood through sociology of law. (Swedberg, 2003:1-37) It is pointed out that sociological research on law and economy should concentrate on social networks and regulation and the notion of social that impinge law and economy can be studied through that kind of an understanding unlike the Weberian take on law and society. (Cotterrell, 2013:49-67). On the other hand, James S Coleman suggested "theory of purpose action" as central to social theory and through methodical individualism and denial of holism and further argued for a shift of social theory and research from "individual actions to that of macro social functioning." (Coleman, 1986:1309-1335).

Sovereignty is also being questioned in the age of the new, global institutions and "world peace through law." (Gessner, 1995 :85-96). Colonialism and postcolonialism have become the key words of contemporary scholarship on society and law. Eurocentric approaches are being criticized through the schools such as Third World Approaches to International Law. Imperialism and larger questions of immigration/emigration have also become part of current socio-legal debates. It is also critiqued that "...the more sociologists of law -like any other empirical scientists-ignore the demands of "pure science" in order to produce "socially relevant" results, the more funding they will get for their research but less they will contribute to theoretical progress, and hence to only really "thing" a science can bring forth." (Griffiths, 2017:125). At the same time, "...fields of social-scientific studies of law and the fraught relationship between law and anthropology, it seems that a proliferation of fields and blurring disciplinary boundaries has resulted in a situation bearing striking similarity with situations of legal pluralism." (Anders, 2015:420).

7.6 LET US SUM UP

This unit introduces the learner to the fundamental debates on the intersections related to the disciplines such as sociology and law in order to explain the relations between society and law. It also provides a fundamental understanding about the sociological, social theoretical and interdisciplinary readings that reflect on society, customs and laws. Nature of the legal transformation is discussed through such disciplinary perspectives. Broadly, it helps understanding of law and society in the light of the pioneering theoretical traditions that examined society and law.

7.7 UNIT END QUESTIONS

1. Discuss the debates on emergence of sociology of law.
2. Critically evaluate the social theory in the context of society and law.
3. Write an essay on legal changes in India.

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