

**MANEUVERING THE PURPOSE OF LAW IN NEPALI  
SOCIETY WITH SPECIAL REFERENCE TO IHERING:  
AN ANALYTICAL STUDY**

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# 1. Introduction

## 1.1. Background

The massive leap defying the definition of law from the Natural School, and coming into the ideas of Legal positivism has rejected profoundly any metaphysical speculation concerning the law, and it studies laws *as they are* and not as they *ought to be*. The idea of interpreting the law from this point of view has come up with the developments of various schools. These developments of schools are highly derived from three main theses i.e. Social Fact Thesis, Conventionality Thesis and the Separability Thesis<sup>1</sup>.

First of which, the Conventionality Thesis defines law as conventional. According to the Conventionality Thesis, it is a conceptual truth about law that legal validity can ultimately be explained in terms of criteria that are authoritative in virtue of some kind of social convention.<sup>2</sup> According to this theory, firstly, the social convention among the person who functions as an official is what explains the validity criteria in any conceptually possible legal system whereby the criteria of validity are authoritative in social virtue of some kind but the criteria from where the authority is derived from may differ. Secondly, the social fact thesis presumes that all legal facts are ultimately determined by social facts.<sup>3</sup> In its very essence, law is a social artifact where the possibility of legal authority is to be derived from or in terms of certain social facts. Despite the fact that positivists are committed to social fact there exists a level of difference as to which social fact is essential as in regards of the explanation of legal validity. For example, on Hart's version of the thesis the relevant social fact is the acceptance of the officials and on the version of Austin and Bentham the relevant social fact is the sovereign's ability to coerce compliance.

Third, the Separability thesis takes law and morality as conceptually different ideas. This thesis is interpreted to make the object level claim about the existence condition for legal validity. This object level interpretation provides with an understanding that, for validity criteria to be present

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<sup>1</sup> Dr. Yubaraj Sangroula, *Jurisprudence, The Philosophy of Law, Oriental Perspective with Special Reference to Nepal*, Kathmandu School of Law , (Kathmandu: 2010), 68.

<sup>2</sup> Internet Encyclopedia of Philosophy, *The Conventionality Thesis*, available at <http://www.iep.utm.edu/law-phil/#SSH1b.ii>, (12/12/13, 9:40 AM).

<sup>3</sup> Scott J. Shapiro, *Law, Morality, and The Guidance of Conduct. Legal Theory*, (2000), 127.

in a legal system it is not a conceptual truth to have or be backed by moral principles. Hence the principle concern of this theory is ‘not necessary a connection’ between law and morality.<sup>4</sup>

As such, the interpretation of law by positivists in strict domain of ‘is’ and rejecting the ‘ought to be’ domain provides with a clear understanding that the existence and content of law is dependent on social facts and not on its merits, meaning the existence of legal system is very intrinsic to certain structure of governance but not to the ideals of justice, democracy or rule of law. Depending on certain social standards that their officials recognize as authoritative, the laws are in force in that system, most commonly legislative enactments, judicial decisions, or social customs.

Whatever be the level of compliance or the criteria of authority to acquire validity, the presence of law is always with a purpose. This can be validated by the very fact of the operation of law in the society, be it to create compliance, coercion, deterrence or any forms of reform. The development of any society is integral and central to the purpose a law carried and its achievement. In that sense, the development of the society or a country can be directly related to the achievement of the purpose of law.

In that proportion, the achievement of the purpose of law marks as an indicator for comparing the difference ratio of equality, the non-discrimination, the standards of justice, the promotion of the weaker sections of the society and similar standards between the developed and the developing countries. Development and progress therein are measured in relation to the sphere of law where the sphere of the performance of law is bigger in developed societies as compared to that of the developing societies.

Nepal as such, today is in the phase of transition. The history of Nepal marks revolution against the power at regular interval of time coming from 1950 to 2006. Nepal’s exercise of creating world’s youngest constitution stands on base decade long armed conflict which claimed over 13,000 lives; more than 8,000 of whom were the victims of government forces, and the majority

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<sup>4</sup> Mark John Bennett, *Legal Positivism and the Rule of Law: the Hartian Response to Fuller’s Challenge*, (Doctorate Thesis), available at [https://tspace.library.utoronto.ca/bitstream/1807/35776/1/Bennett\\_Mark\\_J\\_201306\\_SJD\\_thesis.pdf](https://tspace.library.utoronto.ca/bitstream/1807/35776/1/Bennett_Mark_J_201306_SJD_thesis.pdf), (12/14/1, 9:00 AM)

civilians.<sup>5</sup> The road from monarchy to federal republic has been a thorny one with instances of grave breach of Human Rights<sup>6</sup> widespread and systematic during the time of conflict. In that milieu, the purpose of law has to be found out on two main grounds as to what will be the purpose of law regarding the social transformation of the Nepalese Society and the aspects of providing justice to the victims of Human Rights violation.<sup>7</sup>

As, discussed in the paper, it is a relevant matter of discourse that the purpose of law in Nepalese context thus has to be analyzed from two main viewpoints. First, the purpose of law as to the matter of the transition phase the Nepalese Society is going through and the issues of Human Rights violation that is taking place. Secondly, the purpose of law sought in general conditions seeking into the legislative enactments and Judicial Decisions.

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<sup>5</sup> British Broadcasting Corporation (BBC), *Q&A :Nepal's future*, available at [http://news.bbc.co.uk/2/hi/south\\_asia/2707107.stm](http://news.bbc.co.uk/2/hi/south_asia/2707107.stm), (12/11/2013, 9:00 AM)

<sup>6</sup> Human Rights Watch, *Between a rock and a hard place: Civilians struggle to survive in Nepal's civil war*, available at [www.hrw.org/sites/default/files/reports/nepal1004.pdf](http://www.hrw.org/sites/default/files/reports/nepal1004.pdf), (08/12/13 10:00 PM).

<sup>7</sup> Manfred Nowak, Mission to Nepal, *Report by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, E/CN.4/2006/6/Add.5, 9th January 2006; UNHCHR, *Report of the Working Group on Enforced or Involuntary Disappearances on its visit to Nepal*, E/CN.4/2005/65/Add.1. Also, see UN document E/CN.4/2001/9/Add.2, available at [www2.ohchr.org/english/bodies/chr/docs/English.pdf](http://www2.ohchr.org/english/bodies/chr/docs/English.pdf) (08/12/13, 1:03 PM).

## 2. Sociological School of Legal Thought<sup>8</sup>

*“Law is the sum of the conditions of social life, in the widest sense of that term, as secured by the power of the state through the means of external compulsion”<sup>9</sup>*

With the passage of time, the way of understanding law and viewing it differed<sup>10</sup>. Coming from Natural School to Positivism and the respective schools of thoughts therein, the definition of law is done differently in different schools. As a result, the dissatisfaction to the definition provided by the jurist of one school has led to the definition of law from a different viewpoint and a different level of understanding, bringing about the emergence of new school of thought<sup>11</sup>. However, this notion does not necessarily connote that the failure of one school led to the rise of another school.

Sociological School of thought thus is a continuation of enquiries into the idea of law which has started from the dissatisfaction in viewing the law from the perspective of Historical School of Thought.<sup>12</sup> Sociological School thus is an outcome to the rejection of the concept of law as a growth conceived by a national will which is highly central to the idea that historical and evolutionary analysis of past can help understand the law of present<sup>13</sup>. The romanticist reaction against the Natural School of thought, alike analytical positivism was also carried by Historical School of thought. Despite the fact that Historical School of law also accepts law as found, it disregarded the importance of the existence of heterogeneous society where customs may not be

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<sup>8</sup> Ihering’s concept of law being associated largely with society and societal needs and behaviors, he is categorically being placed under sociological school of thought, and regarded as one of the prominent propound of this school. Thus, the paper begins with the basic tenets of sociological school before entering into the introduction of Ihering.

<sup>9</sup> Stone Julius, *Human Law and Human Justice*, Maitland Publications Pty. Ltd. , Sydney, NSW , 157, available at <http://books.google.com.au/books?id=TP-> , (08/12/13 2:34 PM).

<sup>10</sup> Calabresi Guido, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, Yale Law School Legal Scholarship Expository, Faculty Scholarship Series, (2003), 2113.

<sup>11</sup> Ibid, 2122.

<sup>12</sup> Ethudaiye, MuhtarAdeiza, *The Relevance of the Sociological School of Jurisprudence to Legal Studies in Nigeria*, available at [http://www.academia.edu/4167468/THE\\_RELEVANCE\\_OF\\_THE\\_SOCIOLOGICAL\\_SCHOOL\\_OF\\_JURISPRUDENCE\\_TO\\_LEGAL\\_STUDIES\\_IN\\_NIGERIA](http://www.academia.edu/4167468/THE_RELEVANCE_OF_THE_SOCIOLOGICAL_SCHOOL_OF_JURISPRUDENCE_TO_LEGAL_STUDIES_IN_NIGERIA), (10/12/13 2:30 PM).

<sup>13</sup> Ihering Rudolf Von, *Law as a Means to an End, Translated from the German by Hussik Issac, First Published 1913* (Boston: The Boston Book Company), 3.

nationally relevant and it also undermined the fact that legal principles and Law can in many cases become necessary when custom fails to deliver or to develop. Similarly, in many areas of social transactions custom may not necessarily be present at all. For example, the law governing negotiable instrument, money laundering, terrorism etc. have not developed from custom and that legislation progressive society. This was highly disregarded by the jurist of historical school,<sup>14</sup> making jurist to view it from a different sociological perspective, beyond the standards of custom and manifested national will. <sup>15</sup>

Sociological School thus can be referred to as a reflection to the relationship between sociology and law and the respective interactions. However, this school of thought is not about how a sociologist would look at law. Rather, it is about how a lawyer would look at law from a sociological perspective.<sup>16</sup>

According to Dias<sup>17</sup>, a lawyer's sociological perspective of law has necessarily assumed four forms:

1. There are inquires which seek the social origin of Law and legal institutions.
2. There are also examinations of the impact of Laws on various aspects of society.
3. There are other inquires which deal with the task which laws should perform in society.
4. An attempt to find some form of social criterion by which to test the validity of Laws.

Furthermore, according to Professor Freeman<sup>18</sup>, central propositions of sociological jurisprudence may include:

1. Belief in the non-uniqueness of law: a vision of law as but one method of social control
2. Rejection of a jurisprudence of concepts, i.e. jurisprudence should care more about the practical purposes of law rather than being obsessed with formal logical analysis.  
Rejection of the idea that law is a closed logical system.

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<sup>14</sup> Ibid, 12.

<sup>15</sup> Ibid, 12.

<sup>16</sup> James A. Gardner, *The Sociological Jurisprudence of Roscoe Pound (Part I)*, 7 Vill. L. Rev. 1 (1961).

<sup>17</sup> Dias, R. W. M. 1970, *Jurisprudence*, Butterworths (London).

<sup>18</sup> Freeman, M.D & Lloyd of Hampstead, D.L, *Lloyd's introduction to jurisprudence*. Sweet & Maxwell, (London : 2001), 659.

3. Skeptical about law in textbooks and are concerned about "law in action".
4. Espouse relativism, thus reject the belief of naturalism that an ultimate theory of values can be found.
5. Reality as socially constructed, therefore no natural guide to the solution of many conflicts.
6. Importance of harnessing the techniques of social sciences towards creation of more effective science of law.
7. Concern with social justice, but views differ on how to attain.

## 2.1. Introduction to Ihering

Rudolf Von Ihering, most popularly spelled as Ihering was born in 22<sup>nd</sup> August, 1818 in Aurich, Germany.<sup>19</sup> He is also known as the Father of Sociological Jurisprudence and is known for his teachings in Social Utilitarianism and Roman law.<sup>20</sup> The philosophy of social utilitarianism however, highly differed from that of Jeremy Bentham (advocating law as means to an end) despite the fact that American Lawyers termed Ihering as German Bentham. This sort of the similar recognition came from the very fact that they understood the respective context of transition in their country in the same line and also suggested the similar level of correction to the legal complexities arriving in that particular time.<sup>21</sup> However, difference of Ihering compared to Bentham is Ihering rejects hedonism and eudemonism as he believes the nature of people is to reject the pain. He finds no shortcuts as to compare the competing purposes like Bentham's Calculus of Hedonism.<sup>22</sup>

Ihering had taught Roman law at Giessen from 1852-1868 and Gottingen from 1872. This also included his teachings at other four universities.<sup>23</sup> In between the duration of 1852-65, his most ambitious work was released i.e. *Geist des romischen Rechts* (The Spirit of the Roman law)

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<sup>19</sup> Britannica, *Rudolf Von Ihering*, available at <http://www.britannica.com/EBchecked/topic/303717/Rudolf-von-Ihering> (12/16/13, 3:04 PM).

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.



where he linked the essence of social change to Law by studying in particular the law of possession and expressing Law as serving certain purpose.<sup>24</sup> It was commendable of Ihering to study the Roman law as existing law, trace out the historical development; find out the history was all of value for all time. However the Roman law had no universality in one hand and at the other hand it was never complete, allowing more and more innovation and change.<sup>25</sup> In the last part of the work, which appeared of the spirit, he found the treatment of law to be of logical categories where law came to serve certain purpose which was one determining outcome but his law could not be content to expound the fundamental doctrines under the critics of the ancient law<sup>26</sup>. It was then the *Zweck in Recht* written that freed German legal thought from the usurpations of philosophical systems.<sup>27</sup> His main works include *Kampf ums Recht* ( The struggle for law), 1872, translated into English in 1879, his lectures on *Geist des romischen Rechts*, *Geist des romischen Rechts auf den verschiedenenStufen seiner Entwicklung* (1852-1865), *Der ZweckimRecht* ( Law as a means to an end, 1877-1883), which reflected the intellectuality of Ihering and *Jurisprudenz des taglichenLebens* 1870 translated to English in 1904.<sup>28</sup>

## 2.2. The purpose theory of law as per Ihering

From the actions we perform in our daily life, it is very clear that nothing happens without a reason, or nothing happens for itself. Our actions are governed by the contextual change or the results coming out from it. In other words, for every action we perform there is a cause behind it that happens because of certain results or consequences of another antecedent change. The general principles of the actions Human beings perform are guided with the motive of attaining or obtaining something. The actions done by the antecedent change in physical world are called ‘Cause’ and the similar actions done in the psychological or the world of will are called the

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<sup>24</sup> Ihering (1913), 43.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Wikipedia, *Rudolf Von Jhering*, available at [http://en.wikipedia.org/wiki/Rudolf\\_von\\_Jhering](http://en.wikipedia.org/wiki/Rudolf_von_Jhering), (11/12/13 4:00 PM).

‘Purpose’<sup>29</sup>. For example, if an individual wears warm clothes when it is snowing, the cause behind the one wearing warm clothes is Snow, so the antecedent change in the weather bringing about the situation of snowfall makes a person to act as per the change in the context. Similarly, in the level of the will or psychological level, the actions of individual can be corroborated with purpose. Everyone working today in this world is because of a certain purpose; the purpose of individual to perform work on the daily basis may be to earn livelihood, fame, reputation or the standards of self-esteem. This action dynamics of Ihering underlines the basis of his study coming into the purpose theory of law and the settling of the conflicting interest is laid firmly on the foundation that purpose are the product of the underlying interest.<sup>30</sup>

The concept of action is thus defined in the psychological aspect of purpose and purpose is the most essential criterion of action. Purpose requires two main aspects for fulfillment. First, the idea of future that provides with the ‘object of willingness’ to achieve it. Second, the ‘category of possibility’.<sup>31</sup> This however excludes actions that are habitual or are purposeless actions for example the actions of the insane.<sup>32</sup> The internal stage is often called the law of purpose and the external stage is called the law of causality.<sup>33</sup> The internal stage often ends with the start of the resolution where there is the self-balance of the will leading to the beginning of the external stage where there is the cooperation of natural laws in the stage.<sup>34</sup> However, the will is free from the law of causality as it is the own source of the causal force.<sup>35</sup>

The purpose of law as to Ihering goes parallel to the Kantian Theory of Causality. This is inferred in from the idea that an act to be without purpose is impossible compared to the

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<sup>29</sup> *Purpose in Law, Law as a Means to an End*, available at <http://www.docstoc.com/search/rudolf-von-beckerath-and-charles-letestu%3A-a-unique-tandem-in-the-organ-world> (13/12/13 8:00AM)

<sup>30</sup> Turner, Stephen P., *Two Theorist of Action: Ihering and Weber*, available at [http://www.analyse-und-kritik.net/1991-1/AK\\_Turner\\_1991.pdf](http://www.analyse-und-kritik.net/1991-1/AK_Turner_1991.pdf), (12/12/13, 5:00 PM), 48.

<sup>31</sup> Ibid

<sup>32</sup> Ibid

<sup>33</sup> Ibid

<sup>34</sup> Ibid

<sup>35</sup> Ibid

Causality of Kant where effect is taken as the result of the cause.<sup>36</sup> This proposition is proved relying to the understanding on two grounds. First, the purpose behind one's act is generally influenced by the compulsion of his/her duty or the law, second, the habitual actions are so habitual that one does not think before doing it. This can also be linked to the actions of the insane. These despite the absence of certain purpose are still the action.<sup>37</sup> As per Ihering, the actions under a legal duty or compulsion are a rational action, acts under physical compulsion or threat are also acts of the will. Similarly, the habitual action is also action with the purpose but the purposive character of the act is lost in its repetition.<sup>38</sup>

### **2.3 Ihering's conceptual work on Law**

For Ihering, law is but a part of human conduct and it is only an instrument for serving the ends of society, its purpose is its essential mark which it is to further and protect the interest of the society<sup>39</sup>. Ihering advocates that the standard of the law is not the absolute one of truth but the relative one of purpose. Thus purpose is the basic aspect of law to realize, protect, promote as well as to serve, satisfy and secure the interest of society. Purpose has been identified by Ihering as the motivating incentive of the human will. According to him human conduct is determined not by a 'because' but by a 'for'. In substance, Ihering came to the final conclusion that the dominant motivation in the exercise of human will is the notion of purpose which he terms, the law of purpose.

The problem of society is to reconcile selfish with unselfish purposes when there is a clash between these two purposes the selfish purpose has to be suppressed. Ihering stressed that law doesn't exist for the individual as an end in himself, but serves his interest with the good of society in view.

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<sup>36</sup> Ibid

<sup>37</sup> Ibid

<sup>38</sup> Ibid

<sup>39</sup> *Yel FlgPeople v. Lawrence*, 24 Cal.4th 219, 6 P.3d 228, 99 Cal.Rptr.2d 570, 2000 WL 1210389, 00Cal. Daily Op. Serv. 7231, 2000 Daily Journal D.A.R. 9531, Cal., August 28, 2000 (NO. S070271)404, 66 S.Ct. 193, 90 L.Ed. 165.

To reconcile conflicting interests of society<sup>40</sup> vis-à-vis individual, the state employs methods of reward by enabling economic wants to be satisfied and also the method of coercion. For instance, economic wants of man must be satisfied. Therefore, society in larger interest puts such social control which may reduce the quantum of profits this can be done both by means of reward and by coercion which is called law. Law therefore, is coercion organized in set form by the state. It is a process to achieve a proper balance between social and individual interest. It is through two impulses coercion and rewards that society compels individual to subordinate selfish individual interests to social purposes and general interests. The natural impulses or duty of love i.e. ecological instincts of services and sacrifices also makes man to serve social ends.

On this milieu, he further explains that true aim of the law is the realization of equilibrium of individual and social principles and purposes. The law is, in effect, 'the realized partnership of the individual and society'.<sup>41</sup> The ultimate objective of law is to assist society in achieving its goals, its betterment and, in attempting to achieve that goal; it creates a unity from diversity, allowing individuals to realize their purposes, and, in so doing, creating a strong social fabric. Legal institutions enable man to add to the very quality of his being; individually, man may be able to achieve only relatively limited objectives, but in collaboration with his fellows within society his capacities for self-realization are greatly increased. The law will provide the institutional framework within which the individual's life can be enhanced. Thus, law is the mediator, the balancer, the harmonizer.<sup>42</sup>

Few inferences of Ihering's principle and purposes could be drawn from, L B Curzon's Q& A Series Jurisprudence as well, where he explains, to understand and analyze law, therefore, one should understand and analyze the purpose/s of the law and not merely the concept of law is the concern of Ihering. He tried to emphasize the practical purposes of law and not what he called, "the jurisprudence of concepts"<sup>43</sup>. He argued that the jurisprudence of concepts was irrelevant in practical life as it merely existed in the form of abstract ideas or notions.

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<sup>40</sup> *H Rodda v. Rodda*, 185 Or. 140, 200 P.2d 616, Or, November 30, 1948 N.Y.S. 32; *Teachers' Retirement Fund Ass'n v. Pirie*, 150 Or. 435, 445, 46 P.2d 105, 109.

<sup>41</sup> L.B Curzon, *Jurisprudence, Lecture notes*, Cavendish publishing Limited, (1995), 149-150.

<sup>42</sup> Ibid

<sup>43</sup> L.B. Curzon, Q & A Series Jurisprudence, Cavendish publishing Limited, 3<sup>rd</sup> Ed, 192-194

Ihering stated that his theory of law was an effort to demonstrate that purpose is the creator of the entire law. According to him, law is a result of human will and every legal rule originated in some purpose or some practical motive<sup>44</sup>. His idea of purpose made him categorically reject historical school, especially Savigny's *Volkgeist*.<sup>45</sup> Ihering further argued that law emerged in order that problems might be solved and social needs met.

Purposes of law, in turn, is dictated by interests. A person's individual interests should be linked to the interests of others so that a social purpose might be enunciated and achieved. The linking of interests<sup>46</sup> (the fusing of many sets of individual interests into a unity which reflects common, social purpose) is one of the most important functions of the law. For Ihering, individuals' demands are to be viewed within the context of society as a whole, and the social framework. And law exists for the pursuit and attainment of social purpose.

For Ihering, common interest of all was more important than particular individual interests. Ihering argued, *every person exists for the world, and the world exists for everybody*<sup>47</sup>. Since, human needs and purposes are disproportionate, it is essential that individuals should unite/associate with other individuals in order to be able to achieve the purposes. The protection of this common interest and consequently the protection of society is the ultimate purpose of law. In addition, law also assists in the creation and maintenance of the circumstances in which an individual can add to his/her capacities for self-realization by being a part of the social whole.

Ihering then goes on to identify conditions in which common interest will thrive. First, he presents that selfish purposes should be reconciled with unselfish purposes and that former should be suppressed. Second, balancing of interests requires encouragement of the social activities of people. This in turn is achieved by means of the '*levers of social motion*'. Ihering distinguishes two types of levers, *egoistic and altruistic*<sup>48</sup>. *Egoistic levers* further include *reward*

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<sup>44</sup> *C Watkins & Son v. Carrig*, 91 N.H. 459, 21 A.2d 591, 138 A.L.R. 131, N.H., July 15, 1941.

<sup>45</sup> Thomas Erskine Holland, *The Elements of Jurisprudence*, The Law Book Exchange Ltd, 7<sup>th</sup> Ed, (New Jersey: 2006).

<sup>46</sup> *C Piper v. Ekern*, 180 Wis. 586, 194 N.W. 159, 34 A.L.R. 32, Wis., May 25, 1923.

<sup>47</sup> *Ibid*, Curzon (Q&A Series)

<sup>48</sup> Ihering (1913).

*and coercion*. Reward is seen in terms of private gain. The threat of coercion<sup>49</sup> is seen in terms of compulsion and force, in addition the state should have absolute monopoly over the exercise of coercion.

Altruistic levers include feeling of Duty and Love. Altruistic levers too direct men towards social ends by creating social interest. Levers are to be utilized in a combination which will create and intensify the significance of 'social ends'. Even though, Ihering talked about altruistic levers, he recognized that these would not suffice without the coercive form of social control provided by Law.<sup>50</sup>

Furthermore, he makes a classification of nature of society's wants (all the wants are interdependent) as:<sup>51</sup>

- a. 'Extra-legal': Nature as the sole supplier of the wants. Example, food
- b. 'Mixed-legal': Wants that are peculiar to humanity and are generally independent of coercion. Examples, conditions of social life, preservation of life, labour, trade etc.
- c. 'Purely legal': Wants entirely dependent upon legal commands. Examples, taxes, settlement of debts.

State should use levers to provide the basis for the satisfaction of human wants. The social purposes are however not fixed. They may change with time and society. Here he differs from Naturalist conception of teleological account of law. Ihering rejects the notion that all societies can have same purpose as law comes as a result of the contextual changes and the actions performed in a society. For example, A gay marriage may be punishable in certain societies but not in certain.

#### **2.4. Criticism regarding the thesis propounded by Ihering**

Inhering has been criticized for his inability to provide a scale of values for achieving his conflict between the ideas of interest and purpose. He gave very little insight into how this balance could be achieved through observation and prediction. Some scholars posit that Ihering's genius was in

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<sup>49</sup> *Yel FlgMarsden v. Harlocker*, 48 Or. 90, 85 P. 328, 120 Am.St.Rep. 786, Or., April 10, 1906.

<sup>50</sup> *C State v. Heitman*, 105 Kan. 139, 181 P. 630, 8 A.L.R. 848, Kan., June 07, 1919 (NO. 22299)

<sup>51</sup> Curzon (1995).

the origin of laws rather than in its application.<sup>52</sup> Julius Stone, in his book *Human Law and Human Justice* further criticizes by alleging Ihering's theory being a built system based upon an assumed egocentric individual who gradually develops socially minded member of the group and that in the modern view such sharp opposition of individual and society is false. He further clarifies, Ihering's explanation of how individual purposes are transformed into social purposes as reaching out for Roscoe Pound's point that in final resort all demands are demands of human beings and can be looked at as either 'individual' or 'social'.<sup>53</sup>

Isaac Hussik confronts the approach toward certain systems combated by Ihering would be unavoidable. But, the concept of society (the sum of individuals) would be different. Teleological speculation, to which the idea of objective purpose belongs, irresistibly compels the impression that it is not the nature of individuals with which it deals, but the race; that is to say, society is an entirely different sense than that which regards it as the totality of its parts for the time being. This alteration in the notion of society, however would involve an advance towards idealism.<sup>54</sup> Hans Kelsen further attacks Ihering's theory of subjective rights, which Ihering famously defined as 'legally protected interests', denying the idea that interests constituted the substance of law, and by implication against meddling with the notion of interests in the legal world. For him, Ihering's interest and natural lawyers' freedom simply constituted the same sphere, which aimed at legal substance, in opposition to the objectivity of the legal form. Further, he challenges 'the interest' of Ihering being simply a psychological fact (like what do I feel to be my interest and to that extent his theory was another example of the intrusions of legal theory in the territory of psychology)<sup>55</sup>.

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<sup>52</sup> P. Vasantha Kumar, *An Analysis on Law Vs. Ethics and Morals in a Changing Society*, available at [http://www.internationalseminar.org/XIII\\_AIS/TS%204/3.%20Dr.%20P%20Vasantha%20Kumar.pdf](http://www.internationalseminar.org/XIII_AIS/TS%204/3.%20Dr.%20P%20Vasantha%20Kumar.pdf), (12/18/13 3:00 PM)

<sup>53</sup> Julius Stone, *Human Law and Human Justice*, Stevens & Son Ltd. (London : 1964).

<sup>54</sup> Ibid.

<sup>55</sup> Mónica García-Salmones Rovira, *The Project of Positivism in International Law*, Oxford University Press (Oxford : 2013).

### **3. Concept Propounded by Ihering and Its Application in Nepalese Society**

#### **3.1. Nepal: The people's revolution and the continuing transition**

Nepal recently had the elections of the Constituent Assembly for the second time in History. This prolonged deadlock in Nepalese constitution-making has left Nepal with an extended legal and political transition. The transition Nepal is facing today could be linked to the Governance pattern Nepal had, prior to the Second People's Movement. The governance pattern from the very early days of Monarchical system was autocratic where no questions could be raised against the prerogatives of the King and the Royal Family. This was even illustrated in the Constitution.<sup>56</sup> This provision exclusively mentioned that nothing could be raised or asked about the income, lifestyle or any questions related thereto.

However, there was another faction which was not satisfied by such provisions of the law that never questioned the prerogative of the king and the Royal family, who set up the initial foundation for the Second People's Movement. In other words, the dissatisfaction that carried in the minds of such faction, popularly termed as CPN-Maoist (Communist Party of Nepal) during a decade long conflict between 1996- 2006 was the main reason behind the formation of the foundational base for Armed Conflict and the downfall of the Monarchical system in Nepal. The end of which has brought Nepal into the serious questions of federalism, state restructuring and the devolution of powers.

Nepal witnessed a decade long armed conflict for the first time in history.<sup>57</sup> This began with the foundation as outlined above in the paper with CPN-Maoist's first launch of the Armed Struggle against the government in February 1996. This began the bloodshed within the armed conflict which led into the widespread and systematic violation of human rights, enforced

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<sup>56</sup> Part 5, The Constitution of the Kingdom of Nepal, 1990.

<sup>57</sup> Sushil Pyakurel, *Nature of Human Rights Violation in Nepal, Notes for further consideration* article published in Dr. Bipin Adhikari (ed.), *Conflict, Human Rights and Peace Challenges before Nepal*, NHRC (Nepal:2003).



disappearance<sup>58</sup>, massive killings of Civilians, torture and other inhumane and degrading treatment and arbitrary detention of the people<sup>59</sup> and rape of civilians<sup>60</sup>.

Nepal's current situation can be better defined as 'stalemate' rather than 'peaceful' as it requires substantive effort in peace building even after a peace accord is signed. At this very fragile context demands of truth, justice and reconciliation cannot be outweighed. Commitments that were made in form of peace accord must be implemented and past injustices must be dealt with in order to move forward towards normalcy.

Even upon peace accord and shared dream of 'New Nepal' was construed, legacy of impunity in Nepal continued and still is continuing in de facto and de jure form, as no reasonable and substantive efforts were made to bring perpetrators to justice, till the date the demands of justice seems a long road down. Numerous reports by the National Human Rights Commission (NHRC), local Human Rights groups and international organizations, including those written by the UN Special Rapporteur on Torture and the UN Working Group Against Involuntary Disappearances, documented the failure to hold the security forces and/or the Maoists accountable for serious human rights violations during the conflict.<sup>61</sup>

### **3.2. Finding the relevance of Ihering's theory in connecting the dots from transition to transformation in Nepal**

As to Ihering, the reconciliation of the contradictory interest is the role of Law. In this milieu, the paper moves forward to interpret the thesis propounded by Ihering seeking the relevance in Nepalese Context. The inception of the society is done for the satisfaction of the Human needs

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<sup>58</sup> ICRC, *Missing Persons in Nepal, The Right to Know*, Updated List (2011), 2; Brendan Brady, *The Disappeared: No Peace for Victims of Nepal's War of 6<sup>th</sup> April 2011*, available at : <http://www.time.com/time/world/article/0,8599,2063536,00.html#ixzz1e3ioLzsw> (18/12/2012 3:00 PM).

<sup>59</sup> *Report of Investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003-2004*, (May 2006), 60-61.

<sup>60</sup> Advocacy Forum, *Exhumation of bodies of the Disappeared- in need of a policy framework*, 1<sup>st</sup> Edition, (2011), 21-22.

<sup>61</sup> Manfred Nowak, Mission to Nepal, *Report by the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, E/CN.4/2006/6/Add.5, 9th January 2006; UNHCHR, *Report of the Working Group on Enforced or Involuntary Disappearances on its visit to Nepal*, E/CN.4/2005/65/Add.1. Also, see UN document E/CN.4/2001/9/Add.2, available at [www2.ohchr.org/english/bodies/chr/docs/English.pdf](http://www2.ohchr.org/english/bodies/chr/docs/English.pdf) (08/12/13, 1:03 PM).

and the purpose of law as a social tool is done for the balancing of disproportionate individual needs and interest. In this context, the law to address the serious violation of Human Rights taking place during the time period of 1996 and 2006 came with the practical motive. This was done with the reason that Nepal had to socially transform itself from Conflict to Peace at one end and punish the perpetrators of the serious violations of Human Rights. The contradiction of the interest basically arose from the fact that the perpetrators of such violation were seeking excuse on the base that their acts were propagated for ultimate social transformation. However, this form of excuse was not valid and Nepal had finally institutionalized Transitional Justice apparatus to punish the perpetrators of such violations of Human Rights.

The two bills that came as a transitional justice apparatus with the purpose of reconciliation were a bill made for making provisions relating to Truth and Reconciliation Commission (TRC), 2007 and a bill to Provide for Disappearance, 2005. The essence of the law was to meet the higher ends of Social Justice for who have been victimized and traumatized during the conflict. The idea of establishment of TRC was first determined in Comprehensive Peace Agreement (CPA)<sup>62</sup> and Interim Constitution of Nepal. In spirit of the language of CPA, the government's is to form a high- level TRC which has been envisaged in the Interim Constitution of Nepal which mentions, "To constitute a high- level Truth and Reconciliation Commission to investigate the facts regarding grave violation of human rights and crimes against humanity committed during the course of conflict, and create an atmosphere of reconciliation in the society"<sup>63</sup>. The sole purpose behind such is *Truth telling* and *Reparation of Victims*. The similar is in the case of the Disappearance Commission. For a society, massively struck with Conflict, if has to achieve some form of social transformation then the formations of such commission are the first step taken towards the transformation. In society like Nepal where massive human rights violation have taken place, it is obvious that people still have within them the emotional sides of resentment due to the lack of legal institutions that could make them attain their ends to justice. So for the

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<sup>62</sup> *The Comprehensive Peace Agreement (CPA)* was a peace agreement signed by the then Government of Nepal and Communist Party of Nepal (Maoist). The agreement officially ended the decade long Maoist conflict. Government and Maoist committed themselves to a peace process, Constituent Assembly Election and provide remedy to the conflict victims by formation of a Commission named as 'Truth and Reconciliation Commission'

<sup>63</sup> Article 33, Interim Constitution of Nepal, 2006.

promotion of ultimate social order marked by the system of rule of law and promotion of human rights, and to reject the culture of impunity certain system of justice need to be established.

Ihering demonstrated that his theory of law was an effort to exhibit that purpose is ultimate the creator of the law. The conceptual understanding laid forward by Ihering could be summed as the law being a result of human will and every legal rule is originated with some purpose or some practical motive<sup>64</sup> and the ultimate objective of the law is solving the problem and social needs met. Interpreting his theory in the contextual background of Nepal, the creation of such bills to punish the serious violations of Human Rights between the periods of 1996 to 2006<sup>65</sup> gives us an impression that 'Law definitely come up with purpose' and the purpose of law would be to attain the higher social ends like justice, peace and transformation. The integration of the perpetrators in the society and the issues to address the resentment of the victims and to rehabilitate them in the society provides with the understanding that law is the ultimate form of reconciling the conflict interest as laid forward by Ihering.

Ihering's vouched for the reconciliation of selfish purpose with unselfish purposes. When there is clash between these two purposes the selfish purpose has to be suppressed. As such, the development of transitional justice apparatus in forms of bill regarding the TRC and disappearance commission that have come to reconcile the conflicting interest in lines of the Interim Constitution of Nepal and the Peace Agreement between the two factions of the Conflict should be understood as a medium of reconciliation sought in the perspectives of law. To that end, the ultimate purpose of law in society to satisfy the human needs in totality as stated by Ihering could be justified.

The disproportional in the interest of individuals cannot be balanced on the individual basis whereby there is an urge for satisfaction of the common interest. However, this notion does not essentially connote that one interest could be suppressed to a major extent. Arriving to equilibrium, the common good of the all should be served which should not suppress the interest in such a way where the conflicting parties could feel that his /her interests were left unsettled. In

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<sup>64</sup> *C Watkins & Son v. Carrig*, 91 N.H. 459, 21 A.2d 591, 138 A.L.R. 131, N.H., July 15, 1941

<sup>65</sup> See: Understanding between the SPA and CPN (Maoists), 8th November 2006, *available at*: <http://peace.gov.np/admin/doc/Decisions%20of%20Top%20leader%20meeting%20of%208%20Nov,%202006.pdf>, (12/12/13, 7:00 AM).

this milieu, in context of Nepal, the bills of TRC and Disappearance have come up in such a way that would provide both the perpetrator and victims with a sense of the satisfaction of their interest. The purpose of the law is the same and as such this theory of Ihering can be taken and justified as totally relevant in Nepalese Context.

The paper now moves forward to analyze the purpose of law in normal Nepali setting having justified the fact that the transitional justice apparatus have come up with the purpose to reconcile the interest of the perpetrators and victims of the conflict where the main purpose of such was to balance the altruistic and egoistic levers, come to love from hatred, from conflict to peace and balance the idea of peace and justice.

### **3.3. Law as means to protect the Social Interest in context of Nepal**

Nepal marks a very traditional society rich in its own culture and natural resources. The harmony and the balance, the fraternity, the social solidarity are the founding pillars of the Nepalese Society. As such, there are lots of communities and their practices, linguistic groups, and similar sorts of geographical groups that are rich in tradition and culture. Nepal has mainly four caste Brahmins (the Saints), Chettris, (the Warriors), Vaishya (the tradesman) and Sudras (miscellaneous workers). This is followed by 59 groups that are Indigenous and Marginalized people, 103 lingual groups and so forth.

As such, there is a ritual popular in Brahmins and Chettris that the relatives and friends going to the bride's home from bride groom's side to attend the marriage ceremony. This sort of practice is prevalent in Nepal based on the essence that 'everybody should be there in one's happiness and in their sorrows'. There was no restriction in number as to how many people could go to such walk during marriage or during funeral. However, with the implementation of 'The Social Reformation Act, 1974', the law mentioned that the number of people who could go for marriage march and the funeral procession is to be 50. This law came to defy the purpose of social practices because of which the implementation of the same has not yet been done. Recently, in 2013, the governmental authority attempted to regulate the person present in marriage/funeral within the limitation enshrined in law, but the attempt was not successful, however, the voice was raised to amend the law itself as it was against the social practice.

So, the purpose of law shall be congruent to the needs of the human beings of the society as laid down by Ihering. If the social ends are not met by the law, the purpose of law gets defied in itself and the failure of the provision of the social reform act can be the best example as to how the functioning of law gets questioned when worked beyond the spirits and the interest of the people.

### **3.4. Law as the protector of the rights of the people in Nepal**

The purpose of the law shall always be to protect the rights of the people. If done against the same, the spirit of the law gets question and leads to its downfall, be it the constitution or the other general laws. In such periphery, the paper will discuss and analyze as to how the essence of Constitution of Nepal, 1990 was questioned leading to its downfall.

This part of the paper will analyze how the failure in protection, promotion and recognition of the right to press and publication. Case in point would be the media ordinance incident of Nepal. The Supreme Court declined to issue an interim order against the Royal government in *Ram Krishna Nirala v. His Majesty Government* (Unreported). The government after a royal coup that took place in 2005 promulgated Media Ordinance 2005 curtailing the press freedom of radio and Television stations. Article 13 of the then Constitution (1990) had provided “(1) No news item, article or any other reading material shall be censored. (2) No press shall be closed or seized for printing any news item, article or other reading material.” Government on its part argued that the Constitution did not guarantee the right of Press and Publication of ‘transmitting or broadcasting’ news by ‘electronic media’ including Television and radio Stations as it did to the press to publish ‘newspaper and other article’, therefore Television and radio stations were not protected under right to press and Publication. Indeed Supreme Court also seemed convinced with such construction<sup>66</sup> and did not issue an interim order against the government.

Thus originality account of press freedom under 1990 Constitution would be limited to freedom of newspapers and other prints but not electronic media, internet and so forth. The follower of originality principle would assert that in 1990 in Nepal the electronic media, let alone internet

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<sup>66</sup> In fact, in the case law of *Thir Prasad Pokhrel v. Harihar Birahi* NKP 770 (1992), the Supreme Court observed main reasons behind the drafting of Article 13 of the then Constitution. In its decision, the Court stated that, “experience of unreasonable censorship of the press, closure or seizure of newspapers, and punishment of newspaper and book sellers, during Panchayat era” prompted drafters to frame Article 13. This clearly shows that the word ‘press’ and overall intention of drafters was to cover newspaper and other printed articles and surely not more advanced means of communication like email, internet, and so forth, which at the time of drafting the constitution could not have been imagined as a part of press.

was a distant, unanticipated source of information that was not surely intended within the ambit of Article 13 of the Constitution of the Kingdom of Nepal 1990 as it has been under article 16 of the Interim Constitution of Nepal 2007. Hence, as much as absurd it may sound, if we went by the *originalist* notion, then 1990 Constitution never protected right of press and publication of ‘transmitting or broadcasting’ news by electronic media. And such argument is not only preposterous, but also flagrantly against the essence of 1990 Constitution, which surely did not intend to determine subjects of press freedom but to secure fundamental right of people to freedom of press and publication.

However, this sort of absurdity while in creation of law and the interpretation thereof in the similar way would always have a negative impact on the people. As such, the essence of law gets questioned when it cannot protect the rights of people principally and practically. This was similar to the situation where the essence of constitution was questioned despite the fact that it was interpreted by Supreme Court in accord with the original approach as intended by the drafters. However, these sorts of lacunas regardless of the interpretation of the court came with dissatisfaction in certain groups of people which ultimately led to the downfall of the same.

### **3.5. Law as a means of Social Control in context of Nepal**

As stated by Ihering, law aims to control the society either by coercion or by reward. In line with the provision of State Cases Act, 1992 and its regulations thereof and in compliance with the National Code of the Nepal, 2020, the law lays certain fundamental aspect which creates a form of coercion among the people. The Chapter on Homicide and its penal provisions and similar sorts of provisions on other crime like Theft, Robbery, Rape and so forth defines the crime and its punishment. This sort of provision in law has certainly to an extent created with a sense of deterrence in the people whereby they are coerced to follow the law or else in cases of non-performance face the consequences. Similarly, certain rewards are also given in the Nepalese context whereby the citizens are made to be law abiding. Such can be seen in the provisions of Income Tax Act, Vat Act, or similar sorts of fiscal law where prompt acts of the citizens would allow them to the benefit to a certain extent. Similarly, the ones who help the law in finding criminals are also given with certain reward.

The ultimate end of such law is to promote a safe and secure society where the law acts as the means for the same. The broader and stricter the application of such law, the more disciplined

and developed the society would be. As such, through the means of Coercion and Reward the law as stated by Ihering purports to create a controlled and balanced society.

### **3.6. Law as a means to cope up with the change in society in context of Nepal**

With the passage of time and the development society witnessed, there is an increment in the trends of the crime and criminal activities in the society. A perfect example in Nepalese Context would be Money Laundering and Terrorist Financing whereby the Nepalese legal system is creating a system to stand to its international commitment of Money Laundering and Terrorist Financing. The Money Laundering Prevention Act, 2008 has come up with the provision to stop and punish any acts of Money Laundering. The institution of the Financial Information Unit and Department against Money Laundering are constantly working for checking the acts of Money Laundering and are taking steps to punish them by Court proceedings. However, the purpose set out by National Laws as to Money Laundering are somewhat lesser than that sought by the Financial Action Task Force, the FATF has asked Nepal to address the deficiencies by (1) Adequately criminalizing money laundering and terrorism financing, (2) Establishing and implementing adequate procedures to identify and freeze terrorist assets, (3) Implementing adequate procedures for confiscation of funds related to money laundering and (4) Enacting and implementing appropriate mutual legal assistance legislation.

However, the Anti-Money Laundering framework has come up with the purpose to cover the criminal activities like Money Laundering so that the changing criminal patterns and the new crimes would be covered for a better regulated society.

Furthermore, in context of Nepal, it is important to analyze the Patent Design and Trademark Act which was enacted in 1965 during the period where these rights were even not guaranteed in number of developed nations. The period did not had any inventions nor had any substantive international trade done by Nepal, however, the law was enacted to address the prospective change that would happen in society in due course of time.

## **4. Conclusion**

With all the above analysis, we can conclude that every law comes up with the purpose and the ultimate purpose of the law is the satisfaction of the human needs. No law is without purpose and

as such every purpose works for the betterment of the human needs, the ultimate essence of the society. Law to achieve the ends within it lays down the certain foundational criteria instance of which could be Coercion and Reward, taking a reference from Ihering. Thus, in the modern world, where the rule of law has been the primary concern, the underlying principle of law and its purpose laid forward by Rudolf von Ihering plays a predominant role in setting up a foundation, which is relevant in every society, regardless of diversity and territory. The country in reference would be Nepal.

The purpose theory of the law is equally relevant in the context of Nepal where a conflict struck society is marched towards the way of social transformation by the reconciliation of interest as laid down by the law. Every country in the world has moved forward for a change and development, be it from colonization to de-colonization or from state of war towards peace and justice, the ultimate purpose of rule of law or say the theme of 'law as a means to an end', the ultimate rationale of Ihering's thesis serves to be the basic foundation of law in every country and every society.

Contextualizing the situation of Nepal in this broader domain of 'purpose' thesis of Ihering, the instances could be analyzed through the transitional justice apparatus being laid down to serve at certain extent, the purpose of bringing stability and peace in Nepal. The purpose of the law has thus been bringing the perpetrators and victims of the crime to a certain level of compromise have helped the society like Nepal that has moved from the cusp of transition to transformation. Similarly, Law serves to be the means to protect and promote the rights of the people, without which the essence of the law would be questioned every now and then. The examples given by the Social Reformation Act and Media Ordinance case of Nepal proves the same. Furthermore, to Ihering, the purpose of law in every society is to attain certain forms of social control so that harmony, balance and peace could be maintained in society, replication of which could exactly be considered in context of Nepal, where coercion has been used in the form criminal penalties, following the deterrence theme of law for the proper and disciplined obligation of law at one hand whereas at the other, rewarding those who assist in criminal investigation, the reduction of punishment to those who surrenders or confesses before the authority serves to be the instances of social control through positive means or 'reward' in the words of Ihering. Finally, the law serves amongst several purposes as an instrument that would cope-up the change that takes place in society. When crimes were not defined they were certainly not punished except for certain



crimes but when the law marks something as crime than the punishment is followed by. In that line, the purpose of the law shall essentially be sought as an instrument to cope up the changing society.

As a concluding remark, summarizing the essence of Ihering's insight, true aim of the law is the realization of equilibrium of individual and social principles and purposes. A just and stable society is one which succeeds in balancing the interests in the society, a balance between individual interest, common interest and social interest. The ultimate objective of law is to assist society in achieving its goals, for this reason; there would be no harm if the individual interest gets suppressed. Men may be able to achieve only relatively limited objectives, but in collaboration with their fellows within the society, their capacities for self-realization are greatly increased. Thus, they purport for harmony and collaboration in a society and law is the instrument or the means to those ends, the crucial thesis of Rudolf von Ihering.