



คณะนิติศาสตร์ มหาวิทยาลัยขอนแก่น  
ข้อสอบปลายภาค ประจำภาคปลาย ปีการศึกษา ๒๕๖๒  
วิชา ๓๓๓ ๒๐๑ หลักวิชาชีพนักกฎหมาย (กลุ่ม ๑ - ๒)  
วันอังคารที่ ๒๔ มีนาคม ๒๕๖๓  
ผู้ช่วยศาสตราจารย์กิตติบดี ไยพูล

คำสั่ง

- ข้อสอบทั้งหมดมี ๑ หน้า (รวมหน้าปก)
- ข้อสอบอัตนัย รวมทั้งหมด ๓ ข้อ ให้นักศึกษาทำทุกข้อ (๓๐ คะแนน)
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ข้อ ๑. โปรดศึกษาข้อมูลจากเอกสารประกอบแนบท้ายและให้อธิบายคุณลักษณะและบทบาทของ Legal Professional ใน Legal Service Industry (๑๐ คะแนน)

ข้อ ๒. จากที่ได้ศึกษาถึงหลักวิชาชีพของผู้ประกอบวิชาชีพกฎหมาย ได้แก่ หนายความ พนักงานอัยการ และผู้พิพากษา ขอให้ศึกษาวิเคราะห์ถึงจุดร่วมของคุณลักษณะที่พึงประสงค์ ตลอดจนคุณลักษณะเฉพาะของผู้ประกอบวิชาชีพกฎหมายดังกล่าว เป็นอย่างไร (๑๐ คะแนน)

ข้อ ๓. แนวทางการพัฒนาตนเองของนักศึกษาเพื่อเตรียมความพร้อมในการประกอบวิชาชีพหรือการทำงานเป็นอย่างไร พร้อมวิเคราะห์ถึงจุดแข็งและโอกาสในการพัฒนาตนเอง (๑๐ คะแนน)

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# The Concept of Legal Profession

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# The Concept of Legal Profession

<sup>1</sup>Amrit Kharel

## Abstract

*Despite being one of the best paying jobs, legal profession is also a most challenging among the professions in the world. Though lawyers have been since long leading the world in different context, professional values and standards have its distinct role to put the profession in the centre of attraction among the careers. This paper endeavors to define the concept of legal profession, seeks its jurisprudential notions and position of autonomy in the profession. The public interest versus question of professional sustainability, distinction between the traits of professionals and the brokers is one of the key areas where the paper sheds light on. The international principles on professional code of conduct will be discussed in the paper at the final part. The paper is primarily concerned with the conceptual part of the legal profession with an aim to bring crystal clear picture on the legal profession and its ethical standards along with the comparatist approach necessary for the legal professionals in the modern world.*

## Introduction

The legal profession is arguably the single most researched aspect of law in legal scholarship and socio-legal studies.<sup>2</sup> It is also one of the most challenging professions in the world because legal professional, for the most time, has to pass through tough process of thinking, contemplating and reasoning whether he/she is in a policymaking role, advisory service, justice dispensing role or simply representing clients at court.

It is interesting to note that though lawyer is ranked at the 'sixteenth position'<sup>3</sup> among the U.S. News' list of the top hundred best paying jobs of 2016, it comes only at the 'seventy first position'<sup>4</sup> among the hundred best jobs in the world.

The stressful nature of job and work-life balance factors have descended the choice of law career among the best occupation despite having high pay offs.

The 'higher earning' feature does not only count the whole pride of the legal profession but the dynamic aspect of the job is often reflected due to the emergence of several influential leaders of the world from the law background.

Incumbent President of USA, Barack Obama, Russia's President Vladimir Putin, Chinese Premier Li Keqiang, former US President Bill Clinton, former President of Russia, Dmitri Medvedev, managing director of International Monetary Fund (IMF), Christine Lagarde are the contemporary world leaders worth mentioning here who had earned their highest degree in law.<sup>5</sup> These leaders had been time and again nominated in the celebrated Forbes' list of the most powerful lawyers of the world.

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<sup>2</sup> MATHIEU DEFLEM, *SOCIOLOGY OF LAW: VISIONS OF A SCHOLARLY TRADITION*, Cambridge University Press, Cambridge, UK, 181 (2008).

<sup>3</sup> *The 100 Best Jobs*, <http://money.usnews.com/careers/best-jobs/rankings/the-100-best-jobs> (last visited Mar. 6, 2017).

<sup>4</sup> *Ibid.*

<sup>5</sup> Staci Zaretsky, *The World's Most Powerful Lawyers and Law School Graduates*, <http://abovethelaw.com/2013/10/the-worlds-most-powerful-lawyers-and-law-school-graduates> (last visited Mar. 6, 2017).

Karl Marx, Mahatma Gandhi and Nelson Mandela are the seasoned lawyers among others who passed their whole life in pursuit of emancipation of the human beings. Former President of Cuba, Fidel Castro and Former Prime Minister of Singapore, Lee Kuan Yew were also the law practitioners.

The legal professions, together with the universities, the papacy, the corporation, and constitutional government, are institutions that must rank among the most influential and most enduring creations of the thousand years that constituted the European Middle Ages<sup>6</sup> and this legacy still continues. Without them, the world as we know it would be a poorer, less interesting place.<sup>7</sup>

## Defining "legal Profession"

Herbert M. Kritzer has listed some "characteristics"<sup>8</sup> to define a profession that include (but not limited to):

1. "Possession of esoteric but useful knowledge and skills, based on specialized training or education".
2. An orientation toward service in the interest of an identifiable client.
3. Autonomy of action, with regard both to the specific action (i.e., the professional is in control of the relationship with the client) and to the definition and enforcement of standards of professional behaviour.
4. The existence of one or more organisations to serve the internal and external needs of the profession."

The concept of professionalism when applied to legal profession is a normative concept that provides an ideal that lawyers should strive to meet, idealized as a self-directed calling, informed by the spirit of a public service.<sup>9</sup>

Kritzer has thus defined legal profession as an autonomous nature of job oriented towards public service on the basis of specialised knowledge, skills and systematised through organisations.

He has differentiated between the characters of legal professionals with that of brokers. Broker is a person hired to act as an intermediary who are motivated by their own interests either in long term or short term rather than by any moral factor or altruism. Client plays primary role in decision making for brokers and brokers are involved in regularized interaction with other players in the system. But legal professionals, on the other hand, provide advice service to client and client follows the instruction of legal professionals.<sup>10</sup>

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<sup>6</sup> JAMES A. BRUNDAGE, *THE MEDIEVAL ORIGINS OF LEGAL PROFESSION: CANONISTS, CIVILIANS AND COURTS*, The University of Chicago, Chicago, USA, 492 (2008).

<sup>7</sup> *Ibid.*

<sup>8</sup> HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION*, Oxford University Press, New York, USA, 5-6 (1990).

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*, 12-14.

The legal professional must apply a combination of formal legal knowledge and formal legal skills in a more creative way<sup>11</sup> whereas broker may have insider knowledge of the system but not proper formal skills and knowledge to advice client.

The legal profession refers to the whole of occupational roles purposely oriented towards the administration and maintenance of the legal system, including judges, lawyers, counsellors, as well as experts of legal education and scholarship.<sup>12</sup>

Debates are perennial over the question of whether legal profession should be conceded to be a business or it is a matter of public service. Are legal professionals ought to work for the social cause or not? What is the position of the question of survival of a professional engaged in the legal practice? These sorts of inquiries are always in the heart of debate regarding professionalism and legal practice.

The key issue lies in the nature of lawyers' work. Lawyers' work is more than that of a businessperson and thus lawyer is someone upon whom, regardless of his business acumen and methods, people conferred a status which demands higher standards and a higher commitment of self. Lawyers are not simply selling a commodity or a service. They are dealing with matters that take them deeply into the moral realms of people's lives. Lawyers are trusted with the closest held secrets people have about themselves and the closest secrets businesses have about how they work.<sup>13</sup>

Lawyers possess training, skills, and position which give them immense power and which raise enormously complex moral questions inherent in the work itself. Does a lawyer representing a toy manufacturer retain his client's confidence that a toy on the market is dangerously defective, or does he/she warn the public?<sup>14</sup>

This is indeed a 'moral maze' having no easy exit but striking a right balance between business and public interest is the measuring rod, which only can justify professionalism and complex interrelationships between business and moral sensitivity of legal profession.

## **Jurisprudential Notions on Legal Profession**

Natural law school envisages legal profession based on reason and especially Platonic 'Gold Men' like virtuous professional should provide legal service, dispense justice based on morality and intrinsic human values. Legal professionals must be capable to raise question over the inner morality of law as Fuller describes. Professionals must have the sense of human goods especially the 'practical reasonableness' as provided by Finnis. Aristotle's focus on ethos and values is replicated in these modern days in the form of ethics of judges, lawyers and other professional communities.

For positivists, legal professionals are also bound by the posited law of the sovereign. The professionals must act as the deputed responsible authorities of the sovereign to enforce the commands articulated as the law of the land. Lawyers and judges need to work to translate the letters of the law into deeds, into action. Maintaining consistency in the entire legal

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<sup>11</sup> KRITZER, *Supra* note 7, 171.

<sup>12</sup> DEFLEM, *Supra* note 1, 182.

<sup>13</sup> WALTER BENNETT, *THE LAWYER'S MYTH: REVIVING IDEALS IN THE LEGAL PROFESSION*, The University of Chicago, Chicago, USA, 90 (2001).

<sup>14</sup> *Ibid.*, 10.

system should be the motto of legal profession in the eye of the positivists. Though Dworkin let no space for discretion by the legal professionals especially the judges, for Hart, there are some open textures where minimum content of natural law can be applicable in the profession of law.

Legal profession for the historical school is a part of the tradition that articulates the popular will of the people i.e. volksgeist. As law is language to the historical jurists, lawyers and other legal professionals are like the folk lyricists who need to understand people's folklore and nurture the custom, tradition and refer to those elements to enrich the legal content.

Socialist school sees legal profession as a part of superstructure which is functioning to maintain the base of the society, i.e the economic system. Lawyers, judges and all other legal professionals serve the interests of ruling class. In the communist State, there is no need of special legal professional when law itself withers away.

Only judges as the legal professional are the lawmakers in the realist school of thought. The role of other legal professionals is not given priority but what judges deduced from particular cases by empirical evaluation is only defined as law.

American realist Karl Llewellyn mostly argues on the favour of legal profession. Certain "law jobs" are necessary to be carried out for the effective functioning of law as an institution. According to him, such "law jobs" are of universal nature and, therefore, necessary in most types of social organisation. Llewellyn categorises five law jobs including a. disposition of trouble cases, b. preventive channelling of conduct and expectations in areas of potential conflict, c. allocation and exercise of authority or jurisdiction within society (arranging the say and its saying), d. directive and incentive through the organisation of society (Whither of the net Totality) and e. law as technology to enhance skill of official craftsmen of law.<sup>15</sup> The legal professionals in his belief need to be involved in any of these five "law jobs".

In sociological concept, where law is defined as social institution, the legal profession is given utmost priority as social engineering. The legal professionals are the engineers who design and prepare and architecture of the society balancing the interest of private, public and society and various ingredients are properly placed to make a strong social institution with social cohesion and harmony. The public interest litigation and legal professional's responsibility towards society are the outcomes of this school.

Max Weber put emphasis upon the professionalization of legal work for the development of society in which formally rational legal system can functions. His sociology of law concept places legal profession at proper priority and systematisation of administration of justice is equally advocated to have a formally rational society in place.<sup>16</sup>

In Sociology of Law, Talcott Parsons lays emphasis on the role of the professions with respect to law's integrative function produced a perspective of the legal profession that reaffirmed its centrality in the autonomy of law.<sup>17</sup>

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<sup>15</sup> L.B CRUZON, JURISPRUDENCE, Cavendish Publishing Ltd., London, UK, 191 (2nd ed., 1995)

<sup>16</sup> RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY, Oxford University Press Inc., New York, USA, 172-173 (3rd ed., 2012).

<sup>17</sup> DEFLEM, *Supra* note 1, 196.

Niklas Luhmann describes the role of legal professional to ensure consistency to legal expectations for properly running the law as social system.

The ability of law to develop complex and consistent norms requires the system to develop a sub-system for decisions as to what law is (which includes when law is changed). This sub-system is staffed by persons, identified by their membership (the legal profession and the judiciary), whose particular task is to provide consistency to legal expectations.<sup>18</sup>

## Legal Profession and Autonomy

The centrality of the legal profession is a matter of legal autonomy, which conceptually goes back to de Montesquieu's separation of powers principle. The ideal of legal autonomy as a critical dimension of modern legal systems indeed forms one of law's most critical and sociologically challenging characteristics.<sup>19</sup>

The autonomy of the legal profession is reflected in legal education and various aspects of legal practice inasmuch as, over time, the legal profession has been successful in controlling admission to and the organization of law schools as well as the regulation and execution of legal work by means of systems of supervision and control. The independence of the legal profession is a concrete expression of the autonomy of law, with an independent judiciary as its main manifestation. However, the aspiration to maintain occupational autonomy is one of the legal profession's most challenging characteristics.<sup>20</sup>

Autonomy has a substantive, an institutional, a methodological, and an occupational aspect.<sup>21</sup> Where the legal order is characterized by occupational autonomy, a special group, the legal profession, defined by its activities, prerogatives, and training, manipulates the rules, staffs the legal institutions, and engages in the practice of legal argument. Substantive, institutional, methodological, and occupational autonomy are interdependent.<sup>22</sup>

Nevertheless, the critical legal movement seeks to cast doubt on the idea of legal autonomy in favour of a theory of the practice of law that intimately revolves around power and differential access to justice. Without necessarily denying that practitioners of the Critical Legal Studies movement were animated by a committed interest in unrealized human opportunity, the movement has not, contrary to its intentions, been able to successfully challenge the authority of law and the role played therein by the legal profession. What the Critical Legal Studies movement has contributed to is a diversification of legal thought (especially in opposition to the law and economics perspective) as part of a transformation of law that marked the legal profession as a whole.<sup>23</sup>

Heinz and Laumann in their research has found that, if professionalism is defined in terms of autonomy, the personal services lawyer, not the corporate services lawyer, best corresponds to this image. Personal services lawyers have many clients and are not dependent on any one

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<sup>18</sup> Niklas Luhmann, *Law as a Social System*, Oxford University Press Inc., New York, USA, 15 (Klaus A. Ziegert trans., Fatima Kastner et.al. eds., 2004)

<sup>19</sup> *Ibid.*, 181.

<sup>20</sup> *Ibid.*, 182-183.

<sup>21</sup> ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY: TOWARDS A CRITICISM OF SOCIAL THEORY*, The Free Press, New York, 52 (1976).

<sup>22</sup> *Ibid.*, 53.

<sup>23</sup> DEFLEM, *Supra* note 1, 197.

client for a substantial portion of their livelihood; moreover, the clients of the personal services lawyers tend to be relatively unsophisticated vis-a-vis the legal system. For corporate services lawyers, on the other hand, the client base is much narrower and they are sophisticated users of legal system. Thus it is concluded that in terms of both client sophistication and economic independence is that the personal services lawyer has a more autonomous professional life than the corporate services lawyer, who is highly dependent on the large corporate client as a "patron."<sup>24</sup>

Another research by Cain (1979) has found that even the work of the personal services lawyer is often best described as simply carrying out the instructions of the client, requiring little, if any, autonomous thought or action on the part of the lawyer. Thus, autonomy in the working world of the lawyer is more problematic than posited by the theoretical core of the sociology of the professions.<sup>25</sup>

In addition, to have autonomy, legal professionals in the modern world must have comparatist approach having a broad horizon to conduct any research, study or to work in any other way in multicultural or multiple legal systems. Legal professionals must know that they must cut themselves loose from their own doctrinal and juridical preconceptions and liberate themselves from their own cultural context in order to discover neutral concepts with which to describe problems.<sup>26</sup> One must never allow one's vision to be clouded by the concepts of one's own national system. The Comparatist legal professional must eradicate the preconception of his native legal system.<sup>27</sup> If a picture presented by a scholar is coloured by his background or education, international collaboration should correct it.<sup>28</sup>

## **International Principles of Legal Profession**

Based on the various jurisprudential notions and practices in different legal system, International Bar Association (IBA) has adopted universal principles named "IBA International Principles on Conduct for the Legal Profession" on May 28, 2011 as the guiding code of conduct of world lawyers. These principles aimed at establishing generally accepted framework to serve as a basis on which code of conduct may be established for the lawyers in any part of the world. These principles have taken into consideration that legal professionals have to combine continuous update on legal developments with service to their clients, respect for the courts and the legitimate aspiration to maintain reasonable standard of living.

The major ten principles of IBA are as follows.<sup>29</sup>

### **1. Independence**

A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation. A lawyer shall exercise independent, unbiased professional judgment in advising a client, including as to the likelihood of success of the client's case.

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<sup>24</sup> KRITZER, *Supra* note 7, 9.

<sup>25</sup> *Ibid.*

<sup>26</sup> KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW, Oxford University Press, Oxford, UK, 10 (Tony Weir trans., 3rd ed., 1998)

<sup>27</sup> *Ibid.*, 35.

<sup>28</sup> *Ibid.*, 47.

<sup>29</sup> INTERNATIONAL BAR ASSOCIATION, IBA INTERNATIONAL PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION (2011).

## **2. Honesty, integrity and fairness**

A lawyer shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact.

## **3. Conflicts of interest**

A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's authorisation.

## **4. Confidentiality/professional secrecy**

A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct.

## **5. Clients' interest**

A lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.

## **6. Lawyers' undertaking**

A lawyer shall honour any undertaking given in the course of the lawyer's practice in a timely manner, until the undertaking is performed, released or excused.

## **7. Clients' freedom**

A lawyer shall respect the freedom of clients to be represented by the lawyer of their choice. Unless prevented by professional conduct rules or by law, a lawyer shall be free to take on or reject a case.

## **8. Property of clients and third parties**

A lawyer shall account promptly and faithfully for and prudently hold any property of clients or third parties that comes into the lawyer's trust, and shall keep it separate from the lawyer's own property.

## **9. Competence**

A lawyer's work shall be carried out in a competent and timely manner. A lawyer shall not take on work that the lawyer does not reasonably believe can be carried out in that manner.

## **10. Fees**

Lawyers are entitled to a reasonable fee for their work, and shall not charge an unreasonable fee. A lawyer shall not generate unnecessary work.

## **Conclusion**

The paper has discussed on multiple dimensions of the nature of the legal profession, its concept, definition, jurisprudential values, relationship of autonomy and legal profession and international principles on code of conduct of the lawyers. Based on the above discussion, conclusion can be drawn that legal profession has its broader role to work for the benefit of

the large public interest along with its revenue generation part for the continuity and survival of the service. Thus fully fledged autonomy in legal practice is indeed very difficult to be found today where much of the lawyers are working for corporate institutions. Research has shown that legal professionals working for the corporate institutions are less autonomous. Legal professionals must have comparatist approach of objectivity to be free from own preconception and biases and it will certainly enhance the level of autonomy to conduct study or to work in multicultural multi legal system. Likewise distinction between the brokers and real professionals is necessary. The larger part of the legal profession is occupied by the brokers and consequently real professionals have severe challenges to save professionalism, its values, integrity and balance in their law jobs. International principles on code of conduct for legal profession has been adopted by IBA which should be followed by any law professional by word and spirit to maintain his/her professional dignity.

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