

Reception of Law: Special Reference to Nepal

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1. Introduction

Reception of laws is not a new topic and considerable amount of time and ink has been dedicated towards the same. One more time an effort is being generated to spare more thought upon the issue but to proceed upon such an oft written issue is never an easy task. This article aims for a fresh approach towards the issue even though it cannot be denied that this article incorporates much of what the previous writers have expounded. Considering therefore then about how to introduce the subject-matter, the author, after considerable weighing regards that the purpose will be best achieved by narratives, three in particular which the author hopes that the readers will find not mundane, exciting, interest and imagination, and would simultaneously not only cause for some inherent features of reception to be drawn out but also assist in the latter discussions to come.

Narrative 1

The first narrative is straight from the Christian holy book, the Bible. Choosing this and beginning from a resource of such a nature only probably justifies and keeps true to the spirit of the topic. Of course, it must be asked, could there be a bigger reception? Religious texts whether it be of the Hindus, a word itself of foreign reception, Those people who lived in antiquity in the fertile valleys and along the banks of the Indus River (the modern-day Punjab area) were called Hindus by foreigners. However, these people of Aryan race did not describe themselves as Hindus. They were the followers of the eternal

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cosmic order called *Rita* as described in their religious texts, the *Vedas*. This *Vedic* concept of *Rita* became known as *dharma* later during the *Puranic* Age, and it was the believers of followers of this *dharma* that came to be known as Hindus. From then onwards, Hinduism become a synonym for the eternal *dharma*.” (Surya P. Dhungel). “Are the Principles of Human Rights “Western” Ideas? An Analysis of the Claim of the “Asian” Concept of Human Rights from the Perspective of Hinduism”,¹, Islam, Christian or any other religion is full of stories. The particular story which the author has in mind is from Genesis.

The Story of Babel² : Now the whole world had one language and a common speech. ² As people moved eastward,³ they found a plain in Shinar⁴ and settled there. They said to each other, “Come, let’s make bricks and bake them thoroughly.” They used brick instead of stone, and tar for mortar. Then they said, “Come, let us build ourselves a city, with a tower that reaches to the heavens, so that we may make a name for ourselves; otherwise we will be scattered over the face of the whole earth.” But the LORD came down to see the city and the tower the people were building. The LORD said, “If as one people speaking the same language they have begun to do this, then nothing they plan to do will be impossible for them. Come, let us go down and confuse their language so they will not understand each other.” So the LORD scattered them from there over all the earth, and they stopped building the city. That is why it was called Babel—because there the LORD confused the language of the whole world. From there the LORD scattered them over the face of the whole earth. Why is this story? Is a question which should immediately cross the mind of many. This is rather a very fascinating story and instantly reflects some of the silent characteristics, aims and probably dangers inherent in reception. Now, the author is not entitled to limit the interpretation of the story and the readers are free to draw whatever interpretation they can adduce to the story. But do consider, reception introduces concepts and terminologies developed and perfected in another legal system into the receiving legal system and what that in turn does is provides to all, or at least the recipient and the country of origin, and if the same is carried out to a whole new extreme, then to all the

¹ CALIFORNIA WESTERN LAW JOURNAL, Vol. 30 No. 1, 52.

² Genesis 11: 1-9.

³ Two further possible versions are available, namely, *Or from the east; or in the east*. <https://www.biblegateway.com/passage/?search=Genesis+11%3A1-9&version=NIV> accessed on 19/7/2019.

⁴ That is Babylonia. Ibid.

nations of the world with one common language for describing and for analyzing a particular situation or set of facts or for proceeding towards a common end (symbolized by the Tower of the City). Also, in turn this provides one common language for communicating with each other thereby creating maximum harmony and understanding (as depicted by the “one language” and “a common speech” aspect of the story and also by the Lord’s statement that “If people speaking the same language they have begun to do this, then nothing they plan to do will be impossible for them.”) which in turn makes possible the achievement of any goal (as represented by the attempt to undertake such tasks of great magnitude). This being so, two things must still further be drawn:

- (1) Reception having had achieved its aims – the common language, common aim, understanding and harmony aspects – would probably cause the humans as a species to be unified and might cause them or empower them to undertake such great tasks which might ultimately invite the Notice and/or the wrath and envy of the Almighty i.e. logically open the pathway to the heavens and horrendously make them subject to Divine Intervention.
- (2) Whether ultimately to be the cause of Divine Notice and/or wrath and envy is a good or a bad thing i.e. whether this aspect can be listed as one of the probable dangers inherent in reception or not, the author personally cannot tell but the author can with a great deal of accuracy state that the dangers inherent in reception lies in the area that this will ultimately lead to the demise of indigenouness of culture and may wipe out all uniqueness of the various races and make humans just uniform set of machines with no claim to originality.

Narrative 2

This narrative is about the promulgation of the Interpretation of Laws Act, 2010 (1954). At the time of promulgation, the legal environment of Nepal was in infancy and needed laws too many too quickly to modernize. Such is the background. To draft and promulgate the statute in question, the help of an Indian legal expert Mr. B. G. Murdeshwor was taken. But it is rather the process which is interesting. First, the Indian version of the Act was procured and looked up. Then, the same was drafted in the context of Nepal and this drafted version was then translated into Nepali. Upon this outcome, State powers and Royal Prerogatives inherent in the King was utilized and the Act

was issued.⁵ This narrative highlights the practical utility aspect of Reception where it goes without saying that practical utility is the basis for much of a reception of law. It is simply efficient to borrow, if not for others then certainly for the lawmaker as an awful amount of labor of thought is saved.⁶

Narrative 3

The author at the onset of this narrative would like to reveal that this narrative springs from a personal experience. The subject matter under consideration is a case named “Let Compensation be realized by Refunding the Amount pursuant to the Contract.”⁷ In this case, companies were involved in a transaction. Plaintiff, however had, while filing the suit made the Director, say a certain Mr. X also as the Defendant along with the Company itself. Mr. X was made the Defendant not in his capacity of Director but in his personal capacity. Now fundamental is the rule in company law that company under the laws is a distinct person and the rule extends to cover the same for the persons acting on behalf of the company. For such persons, the law *technically* differentiates between the private capacity (wherein he/she is divorced from the company) and corporate capacity (wherein he/she is part of the company). It is this corporate capacity and not the private capacity which has to be sued. With this the author would like to end the third narrative with a case named Mohan Lal Shrestha v. Director Bijay Kumar Shah on behalf of Jawalakhel Distillery.⁸ It was a case of loan transaction where the Director Bijay Kumar Shah sued on behalf of Jawalakhel Distillery Pvt. Ltd. without obtaining authorization from the company. Now this question was raised vigorously by the Defendant (applicant in the Supreme Court) but the Supreme Court propounded that “the company is a private company and Mr. Bijay Kumar Shah is the **Shareholder Director** of the company and since there is no legal provision barring the Director from filing a suit, it could not be agreed with the application that the suit has not been filed pursuant to the law.”

The third narrative has two parts. The first say the personal part, raises the question of corporate and private capacity. Being sued in private capacity for the act of company is against the principles of company law. But more than that, this aspect being the legal question, the administrative apparatus of the courts was legally not entitled to act upon the issue but the court, in

⁵ Shambhu Prasad Gyawali, “Kanoon Bid Murdeshwor”, KANOON, Vol. 3, Kathmandu: Nepal Kanoon Kitab Company Pvt. Ltd., p.65.

⁶ Alan Watson, “Aspects of Reception of Law”, AMERICANB JOURNAL OF COOMPARATIVE LAW, Vol. 44 No. 2, Oxford University Press, at 335.

⁷ 073-CP-3714, Kathmandu District Court.

⁸ N.K.P. 2055, Dec. No. 6577.

its full capacity did have the power to act and could have quashed the case in the preliminary hearing stage without proceeding towards the Evidence Examination stage. The second part raises the question whether a **particular status** automatically gives a power under the Companies law? In the regime of the company, a company can act only through the Agents who finally are natural persons. Authorization is an important aspect and though authorization can be express or implied, a particular status within the company does not *ipso facto* imply a particular power. The company is still entitled to exercise its will and the will of a Director alone cannot be substituted for the will of the company. **The exercise of the powers inherent in the status can be the will of the company**, implying that the power be exercised but in the particular instance it would be like boycotting the whole of the Board of Directors and substituting one Director for the Board.

The above narrative and the discussion followed highlights yet another important aspect of Reception. Companies law being in Nepal precisely of that category, the above merely serves as an example of **poor reception**. The general category emerging would be that Reception should not just follow the form but also the spirit. If the spirit is discarded the reception becomes an abomination and creates more confusion than upholding of legitimate expectations.

2. Meaning/Definition of Reception

The first approximation to the definition of reception can be sought in the nature of activity which reception entails. At the foundation, reception is an act of borrowing of concepts, rules and legal phenomena from one legal environment and practicing the same in another legal environment. This practicing aspect again subsumes that something new – alien to the borrowing practitioner is being implemented in a different setting of personnel and cultural diversity. In a sense reception is part and parcel of broader cultural exchange mechanism. It is probably this coupled with the implementation aspect which has caused one writer to label reception as both “a fruitful source of change”⁹ and “a creative process.”¹⁰

Reception writes Bishal Khanal is a common global phenomenon and says that probably no country is free from the impact of foreign laws.¹¹ Of course

⁹ WATSON, *Supra* note 6, at. 335.

¹⁰ *Ibid.* p. 345.

¹¹ BISHAL KHANAL, *REGENERATION OF NEPALESE LAW*, Kathmandu: Bhrikuti Academic Publications, at 24, (2000).

Aristotle had studied constitutions of 158 states,¹² Japan's constitution was made by the Americans,¹³ Americans themselves had developed their legal system out of the British common law while the Civil Law System – a major family of the world developed out of the Roman Law through scientific study of the same by the universities and the Pandectists. Although the role of universities in the study and revival of Roman law in medieval Europe is equivocal, it was in Germany where the work of the *post-glossators* was continued by the pandectists, resulting in that monument to Romanist scholarship which is so little Germanic, the German Civil Code.¹⁴

Before examining further conceptual aspect of reception, one question posed from the history of Nepal has to be examined. The code Nyayabikashini of King Jayasthiti Malla as suggested by Bishal Khanal was drafted by inviting five Brahmins from the native states of southern Nepal and northern India.¹⁵ Now although the involvement of Indians in the making of the Code is bit disputed as other writers such as Revati Raman Khanal and Madhav Kumar Basnet does not entertain that thought and therefore itself may become a matter for further investigation. But assuming for the sake of discussion that Bishal Khanal's statement is true, a question is posed that then and there in the reign of Jayasthiti Malla whether some form of receptive act had taken place or not? Bishal Khanal himself while writing about this issue had written it in the heading of Oriental Reception implying some other form of reception than say a foreign reception. But he had nonetheless considered it as a form of reception.¹⁶ Similarly, Madhav Kumar Basnet had in his article demarcated the period of reception only from the year 1854, discarding the period before that. Reasonably, a sort of consensus does exist that the said act is not a reception or a true form of reception. But non whosoever reasons as to the question why? – a state of affairs which no inquisitorial being would ever consider to be satisfactory. Hence in the main text an attempt as to this is being sought for by the raising of the question.¹⁷

To begin the answer let a counter question be posed. Were the persons involved really foreigners or not? Difference in the country of origin may be a

¹² Suman Acharya, "Comparative Legal Tradition and Nepal: An Overview", NYAYADOOT, Vol. 6 No. 199, Kathmandu, Nepal Bar Association, p. 174.

¹³ RENE DAVID, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 3rd ed, Stevens and Sons, London at 540, (1985).

¹⁴ Ibid. pp. 39-45.

¹⁵ KHANAL Supranote 11, at 27.

¹⁶ Vide KHANAL Supranote 11 at 27.

¹⁷ Madhav Kumar Basnet, "Adoption of Foreign Values in Constitutional System of Nepal: A Study", Paper Presented in the Ninth Conference of International Association of Constitutional Law, University of Oslo, Norway, at 1, (2016).

good basis for demarcating a person as foreigner but for the purpose of reception the word, the author humbly believes can be and is to be and should be given a broader meaning. Therefore, in the broader and receptive purpose sense of the word, they were not really foreigners at all. Examine the following line of:

- First they were Hindus and persons learned in the *Dharma Shastra*,
- Secondly, there was cultural affinity,
- Thirdly, they shared common terminologies, aspirations and understanding with Nepal and the Nepali culture and way of life, and
- Lastly, no really alien concept, rule or legal phenomena was introduced.

Nyayabikashini can therefore be taken as a work of consolidation and codification of scatted laws for the purpose of providing an authoritative exposition while the involvement of foreigners can be interpreted as only a form of assistance which allowed the same to be presented in an orderly and arranged manner. The concept was Nepali, only the assistance was foreign. Suffice to say it was no reception and when compared with the definition of reception as formulated in the context of theory of law to the effect that, "In the theory of law, reception is chiefly defined as the transfer of a legal phenomenon of a different legal culture, other area or other period of time to a new legal climate"¹⁸ presents a much clearer picture. Now, therefore, the cultural requirement not being fulfilled and since **a person, natural or artificial or fictitious, cannot borrow or receive that which is his own** the author respectfully submits that the act of the formulation of Nyayabikashini is no act of reception.

Lastly there are other ways of looking at reception. Paul Koschaker has shown that reception of foreign law is also a question of power.¹⁹ Furthermore, like any other human endeavor reception is also a form of action and can be defined as "the sum of countless actions, events and internal processes: of legal statutes, acts of judgment, of legal education, indeed of the transformation of legal convictions of many millions of people."²⁰ Reception has also been equated to modernization of law where modernization has

¹⁸ <https://www.juridicainternational.eu/?id=12458> accessed on 29/7/2019.

¹⁹ REWATI RAJ TRIPATHEE, NEPALESE LEGAL SYSTEM: A JURISPRUDENTIAL AND COMPARATIVE APPRAISAL, Lumbini Prakashan, Kathmandu, at 274, (2073)

²⁰ OMOND RUSH, THE RECEPTION OF DOCTRINE: AN APPROPRIATION OF HANS ROBERT JUASS' RECEPTION AESTHETICS AND LITERARY HERMENEUTICS, Rome: Gregorian University Press, at 130, (1997).

been referred to as the process of receiving the western values, institutions, rules and processes. Nevertheless, it is a process of drawing ideas that involve law as a system of rules, the social context of rules, the acceptance and variability of law, social spheres, and other such concepts, in analyzing how groups of citizens and officials handle the law, use the law, take care of its demands, or push this to the sidelines.²¹

3. Types of Reception

All receptions are primarily state initiated. But the involvement of people in the said process is an important aspect of reception. Therefore, reception can be classified in the first place as **state initiated only** and **state initiated backed by popular support**. Proceeding from the reasons which serve as motivation for the transfer of alien norms, Marju Luts has forwarded an interesting piece of classification into **veneration** and **necessityreception**. She writes that *veneration reception* is one example which occurs if alien norms, institutes or a whole system is adopted for their *venerated position and prestige of cultural background* while *necessity reception* occurs where there is an apparent need for a change of legal system in one culture and another existing culture provides an opportunity to satisfy the need.²² Some other classifications of reception are as follows:

1. Voluntary Reception: If legal phenomenon of one legal system are consciously and willingly adopted into another legal system, then such kind of reception is known as voluntary reception.
2. Involuntary Reception : If any legal system is imposed in a state that is known as involuntary reception. Involuntary reception can consist of both direct and indirect imposition.
3. Obligatory Reception : When compelling factors such as treaties, conventions, declaration and agreements lead to the reception of foreign concept that is known as obligatory reception.
4. Whole/Entire Reception
5. Partial Reception

4. Reception of Laws in Nepal

The introduction of democracy in Nepal and the end of Rana Rule marks an epoch in the history of Nepal. It was with the introduction of democracy that

²¹ <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199291830.001.0001/acprof-9780199291830-chapter-8> accessed on 20/7/2019.

²² <https://www.juridicainternational.eu/?id=12458> accessed on 20/7/2019.

Nepal, an isolated Hilly Kingdom really opened-up to the world. Prior to that, Nepal had enjoyed a closed and self-contained form of existence. Some foreign interaction was exhibited but it was mainly through the British. Nepal exhibited a truly international life e.g. King Mahendra's visit to America, membership of the United Nations, Non-Alignment Movement and so on only after democracy. Hence, the author believes that the study is better facilitated by classifying the study into two periods, The two-fold classification of Pre-Constitutional Era and Constitutional Era as forwarded by Madhav Kumar Basnet is based upon the criteria of Constitution. Moreover, he had based himself on the theoretical lines that in the pre-constitutional era, the adoption of concept only had taken place while in the constitutional era both concept and contents were borrowed. This division neat though is not supported by facts. Dhurba Bar Singh Thapa had pointed out that during the Rana regime after the adoption of the Muluki Ain, other Acts such as the Military Act (Jungi Ain), 1964, the Court Marshall Act, 1971, and more importantly Patent, Design and Trademark Act, Law related to Nepal Bank, Private Company Laws etc., were formulated within the Rana regime. These by the very nature, especially the latter ones imply that within his division, in the Pre-Constitutional Era, not just the concept but contents were also borrowed. Hence, although Madhav Kumar Basnet divides his era upon a happening of a factual event, the author does not find out any concrete theoretical basis of classification.²³, and (1) The Period Prior to the End of Rana Rule and (2) The Period after the End of Rana Rule shall be the classification to be adopted for the purpose of this article.

- (a) The Period prior to the End of Rana Rule
- (b) The Period after the End of Rana Rule

(a) The Period prior to the End of Rana Rule

What is the true stretch of this era? Although following the demarcation of the person from whom the said classification has been borrowed, the era has been demarcated at 1854, the question remains, how to demarcate the beginning? And why?; the end of course is demarcated by the end of Rana period. Rudiment reasoning for demarcating the beginning had developed in the Meaning/Definition of Reception section of this article when the author

²³ Madhav Kumar Basnet, "Adoption of Foreign Values in Constitutional System of Nepal: A Study", Paper Presented in the Ninth Conference of International Association of Constitutional Law, University of Oslo, Norway, at 1, (2016) and Dhurba Bar Singh Thapa, "Nepal Ko Kanooni Pranali – Ek Samchipta Bibaran", NYAYADOOT, Vol 1 No 110, Kathmandu, Nepal Bar Association, 76.

had reasoned as to why no reception had taken place in the reign of Jayasthiti Malla. Cultural affinities and its sharing coupled with assignment of a broader meaning to the word “foreigner” topped up with the definition of reception in the context of legal theory were some of the reasons forwarded. Now, building upon it, **a cardinal principle for taking place of an act of reception is the presupposition that some form of interaction with an alien must take place**; the absence of such an interaction would entail non inculcation of idea for reception to take place. This pre-requisite – an interaction with an alien is fulfilled only when the British establish their residency in Nepal. The fruits of this fact resulted in the first ever historic visit to Great Britain and France by the then ruling Prime Minister of Nepal Jung Bahadur Rana and the inspiration as drawn from this visit resulted into the Muluki Ain of 1854. This date should demarcate the beginning of this era. For sketching the fact that some sort of reception in the making of the Muluki Ain had taken place, the author would again like to take the assistance of Madhav Kumar Basnet.²⁴

- Jung Bahadur Rana had paid a year long visit (from 13th January 1850 to 29 January 1851) to the United Kingdom and France.
- During the visit, he had the opportunity to closely observe, in a first-hand manner the workings of the British and French systems. To understand and perceive the same, presumably and logically language was never a problem – translators and all – implying he should have gained a thorough understanding.
- The implication as made above *ipso facto* entails that ample opportunity for being inspired by the features he deemed good and for being debilitated by the features he deemed contrary to good was presented to Jung Bahadur Rana. The outcome of this could be seen immediately upon his return when a *Kaushal* was formed in order to draft a code. A gigantic volume of law baptized as “Ain” was the outcome.

Examining the events, an act of reception had taken place is a surety but interestingly, as pointed out by Madhav Kumar Basnet, the borrowing was only conceptual in form while the content was mainly based on Hindu customs and practices. Moving forward, the *Kaushal* which comprised of 219 people has been stated as the first known Parliament like-body.²⁵ Seeing at least

²⁴ Madhav Kumar Basnet, “Adoption of Foreign Values in Constitutional System of Nepal: A Study”, Paper Presented in the Ninth Conference of International Association of Constitutional Law, University of Oslo, Norway, 1-2, (2016)..

²⁵ Ibid. p. 2.

few similarities i.e. the fact that it was an assembly, the assembly was gathered for deliberating about law and the assembly made or passed a law – traditionally and dominantly, the chief function of Parliament, it is rather convenient to label it as a Parliament like-body but considering the composition, it seems more like an assembly of bureaucrats! Anyways, the body is undoubtedly an entity inspired by Parliament for Jung Bahadur Rana, as pointed out above had more than sufficient opportunity to see a Parliament in action. Hence, the *Kaushal* is the first concept to have been received or borrowed.

Furthermore, it has been pointed out by historians that Jung Bahadur Rana was impressed by the Napoleonic Code of France.²⁶ The idea of a code and codification then are two other concepts borrowed. But more important than that, the author while reviewing a number of articles upon the issue of reception has found that even though educational influence has been listed as one of the causes of reception, the literature under this heading only begins with and refers only to the democratic period. But already that influence in a rather vague and in a disguised form can be seen working even in this example. By defining education in a way that does not require a formal school or university, but as *an enlightened experience* then the author respectfully submits, if not as a conclusion then as at least a proposition for consideration, that the above situation be absorbed as an example of educational influence. Of course, the author is aware that the examples for this cause refers to direct examples and the idea articulated here is rather an indirect and fringe example of the same. There is yet another incident of importance. It is the *Sanad* of Prime Minister Juddha Shumshere Rana as issued on the 25th of June 1940. In that *Sanad* the Prime Minister Juddha Shumshere Rana had referred to the “doctrine of separation of power” prevalent in the “foreign countries.”

Lastly, in the middle and the latter parts of this period, a number of different Acts and laws were also issued. The Military Act (Jungi Ain), 1964, Court Marshall Act, 1971, Patent, Design and Trademark Act, 1963, Law related to Nepal Bank, Private Company Law, Law related to Fundamental Rights, Personal Freedom Act and so on are a few examples of the laws that were issued. However, the author would like to point out that these Acts and laws were just isolated incidents and hence it cannot be said that a systematic

²⁶ PROMOD SHUMSHERE RANA , RANA SASHANKO BRITANTA,(2nd ed), Pairavi Book House, Kathmandu (2065).

purpose-oriented reception had taken place. Now, in this section the author had introduced “a cardinal principle” of reception in the form of that “for the taking place of an act of reception, some form of interaction with an alien is a presupposition”; the same is now further amended and is to be supplemented by the desire and will requirement. No human endeavor can ever fruition in the absence of this. A systematic purpose-oriented desire and will for reception is exhibited by the forthcoming period and it is to this where the attention shall now be directed.

(b) The Period after the End of Rana Rule

In the field of legal change and by consequence reception, the jurist Savigny’s thesis of *Volkgeist* presents a good start. Law, he said, is a manifestation of the *Volkgeist*, the spirit of the people, so that it alters with the development of this spirit.²⁷ By nature, the process is an organic process of development but is nevertheless, slow. Such was the problem which the country faced at the beginning of this era and the nightmare came to the forefront with the introduction of democracy. Galvanic changes were taking place and the country had no option but that of reception. While the last period saw a few isolated receptions, it is precisely for this reason i.e. the slowness of organic development driven by the “desire and will requirement” which saw the reception in volume. Other causes of reception are as follows²⁸:

- Absence of Educational Institution
- Foreign Trained Resources
- Scarcity of Standard Legal Literature
- University Degree and Courses
- Effect of Globalization

Nepali legal system had exhibited prior to this period an indigenous development. But from this period onwards the proper term to describe the legal system of Nepal is “a mixed legal system.” Before listing out the all the major forms of reception, it is better to begin with by examining a few which has the profoundest importance.

(i) Democracy – is it also a form of reception?

Democracy as a system of government in the political sense of the word comes with its own set of rules and regulations when translated into legal terminology. Democracy requires its own set of institutions and laws and

²⁷ R.W.M. DIAS, JURISPRUDENCE (5th ed), Aditya Books, New Delhi, 306, (1985)

²⁸ Basnet, supranote 24 at. 19-21.

concepts. For example, Election laws coupled with the idea of Universal Franchise. The Election Commission as an institution to conduct and oversee the fairness of the election. The author would like to conclude that while democracy being so important a system of government in the modern era cannot be said to be a reception as every country practicing it should seek gain ownership of the same and as the traces of the roots of popular leadership, Citing that he, Prithvi Narayan Shah personally wanted to appoint Biraj Bakhathi had instead chosen Kalu Pandey as the Kazi because he was popular with the people. Popular leadership, the basic theme of democracy exhibited even against the wish of a King who was absolute and could do what he wished for. The relevant excerpt is given below:

“I was, in fact, surprised with his (Mr. Kalu Pandey) approach. In fact, he pleased me. Yes, it has been written in our Shastras (Religious Books) that King has to give responsibility to them with whom people are pleased. Therefore, I tried to understand the idea of the general people. Our people also wanted to give responsibility to Mr. Kalu Pandey. They said that they would feel protected if I could give responsibility to him (Mr. Kalu Pandey). Furthermore, I also wanted to seek the opinion of the Baishi and Chaubishi states (Petty States in the neighbourhood). They also were in favour of Mr. Kalu Pandey. They advised me that if Mr. Pandey gets responsibility both the external and domestic fronts of the state affairs would be better administered. In fact, I personally wanted to give responsibility to Mr. Biraj Bakhathi but Mr. Kalu Pandey was found more wise; therefore I choose him (Mr. Kalu Pandey) as a Kazi.”²⁹ – the basic philosophy behind democracy – can be seen also in the history of Nepal, the idea of laws and institutions and concepts, the substantive, procedural and administrative apparatus for giving effect to democracy can be considered as a form of reception.

(ii) Division of Laws

In the Rana rule, laws in Nepal was divided into only two types Civil (Dewani) and Criminal (Faujdari) but gradually the laws started getting divided into procedural, administrative, commercial and so on.³⁰ The author submits that this division of laws, technically should always have existed but nobody cared particularly to point out the same. Nonetheless, after the democracy

²⁹ Prithvi Narayan Shah, *Dibyaupadesh* retrieved from <http://www.lawcommission.gov.np/en/wp-content/uploads/2018/09/dibbaya-upadesh-of-prithivi-narayan-shah.pdf> at 5 accessed on 29/7/2019.

³⁰ Dhruva Bar Singh Thapa, “Nepal Ko Kanooni Pranali – Ek Samchipta Bibaran”, NYAYADOOT, Vol 1 No 110, Kathmandu, Nepal Bar Association, at. 77.

laws specific to them not only started to be made but with the influence of education and systematic study of law the division came to a forefront and became an established division in the legal system.

(iii) The Structure of the State and The System of Government

The structure of the state – States by nature are unitary; man need not be taught this structure of the state and it comes most naturally. But the federal system of government is a creation of the mind, a fiction having no parallel in nature and given effect by the laws designed to carry it out. The first such structure was practiced by America and was gradually imported to the various countries in the world. Nepal introduced the system of federal government through the Interim Constitution of Nepal, 2063 (2007) and gave effect to it through the now prevailing constitution i.e. Constitution of Nepal. This structure of the state, the Federal and Provincial division, is a new development of reception in the recent history of Nepal. **The system of government** – Nepal has since the introduction to democracy, adopted the British Bi-Cameral system of Government. Exception to this existed briefly under the Interim Constitution of Nepal, 2063 (2007) when a Unicameral house was practiced. The House of Parliament is a British transplant and enjoys the same form of rights, powers and privileges as enjoyed under the British system. a brief lapse in the Panchayat period exists as an exception to this when the law-making power was conferred to the King who exercised it under the advice and consent of the Rastriya Panchayat.³¹ After the fall of the Panchayat period, the author of the Acts again became the Parliament.³²

(iv) Doctrine of Precedent and Writ System: The Doctrine of Precedent and the Writ System became embedded in the system of Nepal with the introduction of the Pradhan Nyayalaya Act, 2008.³³ The system a British import is now constitutionally recognized.³⁴

(iv) Judicial Review of Legislation

The system initiated by the famous American case of *Marbury v. Madison*³⁵ was imported to Nepal through the Pradhan Nyayalaya Act, 2008. Laws repugnant to the constitution had been struck down by the Pradhan Nyayalaya in the cases of *Bishweshor Prasad Koirala v. Kathmandu Magistrate*.

³¹ *Evidence Act, 2031 (1974), Revenue Tribunal Act, 2031 (1974)*

³² *Arbitration Act, 2055 (1999), Legal Aid Act, 2054 (1997)*

³³ *Pradhan Nyayalaya Act, 2008 (1952), Section 30 and 31.*

³⁴ *CONSTITUTION OF NEPAL, Article 128(4) and 133.*

³⁵ 5 U.S. 137.

Presently it enjoys a constitutional status.³⁶ A special consideration about the judicial decisions referring to foreign judgment and to the words imported from foreign language has been presented in section 5 and 6 respectively of this article. Nevertheless, the author would like to end this section by highlighting some of the major receptions which are from some of the major legal families of the world.

(a) Reception from Common Law Family

- The court system and its organization, the adversarial nature of procedures followed in the court, the parliamentary form of government, judicial review, and the doctrine of *stare decisis*.
- Nepal adheres to the hierarchical court system, with the highest court having the power to lay down binding rules of law is a significant character of the common law.
- The establishment of the Office of the Attorney General is a noteworthy reception from the common law family.
- The role of the judge as a neutral umpire is a judicial attitude replicated from the common law tradition.
- The basic principles of criminal law such as the benefit of the doubt goes to the accused, the prosecutor has to prove the guilt beyond reasonable doubt, the right that one cannot be compelled to be a witness against oneself and consequently the right to remain silent are features of the Common Law criminal justice system which Nepal has received.
- Dominance of the law of procedure with over emphasis upon form is a trait exhibited by the legal system of Nepal which is a dominant character that can be attributed to the common law family.

(b) Reception from Civil Law Family

- The legal development of Nepal after the introduction of the democracy proceeded largely through Acts of Parliament or the Supreme Legislator i.e. largely through formal codes is a feature which the countries who can be associated with the Civil law family had developed in the 13th century.
- Special court system such as Labor Court, Revenue Tribunal, Administrative Court and so on is a concept borrowed from the civil law system.

³⁶ CONSTITUTION OF NEPAL, Art. 133, (2015) .

- Legislation as the dominant source of law and giving the top position to constitution.
- The Inquisitorial nature of litigation where the accused has to prove his/her innocence is followed in cases arising under the Narcotic Drugs (Control) Act, 2033 (1976),³⁷ Human Trafficking and Transportation (Control) Act, 2064 (2007),³⁸ Money Laundering Prevention Act, 2063 (2008),³⁹ the Contract Act, 2056⁴⁰ and presently, the Part on Contracts of the Country Civil Code Act, 2075,⁴¹ and The Prevention of Corruption Act, 2059 (2002).⁴² However, Supreme Court has recently laid down the principle that “In the claim as made by the plaintiff, the claim being taken that as the offence has been committed let the punishment be given without mentioning the basis and evidence of the elements as provided by the law as the mandatory constituent elements of crime for the happening of the crime, without establishing these elements and in the event that there is no concurrent presence of all the elements necessary for the crime, the meaning that the obligation not fulfilled by the plaintiff has to be fulfilled by the defendant cannot be made on the basis of the legal provision that the burden of proof lies in the defendant”⁴³; nevertheless stands as an exception in Human Trafficking and Transportation cases.

(c) Reception from Socialist Law Family

- No direct influence can be found but its effects are silently felt in the ways the country is operated.
- The mixed economic system is a system adopted to accommodate a positive trait of the socialist legal family.
- Planned Economic development which Nepal has started since 1957 is regarded as a contribution of the socialist system.
- The influence of socialist legal system can be felt when one looks at the sheer number of public enterprises, and also the promulgation of Land Reform Act, 1961.

³⁷ Narcotic Drugs (Control) Act, Section 12.

³⁸ Human Trafficking and Transportation (Control) Act, 2064 (2007) Section 9.

³⁹ Money Laundering Prevention Act, 2063 (2008), Section 28.

⁴⁰ The Contract Act, 2056, Section 14 (2) (b).

⁴¹ Contracts of the Country Civil Code Act, 2074, Section 518 (3) (b).

⁴² The Prevention of Corruption Act, 2059 (2002), Section 20.

⁴³ Yangchen Tamang v. Nepal Government, N.K.P. 2075, p. 1908.

- The second generation of human rights incorporated as fundamental right in the Constitution of Nepal⁴⁴ can be considered as the influence of socialist legal system.

(d) Reception from Oriental (Eastern) Laws

While writing the introductory section, the author had argued about Jayasthiti Malla's code and had concluded that "no one can borrow or receive that which is his/her own." The author therefore has a strong theoretical disagreement as to the category of Reception from Oriental (Eastern) Laws. The author respectfully submits that no such reception can take place as the laws or philosophy in question is also rightfully Nepal's own or the inherent heritage of *Himvatkhandato* which Nepal is a part. The same principle that a man cannot borrow or receive that which is his own applies in general to this category of reception.

(e) Reception from International Convention

- Nepal is a state party to a number of different international human rights treaties and conventions. As part of the obligation, Nepal is bound to harmonize its laws to meet her international obligations under the treaties and conventions.
- Nepal has adopted a dualist approach to international law. Under this approach, Section 9(1) of Treaty Act, 1990 gives an automatic legal recognition to international treaties to which Nepal is a state party. The provisions of such treaties are treated at par with Nepal laws.
- Lastly, the author would like to remind the readers about Narrative 1 as presented in the Introduction part of this article i.e. about common language, common aim understanding, harmonization, and about the loss of uniqueness aspects. Now, in this context Nepal has received a large number of laws under the requirements and/or pressure of such international organizations as the United Nations, International Monetary Fund (IMF), World Bank, and World Trade Organization. This situation can be interpreted as within any of the picture i.e. the potentiality or dangers of reception as recounted under that narrative.

(f) Popular Dissatisfaction with Reception⁴⁵

- **Jury System** where it has been argued that the adversarial trial system was adopted from Britain without incorporating one of the

⁴⁴ CONSTITUTION OF NEPA, Articles 31, 32, 33, 36 and 37.

⁴⁵ KHANAL, Supranote 11, 34-40.

basic features the Jury system. Here the concept has been received but the content has been ignored.

- **Legislative, Executive or Electoral Responsibility in the Appointment of Judges** where it has been argued that the legislative approval and ministerial and electoral responsibility makes the appointment process fairer but there are in appointment process controversies prevalent in Nepal. To avoid this, the fairer model of appointment was ultimately argued upon.
- **Plural Adjudication** where citing the example of France and Japan where it is said that ‘a single judge is no judge’ the practice of conducting trial in Nepal by a one judge bench was criticized.
- **Equipment and Information System** where the embracing of information technology was argued about. But since the time when Bishal Khanal had written Nepal has adopted information technology for example in the case registration process, case management system, company registration and so on. But still the use of technology is not satisfactory.
- **Public Participation in the Process of Settlement of Dispute** where the practice of allowing only the designated lawyers and specified witnesses without no public participation has been criticized. Here, the examples of Jury system of Britain, Lok Adalat of India and study group practiced in Japan were cited as examples for the criticism.

5. Special Consideration: Judicial Decisions referring to foreign context:

In the case of General Tung Shamsheer J.B. Rana et al Vs. Indian Airlines Corporation et al⁴⁶ the issue was presented before the Supreme Court seeking for the compensation to the relative of deceased who’s death was caused by Indian Airline run aircraft crash. Majority four out of Five Judges of larger full bench of Supreme Court quashed the case on the ground of expiry of limitation. Justice Prakash Bahadur K.C. however, dissenting the majority decision, wrote extensive majority opinion recognizing the plaint, having reliance of a number of foreign authority including case decision, writers’ write-up, books etc. The opinion also interpreted principles of private international law. In Tirtha Rajkumari Rana vs. Binod Shankar Shrestha

⁴⁶ NEPAL KANOON PATRIKA, Decision No. 389, at 150, Summon Prakasan, Kathamndu (2024)

succeeding the case of late Ram Shankar Shrestha⁴⁷ the issue was whether or not the order of specific performance possible under the domain Contract Act, 2023 for the transfer of immovable property the majority decision was delivered in favor of the issuance of specific performance order entitling the buyer to get immovable property transferred from the seller as per the contract. To reach the decision the bench took reference of history of concept of specific relief in England, transfer of equity right to the common law court from the Kings Court. It also cited the example of Specific Relief Act of India for reference. There are several other case decisions handed down by the Supreme Court of Nepal with the citation of foreign authors, foreign laws, case decisions. The area needs separate research.

6. Special Consideration: Words imported from Foreign Language:

Malla dynasty King Mahendra Malla paid visited to Delhi Palace following the invitation of the Emperor of Delhi. The tuning and means of entertainment of Delhi Palace extended special influence in Nepali Palace.⁴⁸ Because of having open border to proceed for extradition or to make correspondence Urdu was to be used ss a result, the words used in Urdu Parsian were used in the offices and Courts of Nepal. Accordingly, the words such got room in Nepali Law⁴⁹ Ain Akwar of Muslim rules in India was also observed to design Muluki Ain. However, there was no Influence of Muslim Law in Muluki Ain. The use of Urdu , Parsian words was extended in the laws made subsequently than the then Law.⁵⁰ Gradually, Muluki Ain was divided into 5 parts. Initially it was called Ain but qualified with Muluki (Country) later on. Mir Subba Muralidhar Upreti (1946 B.S.-1998 B.S.), the law graduate of the time had good command in Sanskrit, Parsian and English. He was awarded the Higher Designation entitled Mir Subba, had drafted five part Muliuki Ain. It is not over statement to say the influence of Parsian words on legal draft was the outcome of his personality.⁵¹ In this background, various foreign words like Phirad, Jikir, Itlayanama, Batil, Tatil, Writ, Ad hoc, Judge have been used in the laws of Nepal.

⁴⁷ Ibid 2049, Decision No. 4447 at 1

⁴⁸ Balchandra Sharma, Historical Sketch of Nepal, at 195 as quoted in REWATI RAMAN KHANAL, AN OUTLINE OF LEGAL HISTORY OF NEPAL, Mrs. Saraswati Khanal, Kathmandu, at 311,(2059 B.S).

⁴⁹ REWATI RAMAN KHANAL, AN OUTLINE OF LEGAL HISTORY OF NEPAL, Mrs. Saraswati Khanal, Kathmandu, at 311, (2059 B.S).

⁵⁰ Ibid, at 312

⁵¹ Advocate Sakuntala Upreti, Late Muralidhar Upreti, B.A. L.L.B. *Sworgiya Muralidhar Upreti. B.A. L.L.B.*, in NEPALI KANOON, Vol. 5 No. 5, Nepal Law Book Company Pvt. Ltd. Ram Shah Path, Kathmandu 45 (Poush, 2045 B.S.).

7. Conclusion

The fact that this article is being written in English is itself a testimony to reception. In the modern time reception of law has been global phenomenon due to international convention obligations and membership obligations in the global forum and organizations of the nations. Also the growing communications, international banking transactions, international contracts, dispute settlement mechanism have further necessitated reception of law.

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