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Evolving Trend of Domicile and Nationality in Private International Law with special reference to Nepal

Sagar Baral[1,2*]

1. Nepal Bar Council (Advocate)

2. PIL Activist

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Abstract

Understanding the domicile and nationality is the key to properly adjudicating a case involving a foreign element by the judiciary. In this milieu, this paper aspires to analyse the concept of domicile and nationality with its evolving trend and evaluate the Nepalese judicial and legal policy on domicile and nationality through observation of international and local practices. Furthermore, this paper aims to trace the current policy gap in the legal and judicial interpretation of the domicile and nationality in the Nepalese context, including the citizenship bill. The paper concludes that connecting factors need to be used contextually on a case-to-case basis with proper policy genesis. It also prescribes key recommendations to address existing gaps, such as interpreting the habitual residence and nationality, domesticating the various Convention on the PIL such as Hague Conference on PIL, Law Applicable to Matrimonial Property Regimes, 1978, Celebration and Recognition of the Validity of Marriage, 1978, etc.

Keywords: domicile, nationality, habitual residence, foreign element, civil code

* Corresponding author; S.Baral (castro.sagar1@gmail.com)

1. Introduction

In simple parlance, a person's domicile is the place or country which is the centre of his/her life and the gravity (Vakils, 2007). As per Justice Hughes, "domicile is a neutral rule of law used for defining the system of personal law which governs the personal affairs of the person. " (A.G. v. Yule, 1931). The Black Law Dictionary defines nationality as "the relationship between citizens of nation and nation, customarily involving the allegiance of citizens and the protection by the state".

In private international law (PIL), possessing citizenship is prima facia being a national of a particular country (Haandrikman, 1982); thus, citizens' allegiances towards the state are irrelevant. PIL advocates use nationality and citizenship interchangeably despite their distinct political science and public international law meanings. The law governing the individual's status, such as marriage, capacity and personality, is determined based on the nationality factors reflected in individuals' citizenship documents (Hosseini et al., 2019); if there are arrangements in the national legislation to apply it as a connecting factor when there is an element of foreign nature.

The connecting factors, viz. domicile (thaibasobas) and nationality(Rashtriyata), have been significantly used in Nepalese legislation in a piecemeal way. However, due to the lack of legal definition epistemological gap has been created in understanding the meaning of the word from the Nepalese Legal System Context.

In the history of conflict of laws, the domicile served as a geographic link between an individual and the state's law. The domicile was the place of the person's permanent residence and the centre of his private life. In the 19th century, however, the domicile concept started to fade in continental Europe with the emergence of the nationality concept (McEleavy & McEleavy 2007). The work of Italian jurist Pasquale Stanislao Mancini (1817-1888) saw nationality as the foundation of PIL: a nation's laws apply to all citizens of that country, wherever they are. Thus, most civil law countries, such as continental Europe, preferred nationality as the connecting factor. The concept was first adopted in France in 1803 with the promulgation of the Napoleonic Code, and its relevancy is prevalent in the laws of most continental European countries, some South American countries, and Japan. However, in contrast, the common law system prefers domicile as the general trend.

Although the development of PIL with domicile and nationality started in occidental society at the beginning of the early 19th century, in Nepal's context, it is relatively undeveloped. Until the promulgation of the National Civil Code, 2074 (The "Civil Code"), no specific legislation governing the PIL existed. Over the past few years, the Nepalese judiciary has witnessed several cases involving the foreign element that

necessitates connecting the person with the legal system using the approach of either domicile or nationality. Thus, judicial activism has addressed such policy gaps through foreign law and cases as persuasive references.

In this milieu, the realisation from the Nepalese legal fraternity that it is difficult to govern human transactions solely by the local law in the globalised, liberalised, and polycentric era has compelled to enact the Civil Law, which uses the connecting factor to adjudicate the legal disputes involving a foreign element. However, the journey does not end here, as the current policy gap in the legal and judicial interpretation of the domicile and nationality in the Nepalese context needs to be traced under the evolving trend.

2. Rules regarding Domicile and Nationality

Compared with other kinds of law, a methodical body of rules on the conflict of laws only came into existence at a relatively late phase. The discipline began to proliferate in the late 19th century, when international trade and financial transactions expanded rapidly, also causing the development of family law and specific commercial law involving a foreign element. English courts then developed more sophisticated domicile rules for adjudicating cases involving foreign elements by relying on the writings of jurists such as Story J, A.V Dicey, Huber etc. Based on it, English writer Elizabeth Crawford set down the following rules of the domicile in an organised fashion extracting a comprehensible set of principles from the case law (Crawford, 1998).

- No person can be without a domicile, though they may lack a home and have no knowledge of a legal home.
- No person can have more than one domicile at one time .
- There is a presumption in favour of an existing domicile. The onus of proof of change lies before the party, arguing that change has taken palace.
- Domicile is always ascertained under the lex fori.
- An existing Domicile is presumed to continue until a new domicile is proven.
- The person who alleges a person's domicile is of a particular country must prove it.

Furthermore, the person can have only a domicile and more than one nationality. Similarly, the principle of "jus sanguinis" and the "jus soli" applies in the acquisition of nationality. A person born anywhere in the world would automatically acquire the

parent's nationality, called jus sanguinis (Collins, 2014, p. 2134). Additionally, a birth within a particular country would automatically acquire the nationality of that country, called "jus soli"(Scott, 1930). The jus soli episteme is traced in the oriental philosophy, which views that one born to a particular state shall only be allegiance to that state (bumiputra matra bhumi prati bhaphadar huncha) (Baral &Adhikari, 2016).

Furthermore, from the art. 15, Universal Declaration of Human Rights (UDHR, 1948), the following rules of nationality are derived as follows:

- Everyone has the right to have a nationality.
- No one shall be arbitrarily deprived of nationality.
- No person shall be denied the right to change nationality.

Nepal has followed both the principle of acquisition of nationality. Adhering to the jus sanguinis principle, Constitution of Nepal, art. 11(3) mentions that "a child of a citizen who has acquired the citizenship of Nepal by birth before the commencement of the constitution of Nepal shall acquire the citizenship of Nepal by descent". According to Citizenship Act 2063, anyone born in Nepal before April 12 1990, can acquire citizenship by birth. However, despite their permanent domicile in Nepal, their children have not gotten citizenship by descent. The story would have been different if the President had assented to the Citizenship Bill.

Furthermore, the Jus Soli doctrine in the Nepalese constitution provides that any child born in Nepal to a Nepalese woman with an unidentified father shall be entitled to citizenship by descent. Nonetheless, the Citizenship Bill stated that the petitioner's mother must provide a self-declaration that the father is "unidentifiable". It has criminalised the false claim of an unidentified father, which is against the women's basic dignity and right to privacy.

Moreover, the principle of jus soli and jus sanguinis is followed conditionally in the constitution, which might lead to complexity in applying PIL. The Nepalese forum judge can examine the nationality of foreign countries from the Nepalese principle of nationality and may denounce it through the public policy exception and vice-versa. The Nepalese citizenship law is discriminatory and seriously prejudiced against gender justice; the foreign forum court may refuse to apply Nepalese law on the public policy exception. Foreign law that seriously infringes human rights should not be recognised (Knowler, 2018) and disregarding the principle of comity is justified in PIL to protect human rights. As the public policy exception implies setting aside foreign law in favour of one's domestic law, there are also often concerns of

parochialism and undermining of the complete PIL system.

The case Richardson v Mellish (1824) observes public policy exception as "a very unruly horse, and once you get astride it, you never know where it will carry you." Despite concerns about denouncing the entire PIL, it is a necessary evil in PIL. Thus, discriminatory citizen bills against the fundamental tenets of civilised society have a high chance of denouncement by the forum court. In the world of diverse legal systems, the significance of the public policy exception has been a vital tool for protecting society's episteme and fundamental values.

3. Types of Domiciles

3.1 Domicile of Origin

An individual's domicile of origin is based on the domicile of one of his parents at the time of his/her birth or associated with an individual's place of birth. Hence, the domicile of origin often coincides with nationality. In the case Udny v. Udny (1869), Colonel Udny was born in Tuscany and lived in Tuscany, where his father was a British consular. However, his father was domiciled in Scotland. The court ruled that Udny's domicile of origin is based on the parent's domicile at the time of birth, irrespective of where the individual is born. In this case, the court rejected place of birth as the basis of domicile of origin.

The general rules of domicile of origin are (Fawett & North, 1999):

- In the case of a legitimate child, the domicile of his/her father governs the children's domicile. In contrast, the domicile of an illegitimate child is governed by the domicile of his/her mother. The rule is against the fundamental values and norms the civilised society strives for wellbeing. The recognition of the single mother, surrogacy and adoption has further eroded this rule. In modern jurisprudence, the concept of the child's legitimacy is highly irrelevant in the domicile of origin because the child's best interest should be the principal basis for governing the children's domicile .
- The domicile of origin of children can be changed by adoption.
- In case children are found within the territory of a particular country, children acquire the domicile of origin of that country. This provision overlaps with the exceptional method of acquiring nationality by the children whose parents are unknown.
- For instance, art. 11(4) of the Constitution of Nepal mentions that a " minor who is found within Nepal and the whereabouts of whose father and mother are not known shall until the father or the mother of the child is traced, be a citizen of

Nepal by descent."

A person may abandon her domicile of origin in favour of a new domicile of choice. An intent to take a new abode and abandon the old must be manifested to effect such change. It is possible, however, that the domicile of origin may revive in cases where the domicile of choice is abandoned, and no new domicile of choice is designated (Ronald, 1974). For example, in Bell v Kennedy (1868), Belle was originally from Jamaica as his domicile of origin was in Jamaica but, after leaving Jamaica, was unsure whether to settle in Scotland or England. The House of Lords thus ruled that he had not lost his Jamaican domicile of origin.

Nonetheless, the doctrine of revival has been much criticised by Morris as artificial. Broadly, upon the abandonment of a domicile of choice, any one of three paths may be pursued, the law may give him back his original domicile, or one of his domiciles (acquired either by the construction of law or by choice) intermediate between the domicile of origin and his last domicile, or it may compel him to retain the last domicile of choice (Effect of Abandonment, 1914 , p. 396). Generally, the American court applies the rule of persistence of the last domicile and the revival of the original domicile until the new domicile is acquired.

3.2 Domicile of Dependence:

The domicile of the dependent is and changes with the domicile of the person to whom they are dependent. The general rule for it is: (Mayss, 1998).

- After a woman marries a person with a different domicile, the wife's domicile will be changed, and her domicile will be that of the husband.
- In the case of legitimate children, the domicile of the father prevails. Conversely, for illegitimate children, the domicile of the mother prevails. Jurisprudentially, using the illegitimate adjective for the child is irrational because a child has no role to play in her/his birth. Hence, there may be illegitimate parents but no illegitimate children.
- In the case of adopted children, the domicile of adopted parents prevails.
- If the person is mentally disordered from birth (considered dependent), his/her domicile is the domicile of whom he/she is dependent. If the person becomes mentally disordered at birth, then his/her domicile is the person's domicile before he/she becomes mentally disordered.

3.3 Domicile of Choice:

Every person can acquire a domicile of choice by the blend of residence and intention

(O'Brien, 1999). Furthermore, O'Brien defined residence as the physical presence of the inhabitant for an unlimited period. Duration is not an important element in determining the domicile of choice, as the intention to remain permanently must be there. There is no necessity for the specific length of residence to acquire a domicile of choice, but his/her intention must be to make such state his/her permanent home (Ramsey v Royal Liverpool Infirmary, 1930).

For instance, If the "A" intends to reside in China for a fixed time of 20 years, then a domicile of choice is not acquired in China. Furthermore, the case White v. Tennant (1888) also observes that duration does not need to be for a long time to acquire a domicile of choice. The immigrant can acquire the particular residence if he/she intends to settle in that place. However, the intention to reside must be permanent or indefinite. However, if the person intends to leave in fulfilment of contingency, it will depend upon the contingency. For instance, if A says, " I will live in Nepal until I get the lottery." The statement of "A" portrays that he will leave for an indefinite period causing the acquisition of a domicile of choice. In contrast, if A leaves in Nepal due to his employment contract, he lacks the intention to leave permanently, causing no acquisition of domicile.

Regarding the determination of intention, in the case Ross v. Ross (1894), it was stated that "a person's claim must be fortified and carried into effect by conduct and action consistent with expressions made." The essence is that the law does not look at what a person says in relation to his/her domicile but what a person does and his/her conduct inference. On the other hand, Udny v. Udny (1869) specifies that "residence has taken freely without external necessity such as duties of office, demands of creditors, illness, etc." determine the permanent intention to reside. Moreover, in "Drevon v. Drevon (1864)", it was stated that "no information is too trivial in determining the intention." Thus, every conduct and context of the person leaving a particular country must be observed to know his intention to stay permanently or indefinitely.

Historically, the domicile of choice has been taken as the basis for granting the citizenship certificate in Nepal. The first citizenship act of 2009 stated that the child born to a "foreign father and Nepali mother" or" foreign mother and Nepali father" shall get a citizenship certificate if they intend to stay permanently in Nepal.

4. Domicile Vs. Nationality

The traditional concept of domicile has received criticism following critics from reform agencies in England (Domicile and Habitual Residence as Connecting Factors

in the Conflict of Laws), which was pointed out in the 1954 First Report of the PIL Committee of England.

- The contention relates to the revival of the domicile of origin when the domicile of choice is abandoned without obtaining a new domicile of choice and the fact that there is a heavy onus of proof on the person who proclaims the change in the domicile of origin, which seems to be unjustified and irrational.
- The struggle attached to proving the intention required to acquire a domicile of choice.
- There is no consistent concept of domicile, so the construction of its meaning is left to the lex fori.

The law of the country of one's permanent home, which is the notion of domicile, is more appropriate to prescribe questions of property status than one's nationality, with which one may have slight or no practical linkage (Rogerson, 2013). For example, a Nepali person immigrating to the United States may never obtain citizenship in that country but may live for fifty years in New York, never return to Nepal, or have any interest in doing so. It may be argued that to apply Irish law to questions of that man's status or of his property at the time of his death (which an application of nationality as a connecting factor would require) is less appropriate than to apply the law of New York, where he had long since become domiciled. Conversely, a person's nationality usually is easy to determine, whereas a person's domicile is frequently quite challenging to establish.

The application of nationality as a connecting factor is more religious friendly too. For instance, a Muslim immigrant in a European country may wish to obey Sharia law as he may feel connected to his motherland and may intend to be governed by his national law(nationality).

Inversely, the application of the lex domicilii will exclude such a possibility. Nevertheless, nationality also has a flaw. Whilst a person may have only one domicile, he may have more than one nationality or none. In such cases, nationality as a connecting factor may become complex or inoperative. The application of the connecting factor of nationality to the capacity regarding international commerce does not seem objectively justifiable as there is a problem in relation to the transit of goods. Moreover, there is a conundrum in the case of dual citizenship of any party involving the foreign element.

5. Evolving new actors in the domicile of choice.

In most cases, it will be relatively easier to decide where somebody is domiciled, but

some exceptional case law proves that there can be great scope for an argument where the issue is disputed. For example, tracing the domicile of refugees is quite challenging as they do not have the intention to leave permanently in the host country, but their stay is indefinite. However, habitual residence is more applicable to them . For fugitive, in the case, Puttick v. AG (1981): porosities fugitive in German fled to England on a forged passport. The court stated that even though she had the requisite intention to remain in England permanently is not domiciled as the residence is illegal and obtained by fraud. Similarly, the domicile of choice for a fugitive is a compulsion to them and is not voluntary, but due to the circumstance as they need to escape from the consequences of their crime and their civil liabilities.

Moreover, public servants, who are stationed in foreign countries by their governments, like-, consular, ambassadors and staff in embassies etc., do not acquire a domicile of choice in such states, and their existing domicile is continued. However, if any public servant continues to live in that state after he/she has been dismissed from his/her job, he/she may obtain a domicile of choice in that state. In "Stone v. Stone (1959), members of the U.S. army were deployed in Europe. He spent all his holidays in England, intending to settle there upon his resignation. A court found that he had acquired a residence of choice in the U.K. Similarly, prisoners retain their original domicile irrespective of where they are housed or kept.

Additionally, for persons who are liable for deportation, in the case Cruh v. Cruh (1945), it was stated that a deportation order alone is not insufficient to negate the domicile that they have acquired at that concurrent movement. They will lose it only when deported. For migrant workers(employees), if the person goes to a country merely for work, he/she will not get a domicile of choice. In the case, A.G. v. Rowe (2020), the employee's domiciles were questioned, and the Sri Lanka court held that "mere work-related relocation does not amount to the new domicile of choice." With the increasing complexity of the legal system, the common law rules laid down by judges need to reflect a new socio-cultural reality as outdated laws are artificial or inadequate. Thus, the domicile of refugees, public servants, foreign deployed army, fugitives, refugees, etc., also must be traced. In all these evolving actors, the domicile of choice element- the fact of residence (factum) and the intention to reside permanently (animus) has been used to their existing domicile as principally, everyone should have a domicile .

6. Habitual Residence as anti-thesis of Nationality and Domicile

The word habitual residence contains the word habitual and the residence. The literal meaning of the word habitual is continuous, whereas the "residence connotes more

than mere presence that carries the notion of time" (O'Brien, 1999). Nevertheless, the period of residence, nevertheless short, does direct that someone was living in a particular place (R v. London Borough of Barnet, 1983). Logically, it can be inferred that period of the provisional location in any country without any work, family, and emotional or political commitment to the place is not the residence as it needs to be more than present. Similarly, forceful residence cannot also suffice for residence per se. Thus, one element to prove habitual residence is the continuity of residence, which is a part of the regular order of life, irrespective of long or short duration (Ferrari & Arroyo, 2019).

As per Davrados (2018), the traditional debate between domicile and nationality gave way to the emerging connecting factor of habitual residence. There is no universally agreed definition of habitual residence as it is a new connecting factor. Even within national jurisdictions, including Nepal (Samanya basobas is the Nepali translation of habitual residence), legislation has yet to define the term. The reason might avoid the dry formalism associated with the alternative concepts of domicile and nationality and allow the judiciary to define it on a case-to-case basis . In Britain's landmark case, Abduction: Custody Right (1990) of Britain, Lord Brandon held that "habitual residence is a matter of fact to be decided by reference to the circumstances of the case." Habitual residence means being physically present in a place for a certain period as a part of the regular order of life, for employment, education or even as a political hostage.

Furthermore, Abduction: Custody Right (1990) also held that amount of time spent in a particular place is one-factor determining habitual residence but not the sole factor. Duration, durability and continuity of residence must be considered in determining whether a residence is habitual (Walker & Janet, 2010). In other words, facts of a personal or professional nature that exhibit a lasting bond between the individual and the place of residence should be considered. The voluntary establishment of a residence and the person's willingness to maintain that place of residence are not the conditions of the existence of habitual residence. However, an individual's animus (intentions) can be considered in determining whether the person possesses a residence of the character of that residence. Thus, a place where a person has settled to live for an appreciable period and under all circumstances is his/her the centre of that person's life. As a general rule, a person usually has only one place of habitual residence, which he/she returns to regularly and routinely after visiting other places.

For tax legislation to levy tax, 'residence' needs to be equated with habitual residence, excluding the accidental or temporary stay less than the law prescribers (Levene v

IRC, 1928). In this context, the Income Tax Act (2002) of Nepal has comprehensively defined the resident as the natural person who has the habitual place of abode in Nepal and a person present in Nepal for 183 days or more in 365 consecutive days, which may include a foreigner too. Besides, a permanent foreign establishment of a non-resident person in Nepal is also considered a resident for tax purposes. Thus, if the person is a resident of Nepal, his/her income shall be subject to income tax of Nepal irrespective of the situation of its source of income being inside or outside of Nepal. Hence, Income Tax Act (2002) prescribes the application of it to the resident person outside the territory of Nepal too. Hence, the act has applied the worldwide principle of residents in imposing the tax, which may even lead to double taxation. Going beyond the usual rule, it seems that there can be two residences for income tax if there is an inconsistency between the policy of the sovereign country. This necessitates maintaining the policy coherency within the international community for tax purposes.

There might be confusing to separate the domicile and habitual residence. Unlike domicile, habitual residence involves only the apparent rather than future intention, implicating a weaker "animus" (Zhang, 2018a, p. 178). Thus, the habitual residence is more fact-oriented. Zhang observes that habitual residence heavily depends on a case's facts, and its definition varies. Thus its threefold test is done from the actual residence, continuity of stay and persistence to remain. Tracing the nationality is easier than domicile, and habitual residence as the nationality shows the legal connection with the particular state determined based on legal documents. Unlike habitual residence and domicile, nationality does not require the examination of the person's intention, which is to be assessed subjectively on a case-to-case basis. Hence, nationality is highly objective, but habitual residence is subjective .

In the international setting, Hague Conference on Private International Law prefers habitual residence as the primary connecting factor (Sarcevic et al., 2020). For instance, the Hague Convention of 1980 of the Civil Aspects of International Child Abduction article 3 mentions that "removal or the retention of a child is to be considered unlawful if it violates the rights of custody attributed to a person, an institution or any other body, under the law of the country in which the child was habitually resident immediately before the removal or retention". Convention on the Recognition of Divorces and Legal Separations, 1970 has also taken habitual residence as the primary factor. In regional level E.U. Regulation, No. 650/2012 states "the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death." In "Rome I" and "Rome II", habitual residence is also a primary connecting factor for determining the governing

law in contracts, torts, and related areas. Outside European Union, the habitual residence has already been adopted as a connecting factor in Irish legislation (Succession Act 1965). In Britain, it is being used to an increasing degree in legislation in such important areas as matrimonial jurisdiction (Domicile and Matrimonial Proceedings Act 1973), recognition of foreign divorces (Wills Act 1963) and succession. In China, the 2010 Choice of Law Statute makes habitual residence a basic connecting factor for the choice of law (Zhang, 2011b, p. 84-155). Conversely, only a few conventions prioritise domicile as a primary connecting factor, such as the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007.

The technicalities associated with the domicile have decreased its significance. In contested cases, establishing the domicile can be an expensive and protracted business as nothing in the individual's life cannot be grist to the judicial mill (O'Brien, 1999, p. 86). Similarly, the long-duration residence does not necessarily result in the domicile as the intention should be there to make a permanent home, and the intention is difficult to ascertain. Furthermore, the law of domicile does not have a rule for recognising the domicile of children of same-sex relations. Sometimes it is hard to demonstrate the chief residence in case of having residence in a different state. It is easier to regain a habitual residence in a country where one has already been established and left than to establish a residence where one has not lived previously (Nessa v Chief Adjudication Officer, 1999).

Nationality as a connecting factor cannot address situations where nationality could not be identified, such as statelessness, refugees, etc. Nationality is a political rather than a civil term. Thus, any state can quickly terminate and withdraw the nationality of any particular person, such as fugitives and persons in political asylum. Moreover, nationality and home are different. A person may not have a home in the state where he/she is national. Sometimes the person may have lost all connection with the law of nationality. Furthermore, nationality does not always specify the internal law to which a person is a subject, such as in various political units in Canada and the USA. This may require the further supplementary test to connect with a definite system of internal law.

In this complication, the habitual residence has been gaining popularity as the best connecting factor. In numerous E.U. legislation, it is accepted as the primary connecting factor with the motive of legal unification, facilitating the free movement of persons and removing barriers to that free movement. The difference in the application of connecting factors between the countries may lead to different outcomes, which frustrates the whole system of PIL, leading to incoherence and

unpredictability (Rogerson, 2013).

7. The Legal Policy Setup

Due to the negligible incidence of cases involving foreign elements before the 1990s, the PIL issues were neglected, overlooked, misapplied and misunderstood. Even Prof. Prosser describes private international law as "a dismal swamp, filled with quaking quagmires and inhabited by learned but eccentric professors who theorise about mysterious matters in a strange and incomprehensible jargon (Prosser, 1953). However, after the 1990s owing to the increase in the transnational relationship, trade liberalisation, foreign investment, high mobility of people, the shift from the isolationist to open foreign policy, new legal education and a wave of change, the demand was raised to inculcate the PIL in the national legal regime. As a result, with the connecting factor addressed, the following provisions are included in Civil Code (2017)

7.1 Nepalese Domicile and Nationality Trend for Natural Person

In the Civil Code (2017), nationality is taken as the primary connecting factor in "determination of legal capacity (sec. 693)", "presumption of disappearance or death of foreigner (sec. 694)", "determination of successor (sec. 695)", "consequence of marriage (sec. 701)", "paternal authority governance (sec. 702)", "adoptive person governance (sec. 703)", "determination of guardianship or curatorship (sec. 704)" and "validity of donation and gift (sec. 711)" In most of the cases, the habitual residence is taken as a secondary connecting factor. Conversely, in terms of regulation of property, the Civil Code (2017) prescribes "habitual residence as the mere factor for the governance of the immovable property (sec. 698(1)". Also, the Civil Code states that "the matter of separation of bread and board shall be governed by the law of the country of habitual residence of the married couple (sec. 705(1)." However, there is not even a single domicile word used in PIL provision of the Civil Code.

From the Civil Code analysis, it is traced that single nationality and habitual residence exist for entire Nepal for the "Conflict of Laws." However, it seems prima facia unconstitutional as the Constitution of Nepal has provided "federal citizenship with provincial identity (art. 10(2)." the "provincial identity" inter-alia is the basis of the President's return of the citizenship bill for reconsidering. However, there might be different nationalities and habitual residences in the USA and Canada, depending upon the states. The difference can be due to the nature of federalism as the USA and Canada are based on the " Coming Together Model", and Nepal is the "Holding Together Model".

7.2 Nepalese Domicile and Nationality Trend for Legal Person

In PIL, the corporation as a legal person's domicile and nationality is needed for several purposes, including tax assessment. In the civil law system, the domicile and nationality of the corporation are determined by the place of its incorporation or registration (Sharma, 2016). In the common law system, the domicile and nationality coincide. In contrast, in the civil law system, the nationality of the corporation is determined by the principal place of business of the corporation or the place where the head office is located (Sharma, 2016). In recent years, Muchlinski (2012) suggested that certain private international law issues have been subsumed into an overarching transnational legal regime referred to as the lex mercatoria. In the context of Nepal, Civil Code prescribes that the legal capacity or status of a corporate body is determined primarily by the law of the country where it is incorporated and if that cannot be traced according to the law of the country where the headquarters of such body is located, however, if such a country cannot be ascertained, according to the law of the country where the place of transaction of such a body is located.

8. Nepalese Judiciary Opinion: Filing the Policy Gap

Due to the absence of indigenous law and literature in this epistemological domain, the cases involving foreign elements were left to the judge's discretion. The judge fulfilled such comprehensive policy and legal gaps despite the principal basis that they must refrain from making policy while adjudicating the cases. The Tunga Samsher JBR v Indian Airlines Corporation (1967) was the first case involving a foreign element. The case addressed the question of applying foreign law in adjudicating the case by a Nepal court when the defendant was a foreign national. Although the majority opinion completely overlooked the PIL principle, Justice Prakash K.C expressed the dissenting opinion, stating that foreign law can be applied in a case involving a foreign element. He also held that the connecting factors based on nationality and domicile theory could be adopted. This dissenting opinion introduced the Nepalese judicial system to the conception of PIL, which is considered a landmark in the development of PIL in Nepal. Subsequently, in the case Meena Devi v. Shanta shumsher (1972), the supreme court stated that even if the foreign element is under perfect control of the court, the court should not decide on the cases involving foreign elements if the execution of such decisions cannot be accomplished. The court implicitly denounces the nationality, domicile, or habitual residence connecting factor and stresses the lex situs connecting factor in the case involving immovable property. The Supreme Court, in the case Rajmata Basanta Kunwarawa v. Uma Sundari Devi (1972), adhered to the same precedent as propounded in the Meena Devi case. Furthermore, in the case Sabina Pandey v. Krishnaraj Pandey (2008), the

Supreme court refused to recognise the foreign judgment made by the Oklahoma court on the basis that Sabina Pandey, the defendant in this divorce case, was not the domicile of the USA. Refusal to recognise foreign judgment, in this case, was also because of the denial of a fair trial. The court used the public policy exception for non-recognition of foreign judgment as the fair trial was not followed in the Oklahoma court. However, it did not clarify the connotation of public policy. The civil code has not also addressed the meaning of the public policy. The drafter's intent might be that defining public policy may lead to limitation of the word, and such limitation could cause absurdity and be problematic in the future as such concepts are indefinite and need case-to-case analysis. For instance, the Nepalese court can never recognise the proxy marriage of an American girl and a Nepali boy or same-sex marriages. Similarly, divorce by the triple talaq cannot be recognised in Nepal, even though it is between Nepalese Muslims and Indian Muslims. Although the public policy has been analysed and defined in several cases, there are minimal national and international instruments defining public policy. This exception is necessary for the context of PIL, but its boundaries cannot be easily defined .

9. Existing Lacuna in the Legal Policy: An Analyses

The merits of the unwritten conflict of law rules are their flexibility and adaptability. However, insufficient guidance on identifying the prerequisites for applying these unwritten rules (Fiorini, 2005) for a state like Nepal does not work appropriately due to minimal knowledge of PIL. PIL is addressed in the Civil Code but has wide policy gaps in addressing the connecting factor, including the lack of definition of connecting factor habitual residence. In case of vagueness and ambiguity of any legal provision, the Civil Code directs the court to follow the generally recognised principles of justice.

The international literature from the Cheshire to North & Fawcett has agreed to give importance to intention and time for residents to become habitual. Further, it has been argued that a person may have more than one habitual residence or none. In these circumstances, it might well be regarded as disagreeable to substitute habitual residence for domicile unless special legal provisions were made to illuminate the part played by intention and length of residence whether a residence was habitual and to cover cases where a person might have no habitual residence or have more than one. In any event, if the legislation did not make such a provision at the outset, it is clear that the courts would have to do so subsequently. The paradox is that, on the one hand, the judiciary does not have the power to be a policy-making body; on the other hand, it has to define habitual residence and public policy on a case-to-case basis.

Analysing International and European PIL Instruments, the trend is the negation of the domicile and nationality and consideration of habitual residence, but international and European instruments also lack the precise definition of habitual residence. Such instruments might have resisted the term definition, so courts will enjoy more latitude to determine habitual residence more flexibly. Nonetheless, such a blanket approach has a high probability of abuse in the Nepalese policy environment, where the policy gap in terms of the definition of any term has high prospects of abuse even by the judiciary.

Furthermore, most international conventions, regional conventions, and Private International Law treat the habitual residence as the primary connecting factor, but Nepalese Private International Law takes nationality as the primary connecting factor. The reason might be the presumption of drafters that it is comparatively easier to determine nationality. However, in the globalised world, transnationalism has given rise to the concept of dual nationality. To even negate the double nationality consequences, the civil code has stated that "in case of double nationality, the law of the country of habitual residence is to be applied." Adaptation of nationality principle is adhering to the closed legal system and resisting assimilation.

Moreover, the Constitution of Nepal deals with NRN citizenship, stating that the non-residential citizenship of Nepal may be granted to a person who has acquired the citizenship of a foreign country. In these circumstances, legal issues such as partition, property transfer, deed execution, contract implementation, and investment disputes will inevitably involve them. As Foreign citizens of Nepalese origin live in more than 100 countries, conflict of laws between their nationality country and Nepal is unavoidable. The code and the Non-Resident Nepali Act (2008) have not addressed elaborately dual nationality aspects of NRN in tracing the connecting factor. For NRN, as per the Civil Code, "habitual residence has been completely avoided, and laws of Nepal have been taken into consideration", despite the probability that some NRN may not have a substantial connection to Nepal later in life.

Similarly, the Civil Code has not addressed domicile as a connecting factor. Consequently, domicile and its new three-fold division of kinds into the domicile of dependency, domicile of origin, and domicile of choice have not been recognised. As the nationality provision of the Civil Code is not dependent on the residence, its use would increase the risks of connecting a person with a state that he/she may never have visited. The nationality achieves stability by sacrificing a human being's liberty to adopt the legal system of his own choice. The fundamental opposition to the concept of nationality is that it may require the application to a human being, against his/her wishes and desires, of the laws of a country to escape from which he has

perhaps risked his life (Trevor C, 2008, pp. 899–908). So, applying nationality all the time without understanding the case context will not serve the purpose of justice.

Although Nepal is a party to the Vienna Convention on the diplomatic relationship, 1961 and Vienna Convention on the consular relationship, 1963, diplomatic immunity is not reflected in the code in PIL on the application of connecting factor. It may lead to a problem as the court rejects international law in its interpretation until it is included in domestic law. The Supreme court of Nepal, in the case Gyan Rai v. Ministry of Law and Justice (2002), stated that the provision in Section 9(1) of the Treaty Act, 1990 views that the to be law and law are different things in the spirit of the act, therefore, international law cannot be directly applied in Nepal.

The code of using domicile, habitual residence, or nationality in taxation for natural and legal persons is unclear. Lex specialis, Income Tax Act (2002) also fails to properly explain the connecting factor necessary to impose tax obligations in case of tax evasion techniques such as transfer pricing and the use of general anti-avoidance rule (GAAR) in the context of conflict of laws. In Dawarikanath Dhungel et al. v. Large Tax Payers Office (2017) case, the Supreme Court faced a challenge in tracing the conducive company connecting factor to Nepal to impose the capital gain tax due to legal lacuna in the Civil Code as well as the Income Tax Act (2002). In this case, Ncell refused to pay capital gains tax, claiming that the sell transaction was not done by it but by its parent companies, registered outside Nepal. The Civil Code does not recognise the concept of effective management.

As per the Civil Code (2017), the legal capacity or status of a corporate body is determined primarily by the law of the country where it is incorporated and if that cannot be traced according to the law of the country where the headquarters of such body is located (sec. 693(3). However, if even such a country cannot be ascertained, according to the law of the country where the place of transaction of such a body is located. The drafter's superfluous attitude determines corporation domicile and nationality as in the present globalised area; every corporation has a country of registration and headquarters. Any business operation without registration falls within the domain of illicit activities, irrespective of PIL. Thus, the Civil Code (2017) unnecessarily adds such redundancy to the words. However, from the other side of the coin, it can also be the drafter's tendency to tax or trace and make them bear any legal consequence or obligation, even if illegally made. For example, in India, cryptocurrency trade is illegal, but tax law makes it mandatory to pay capital gain tax in case of transaction.

Additionally, the conventional common law rule on the domicile of married women,

the domicile of married women is in contravention art. 15(4) of the Convention on the Elimination of All Forms of Discrimination against Women, 1979. The rule has long been criticised, and Lord Denning said that it was "the last barbarous relic of a wife's servitude" (Gray v. Formosa, 1963). The unequal common law of recognising the wife's domicile will be that of the husband's domicile is against the principle of justice because such law has restricted the wife's freedom to choose the domicile.

Other forms of latent discriminatory practices are also observed through jurisprudential inquiry of the present citizenship bill. According to the bill, foreign women having a matrimonial relationship with Nepali men must wait for seven years before getting naturalised citizenship. Its provisions are that when foreign men marry a Nepali woman, they will have to live in Nepal for 15 years for eligibility for naturalised citizenship. Although the bill wants the permanent intention of such men and women married with Nepali citizenship to live in Nepal, a different "cooling-off period" is against the philosophy of equality and democratic values envisioned by the constitution's preamble of Nepal. Rules should not be separate for men and women based on their sex. Although geopolitical sensitiveness is taken as the basis of such discrimination, it is against the fundamental ideals that a republic country vouches for the citizens and feeling of inferiority complex.

Due to the open border and socio-cultural relationship between Nepal and India, marital relationships have been across the border for centuries and will continue. The Indo-Nepal relationship is sensitive and volatile, sparking off hullabaloo more easily. Nuptial relationships between Nepali and Indian citizens are prevalent. The incidence of Indian women coming to live in Nepal as daughters-in-law are expected and part of the socio-cultural life along the southern border of Nepal. Nevertheless, in India, there is no discrimination in the cooling-off period. Thus, if a Nepali woman or man gets married to an Indian citizen, both have to wait seven years to get an Indian citizen. To address the domicile gap during the cooling-off period, once a foreign citizen gets married to an Indian woman or man, they are provided with Adhar Card. Although Aadhar Cards are not citizenship certificate, it helps these sons-in-law and daughters-in-law to get the fundamental social, economic and cultural rights that the Indian government gives its citizens. In this context, the Nepal citizenship bill has not addressed the gap in the cooling-off period making it difficult to assess the domicile and habitual residence of such foreign sons-in-law and daughters-in-law.

10. Conclusion and Policy Recommendation

The different orientations of civil and common law usually lead to two different laws creating a contradictory situation where the person lacks capacity in one system and

has the capacity in the other system; also, the agreement or act void in one state is valid in the other. This situation is insufficient in determining the choice of law in dispute resolution containing foreign elements. So, habitual residence between nationality and domicile will be a more potent connecting factor to determine personal law governing the person, his relation, agreements or transaction.

Habitual residence shows a closer connection than domicile and nationality because an intention to reside as part of the regular order of life, for the time being, can be easily determined without the situation of dual nationality and revival of domicile. However, habitual residence cannot be a universal connecting factor. Thus, it is asserted that habitual residence will endure in certain conditions to be a most crucial connecting factor as an alternative or supplement to domicile and nationality, but it should not be regarded as an absolute connecting factor. Similarly, replacing nationality entirely with habitual residence will not be pragmatic.

Thus, the connecting factor and the public policy exception of the Civil Code should be used in the case involving foreign elements without resorting to judicial anarchism. Furthermore, it can also be asserted that politicisation of citizenship question without truly understanding the nature, concepts and dimension of connecting factors from the private international law doctrines is the sole basis of the fear psyche, inferiorly complex and polarisation of Nepali society.

It has become clear that present legislative defects and gaps require substantial change. Thus, some of the recommendations to address the legislative defects and gaps are-

- Judiciary should exercise maximum judicial restraint while using the habitual residence to adjudicate the case involving foreign elements so that it does not frame the policy. Case-to-case analysis is the best approach.
- Address the legislative gap regarding the connecting factor for the refugees and statelessness by adopting the habitual residence as their primary connecting factor. It is crucial as Nepal Government has officially given refugee status to the Bhutanese and Tibetan refugees.
- Inculcate the habitual residence as the connecting factor for the natural person with dual citizenship. As constitutionally, NRN (Non-resident Nepali) are all set to receive Nepali citizenship certificates, which will guarantee all economic, social and cultural rights except political rights; habitual residence can be the best connecting factor to settle civil legal disputes involving them by the Nepalese judiciary.
- Domesticate the Vienna Convention on Diplomatic Relationship, 1961 and Vienna Convention on the consular relationship 1963 provision of the diplomatic immunity in the code to prevent any sorts of ambiguities and vagueness in its

application to the diplomatic and consular community in applying the connecting factor.

- For the taxation purpose of income tax and capital gains tax, apply the connecting factors so that double taxation and tax evasion are avoided with consideration of any DTAA (Double Taxation Avoidance Agreement) if exits.
- Judiciary should exercise maximum judicial restraint while using the public policy to denounce foreign law in cases involving foreign elements so that it does not frame the policy. Public policy exceptions should be a last resort.
- Nepal should be a party to various Convention on the PIL, such as Hague Conference on PIL, Law Applicable to Matrimonial Property Regimes, 1978, Celebration and Recognition of the Validity of Marriage, 1978, Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matter, 1971 etc. and domesticate it in the Civil Code, 2017
- Amend the same cooling-off period to receive the Nepali naturalised citizenship by foreign daughter-in-law and son-in-law.
- Address the domicile gap during the cooling-off period in the citizenship bill with the introduction of a permanent resident card. For this, India's Adhar Card arrangements can be taken as a reference.

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Authors Bio

Baral, an advocate of the Nepal Bar Council and PIL activist, earned his law degree from Kathmandu School of Law with distinction division. He is currently pursuing LLM in Business and International Trade Law at Purbanchal University. He has made numerous paper presentation and published research articles in reputable journals on intellectual property law, public international law, environmental law, international commercial law, and constitutional law demonstrating his academic rigor. He is also the co-author of the book "Practices of Fiscal Federalism in Nepal" which assess Nepalese present fiscal federalism modality. Moreover, Baral is a "Millennium Fellow" of the United National Academic Impact and Millennium Campus Network selected based on his project "Airport Environmental Nightmare". His professional and personal philosophy includes giving back in ways that make a meaningful difference to the local and global communities for social engineering. By virtue of this philosophy, he recently filed PIL in the supreme court of Nepal demanding the legal framework for the regulation of cryptocurrency in Nepal.