



MAJOR LEGAL SYSTEM AND THEIR INFLUENCE ON NEPALESE LEGAL SYSTEM

*Roshan Kumar Jha**

ABSTRACT

The legal system is an important part of a state. It is impossible for the state to administer justice effectively without a well-organized legal system. The administration of justice in a legal system is run and administered by the interaction of some essential organs, such as the judiciary, judges, lawyers, and law officers. There is various legal system exist throughout the world. Some of them are: Common Law; Civil/ Continental Legal System; Socialist Legal System and Hindu Legal System. The study of different legal systems revives the study of general jurisprudence from a global perspective which enables justice systems in every country to attempt to perfect their own legal system and helps in shaping foreign policies in different countries and aids in streamlining global business. The 21st century is an era where people are closer to each other and at the same time share many problems and are continuously striving against them. So to meet such challenges relating to legal systems comparative method of approach to be taken as it gives the perspective of continuous law reform. And it acts as an aid to systematic unification and harmonization of law. This article aims to give conceptual aspects of major legal system and their influence on Nepalese Legal System. The information of the article is collected from secondary authority as well as primary authority.

* Section Officer, Government of Nepal.

Key Words: Legal system, Nation, Common, Right, Institution.

INTRODUCTION

A legal system may be defined as the legal rules and institutions of a given country called as, Nepalese legal system, French legal system or German legal system etc. In a broader sense, legal system is the juristic philosophy and techniques shared by a number of nations with broadly similar features of a legal system i.e., English common law system, or Civil Law system. It has been rightly pointed out by Paton¹ that it is impossible to conceive jurisprudence without comparative law since all schools of law whether philosophical, sociological or analytical rely on the comparative research methodology. The concept of legal families was outlined by Montesquieu. Most legal systems in the world possess the characteristics, predominantly identified with the major legal systems or parent legal families. A legal system comprises of number of legal traditions which represent the heritage of that particular jurisdiction.²

- Civil law system
- Common law system
- Socialist Legal System³ and
- Hindu Legal System

However, the civil law system and the common law system are recognized to be the most influential legal systems.

NEPALESE LEGAL SYSTEM

The Nepalese legal system is largely based on common law principles, which have been influenced by Hindu and Buddhist legal traditions. It is a unique blend of customary law, statutory law, and judicial precedent. Nepalese legal system has a known history of over thousands of years. The present Nepalese legal system has evolved as a result of the

¹ G.W.PATON, A TEXTBOOK OF JURISPRUDENCE 41 (1972).

² It is pertinent to mention that a 'legal tradition' has been defined as a set of deeply rooted historically conditioned attitudes about the nature of the law, the role of law operating in a given society, and the political ideology, the organization and operation of a legal system.

³ The Socialist Laws make up a third family distinct from the civil and common law system, lost relevance on account of social disintegration of Soviet Union and demise of communism throughout Eastern Europe and hence the discussion is confined to civil and common law system only.

gradual processes during the different ruling dynasty of Nepal such as *Gopal, Mahispal, Kirant, Lichhavi, Malla, Rana and shah* dynasty. Among all these dynasties Malla and shah dynasty had a great impact on the development of our Nepalese legal system.⁴

Nepal's legal system is predominately influenced by the common law tradition and also has some elements of continental law. The first codified law for a unified Nepal, *Muluki Ain* (the Country Code) was introduced in 1853 and was replaced by the *Muluki Ain* in 1963. The *Muluki Ain* is a general law that contains both substantive and procedural laws covering criminal and civil matters. The Constitution of Nepal, which was enacted in 1990, is the country's supreme law. Commercial laws were first introduced in the 1930s on the basis of common law, although Nepal has not kept up with subsequent developments in common law.⁵

Existing many of the fundamental laws of Nepal such as National *Penal Code, 2017 (2074)*, National *Civil Code, 2017 (2074)*, National Criminal Procedure Code, 2017 (2074), The National Civil Procedure Code, 2017 (2074) and Companies Act 2063 (2006) are influenced by English common laws. However some of the provisions family laws such as laws relating to marriage, dissolution of marriage and inheritance are somehow based on religious scripts, and therefore differ between religious communities.

The Nepalese legal system is based on a written constitution and the laws often take statutory forms which are enacted by the legislature and interpreted by the Supreme Court. Yet being a common law system, the statutes are short, and set out basic rights and responsibilities but are elaborated by the courts in their application and interpretation of those. In addition, certain customs and practices established over a period are also to some extent recognized as acceptable and are enforced by the courts.

PURPOSE OF LEGAL SYSTEMS

The aim, function and purpose of study of legal systems are listed below:

⁴ T. R. VAIDYA, *ADVANCED HISTORY OF NEPAL* 194 (1994).

⁵ Kusum Shrestha, *Framing the Constitution Some Important Issues*, 1 *ESSAYS ON CONSTITUTIONAL LAW* (1991).

- As an academic discipline, the knowledge of legal systems will broaden the perception of the operation of legal rules in different legal systems and provide for solutions to legal problems.⁶
- The second important function is the legislative reform.
- Harmonization and unification seeks to effect an approximation or coordination of different legal provisions or systems by elimination of major differences and creating minimum requirements or standards.⁷

It is pertinent to note that there are few major legal systems from where all legal systems draw their source and authority.

FACTORS AFFECTING LEGAL SYSTEMS

The style of a legal system is crucial test that determines classification of a legal system. Any Legal system strengthens through five basic factors. They are⁸:

- **Historical background and development-** It is to be borne in mind that each legal family has a chequered history which reflect the influence on a legal system.
- **Its characteristic mode of thought -** It is the mode of thought existing in a given legal system that has a bearing. For example, civil law system is rule based and constantly seeks to find solutions to a problem before the court contrary to the socialist law which is based on Marxist- Leninist ideas.⁹
- **Its distinctive institutions-** In every legal system there are certain distinctive features which are developed and peculiar to their system. To illustrate in common law jurisdictions, the typical legal institutions are agency, the trust, tort principles consideration and estoppels.
- **Sources of law-** Sources of law distinguishes the system of law existing and the predominant principles that determine the source of law. In

⁶ J.H. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 56 (1985).

⁷ Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison* 15 AM J COMPL 419 (1967).

⁸ Craig M Lawson, *The Family Affinities of Common-Law and Civil-Law Legal Systems* 6 HASTINGS INT'L & COMPL REV 85 (1982).

⁹ The Common Law in India, The Hamlyn Lectures, Twelfth Series, N. M. Tripathi Private Ltd.

civil law countries like, France and Germany is still a predominantly codified or enacted law, where as in common law countries it is the case law.

- **Ideology of a Legal System:** Zweigert and Kotez interpret ideology of a legal system as meaning ‘Political or Economic doctrines or religious belief.’ It is this ideology that places them under different categories due to their uniqueness.¹⁰ As stated earlier a legal system comprises of a legal tradition and legal culture.

COMMON LAW SYSTEM

‘Common Law’ means law which is commonly applied. But that is not the meaning of the term ‘Common Law’. ‘Common Law’ is the name of a family of different legal systems of the world which follow common features and traits albeit with small deviations. Countries following a common law system are typically those that were former British colonies or protectorates, including the United States. Common Law System has influenced the development of many legal systems of the world, such as India, England, U.S.A., Canada, Australia, Singapore, South East Asia, Hong Kong Pakistan North America, New Zealand and large parts of Africa. Actually, the origin of Common Law is believed to have been in England and so wherever the British Empire spread its sovereignty, the Common Law System was imposed.¹¹

It is considered as one of the most influential major legal systems in the world and nearly half of the world falls under this jurisdiction. The unique feature of common law system is English sources; institutions co-existed with the religious and local customs of people.¹²

CHARACTERISTICS OF COMMON LAW

Common legal system started from England and developed through culture, tradition, and customary law.

¹⁰ For example, Countries such as China, Mongolia, North Vietnam, North Korea, Russia until recently have adopted a communist theory of law based on Marxist-Leninist philosophy. Similarly legal systems such as Hindu and Muslim systems justify separate categorization as religious, legal systems in view of their uniqueness.

¹¹ R MOUSNIER, *THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY* 655 (1979).

¹² M Craig, *Laws on the Family Affinities of Common-Law and Civil-Law Legal Systems* 6 HASTINGS INT’L & COMPL REV. 85 (1982)

The three characteristics of Common Law are:

- (i) Authority of the Judgments delivered by Supreme Court¹³;
- (ii) Composition of Judicial Institutions; and
- (iii) Importance of Acts, Statutes and other Legislation passed by competent authorities.

Features of Common Law System

The salient features of Common Law System are as follows:

- (a) judgments rendered by the higher courts enjoy binding authority, which is technically known as ‘judicial precedent’;
- (b) judges of the courts are highly skilled persons who have special knowledge of law and are experienced in the administration of justice;
- (c) court proceedings are based on the adversarial nature and the judges play a passive role; and
- (d) Laws passed by the legislature enjoy the same status as ‘judicial precedents’.

INFLUENCE OF COMMON LAW IN NEPALESE LEGAL SYSTEM

Common Law countries are those in which following major components are present. These are:

- **Centralization of Courts:** The early centralization of courts mainly brought about by Henry II, wherein the royal courts were constituted. The common law courts became the main source of law common to the whole country.¹⁴ Article 153 embodied the provision of Judicial Council. and the judicial council is responsible *to make recommendation or give advice, in accordance with Constitution, on the appointment of, transfer of, disciplinary action against, and dismissal of, Judges, and other matters relating to the administration of justice.*¹⁵
- **Doctrine of precedents:** The source of law is previous decision. The authority of judgments of Supreme Court is given the technical name

¹³ Quebec Research Centre of Private and Comparative Law, Private Law Dictionary and Bilingual Lexicons 243 (2nd ed., Revised and Enlarged, Les editions Yvon Blais, 1991).

¹⁴ J.H BAKERJ, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 312 (2002).

¹⁵ Art.153 of CONST.OF NEPAL, 2015.

‘judicial precedent’. Constitution of Nepal, Article 128(4) stated that, *all shall abide by any interpretation of the Constitution or a law made by or any legal principle laid down by the Supreme Court in the course of hearing a lawsuit. In case anyone makes obstruction in the dispensation of justice or disregard any order or judgment handed down by it or any of its subordinate courts, the Supreme Court may, in accordance with law, initiate proceedings of contempt and impose punishment therefore.*¹⁶

- **Common Law created prerogative writs:** The common law created prerogative writs like Certiorari, Mandamus, and Prohibition which enabled administrative decisions of state organs and officials to be challenged. Constitution of Nepal, Article 133(3) stated that, *Under the extra-ordinary jurisdiction under the Supreme Court may issue appropriate orders and writs including the writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto.*¹⁷
- **Equity:** The concept of equity, which supplemented common law, is another distinctive feature of English common law. For example, trust is the most important creation of equity. Similarly decree for specific performance, injunctions quasi contracts, clog on equity of redemption etc. are all principles of equity. Constitution of Nepal, Article 290 stated that, *The Federal Parliament shall make necessary laws in relation to the rights of the trust and the farmers enjoying possessory rights over trust lands in a manner not to be prejudicial to the basic norms of the trusts.* Equity law developed in England as a legal method to soften the harsh effects of judicial precedent or legislation¹⁸.
- **Composition of judicial institutions:** Second common feature of the Common Law family is that the judges of the Courts are highly skilled persons who have specially studied the discipline of law and possess practical experience in legal administration either as advocates or judges. A judge, in other words, cannot be a lay person or even a scientist. He must be a person of legal background, either as an

¹⁶ Art. 128 (4) of CONST.OF NEPAL, 2015.

¹⁷ Art.133(3) of CONST.OF NEPAL, 2015.

¹⁸ H. Merryman John, *The civil law tradition* 53 (Stanford university press, 2nd edn., 1985).

advocate or a judge or at least with a degree in law. This feature of Common Law makes the judicial institutions a separate set of professional persons. So the background of judges in Common Law must be Law. **As an example**, Constitution of Nepal, Article 129 (5) stated that, *Any citizen of Nepal who has obtained a bachelor's degree in law and served as the Chief Judge or a Judge of a High Court for at least five years or who has obtained a bachelor's degree in law and constantly practiced law as a senior advocate or advocate for at least fifteen years or who is distinguished jurist having constantly worked for at least fifteen years in the judicial or legal field or who has served in the post of Gazette first class or a higher post of the Judicial Service for at least twelve years shall be deemed to be eligible for appointment as a Justice of the Supreme Court.*¹⁹

Constitution of Nepal, Article 140 (2) stated that, *Any citizen of Nepal who has obtained a bachelor's degree in law and served as a Judge of a District Court for at least five years or who has obtained a bachelor's degree in law and constantly practiced law as a senior advocate or advocate for at least ten years or who has constantly been engaged in the teaching or research of law or in any other field relation to law or justice for at least ten years or who has served in the post of at least Gazette first class of the Judicial Service for at least five years shall be deemed to be eligible for appointment as the Chief Judge or a Judge of the High Court.*²⁰

Constitution of Nepal, Article 149 (2) stated that, *The vacant posts of Judges of the District Court shall be fulfilled as follows:- (a) Twenty percent of the total vacant posts, on the basis of evaluation of seniority, qualification and competency, from amongst the officers who have obtained bachelor's degree in law and served for at least three years in the post of Gazette Second Class of the Judicial Service; (b) Forty percent of the total vacant posts, on the basis of open competitive examination, from amongst the officers who have obtained bachelor's degree in law and served for at least three years in the post of Gazette*

¹⁹ Art.129 (5) of CONST.OF NEPAL, 2015.

²⁰ Art.140(2) of CONST.OF NEPAL, 2015.

*Second Class of the Judicial Service; (c) The remaining forty percent of the total vacant posts, on the basis of open competitive examination, from amongst the citizens of Nepal who, having obtained bachelor's degree in law, have constantly practiced law for at least eight years as an advocate or who, having obtained bachelor's degree in law, have served in a Gazetted post of the Judicial Service for at least eight years or have constantly been engaged in the teaching or research of law or served in any other field of law or justice for at least eight years.*²¹

- **Adversarial system of court proceedings and the role of judge:** The judge in the court acts like a neutral observer (umpire) listens patiently to the advocates of each party. For example, section 25 of Evidence Act, 2031 stated that, *The burden of proof of proving that the accused has committed the offence in a criminal case shall lie on the plaintiff.*²²
- **Acts, Statutes passed by Competent Authorities:** A very important feature of Common Law system is that though the legislations passed by competent authorities such as the Parliament and Legislatures are given an authoritative place which is binding on the judges whenever the judges find any gaps in the Acts or Statutes passed by the Parliament, they can make suitable interpretations to fill the gap in these Acts. For Example, according to Article 109 of Constitution the legislative powers is vested in Federal Parliament. Article 128 (2) stated that, *Supreme Court shall be a court of record. All courts and judicial bodies shall, except as otherwise provided in this Constitution, be under the Supreme Court. The Supreme Court shall have the final authority to interpret this Constitution and laws.*²³

In other words, the judges and advocates of the Common Law system would think that the Acts are very abstract and the rules contained in those Acts are very general in nature. These general and abstract rules are incapable in themselves to be applied in all facts and circumstances.

²¹ Art.149 (2) of CONST.OF NEPAL, 2015.

²² Section 25 of Evidence Act, 1974.

²³ Art.128 (2) of the CONST.OF NEPAL, 2015.

Facts of every case would be so peculiar that it would be very difficult to apply the general and abstract form of rule which may need suitable additions and interpretations. That addition and interpretation is as important as the bare provision of general and abstract law.

For example, the punishment prescribed by the Act passed by Nepalese Parliament for the commission of murder is up to life imprisonment. However; in every circumstance it has not been clearly prescribed in what situations punishment would be life imprisonment. So the judges may have filled this gap.

- **Extensive freedom of contract** - Few provisions are implied into the contract by law. (although provisions seeking to protect private consumers may be implied), According to Section 22 of The National Civil Code Act, 2017 (2074), Every citizen shall have the right to make a contract subject to the law. Part-5 of The National Civil Code, 2017 (2074) embodied the Provisions Relating to Contract and Other Obligations
- **Generally, everything is permitted that is not expressly prohibited by law-** Chapter 2 of The National Penal Code, 2017 under General Principles of Criminal Justice, section 6 stated that, *no act required by law to be done or excused by law shall be considered to be an offence.* In the similar way, Section 7 stated that, *no person shall be liable to punishment for doing an act not punished by law nor shall a person be subjected to punishment which is heavier than the one prescribed by law in force when the offence was committed.*
- **Recognized principle of justice** - The National Civil Code, 2017 (2074) Chapter 2 embodied the General Principles of Civil Law. In the similar way The National Penal Code, 2017 Chapter 2 incorporated the General Principles of Criminal Justice.
- **Principle of natural Justice-**Article 126 (1) of Constitution of Nepal stated that, *Powers relating to justice in Nepal shall be exercised by courts and other judicial institutions in accordance with this Constitution, other laws and recognized principles of justice.*²⁴

²⁴ Art.126 (1) of the CONST.OF NEPAL, 2015.

- **Rule of law-** The preamble of our Constitution adopt the concept of the rule of law in order to build a prosperous nation. Article 51 (b) (2) under Policies of the State, it is stated that, to maintain rule of law by protecting and promoting human rights.²⁵
- **Independent judiciary-** The preamble of our Constitution adopt the concept of independent, impartial and competent judiciary.
- **Judges from bar-** According to Article 153 (1) (e) of Constitution of Nepal Among five members of judicial council, one member is from Nepal Bar Association. A senior advocate or advocate who has gained at least twenty years of experience, appointed by the President on recommendation of the Nepal Bar Association. Constitution of Nepal, Article 129 (5) stated that, *Any citizen of Nepal who has obtained a bachelor's degree in law and served as the Chief Judge or a Judge of a High Court for at least five years or who has obtained a bachelor's degree in law and constantly practiced law as a senior advocate or advocate for at least fifteen years or who is distinguished jurist having constantly worked for at least fifteen years in the judicial or legal field or who has served in the post of Gazette first class or a higher post of the Judicial Service for at least twelve years shall be deemed to be eligible for appointment as a Justice of the Supreme Court.*²⁶
- **Government prosecuted state case-** According to The National Penal Code, 2017, The National Criminal Procedure Code Act, 2017, Government prosecute the criminal case on behalf of victim.
- **Discretionary power goes to judges-** The National Penal Code, 2017, has given excessive discretionary power to judges. For Example, imprisonment for a term not exceeding five years and fine not exceeding fifty thousand rupees.²⁷
- **Equality before law-** According to Article 18 (1) of Constitution, all citizens shall be equal before law. No one shall be denied the equal protection of law.²⁸

²⁵ Art. 51(b) (2) of the CONST.OF NEPAL, 2015.

²⁶ Art.129 (5) of the CONST.OF NEPAL, 2015.

²⁷ Section 51 (4) (a) of the National Penal Code, 2017.

²⁸ Art. 18 (1) of the CONST.OF NEPAL, 2015.

- **Reason based decision from competent Court-** According to Article 20 (9) of Constitution, every person shall have the right to a fair trial by an independent, impartial and competent court or judicial body.²⁹
- **Contempt of court-** According to Article 128 (4), *All shall abide by any interpretation of the Constitution or a law made by or any legal principle laid down by the Supreme Court in the course of hearing a lawsuit. In case anyone makes obstruction in the dispensation of justice or disregard any order or judgment handed down by it or any of its subordinate courts, the Supreme Court may, in accordance with law, initiate proceedings of contempt and impose punishment therefor.*

Common legal system is most important and major legal system dominated on Nepalese legal system. The impact of common law took place after 2007 B.S. I think that Nepal's Legal System is primarily influenced by 'Common Law System' because of the following factors:

CIVIL LAW / CONTINENTAL LEGAL SYSTEM

The term Civil Law is derived from the Latin word "jus civile", by which the Romans designated the laws that only the Roman citizens or "cives" were originally privileged to enjoy. It is sometimes said that the countries of civil law are those which received legal system from the Roman law.³⁰ The Legal System followed by the countries in the mainland of Western Europe (which is commonly referred to as 'Continent' as distinguished from the island of England) is referred to as Continental Legal System. In civil law systems, the substantive body of private law consists, principally of civil law, which is further subdivided into various divisions of law, such as the law of persons, family law, matrimonial property regimes, property law and the law of obligations. In civil law systems it should be noted that commercial law is not regulated by the French Civil Code.³¹ It is a distinct body of law which is administered by

²⁹ Art. 20 (9) of the CONST.OF NEPAL, 2015.

³⁰ Joseph Dainow, *The Civil Law and the Common La: Some points of Comparison*, 15 AMERICAN JOURNAL OF COMPARATIVE LAW 419 (1966-67).

³¹ The French Civil Code of 1804 was enacted on March 21, 1804, as the "Code civildes Franfais." The tide was changed to the "Code Napolion" in 1807 because of the Emperor's personal interest in the drafting of the Code while he was First Consul of the Republic. The original title was revived in 1816 after the fall of the Napoleonic Empire, but the Code was reinstated as the Code Napoleon in 1852 by decree of Louis Napoleon (Napoleon I), then President of the Republic. Since September 4. 1870, however, it has been referred to as the "Code civil."

separate commercial courts. Roman law was the starting point for the systematic study of Western Legal System.³² There were two phases during which Roman law developed.³³

The period of compilation by Emperor Justinian (AD 527 -565).

Justinian Code- (Justinian was an Emperor (527-565) who enacted a comprehensive compilation of systematization and consolidation of all existing law from every source. The Code is otherwise known as Corpus Juris. It comprised of³⁴

- *Institutions-* a systematic treatise issued as an elementary textbook.
- *The digest* – a compilation of edited fragments from roman juristic writings.³⁵
- *The Codex-*Collection of Imperial enactments.
- *The Novels-* Collection of the imperial legislation enacted by Justinian himself.

The revival of Roman law (where Justinian works were studied by the Italian universities during 11th century.)

It must be borne in mind that within the civil law tradition, there is French Law Tradition and German Law tradition which are based on the Roman law. The French law tradition is based on rigid separation between private law and criminal law and public law and administrative law. The French law tradition has an influence on Germany due to various historical reasons like lack of unity within Germany and lack of written law and fragmented legal order etc. therefore, Germany adopted Roman law.³⁶

Thus, the Civil law system refers to the entire systems of law which applies to European Countries, Latin America, Africa, Indonesia, Japan etc³⁷. The Civil law countries include France, Germany, Italy,

³² MERRYMAN & H JOHN, THE CIVIL LAW TRADITION 5 (1985).

³³ WILLIAM TEDLEY, THE GENERAL MARITIME LAW: THE LEX MARITIMA 105 (1996).

³⁴ Robert Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L REV. 603 (1976).

³⁵ A Digest of the Civil Laws now in force in the Territory of Orleans, with Alterations and Amendments Adapted to its Present Form of Government (1808).

³⁶ ENID A. MARSHALL, GENERAL PRINCIPLES OF SCOTS LAW 111 (1982).

³⁷ STEIN PETER, ROMAN LAW IN EUROPEAN HISTORY 89 (1999).

Switzerland, Austria and Latin American Countries, Turkey various Arab states, North Africa and Madagascar. Civil Law as an autonomous system of law originated and evolved in the continental Europe and the influence of colonization, legal science movements and various key codifications, particularly those of 19th century have played a part in the formation of this type of law.³⁸

We might be aware that in India, even French and Portuguese had come to establish their suzerainty for some time and during that period they had successfully imposed their legal system in those places, such as Pondicherry, Goa, Daman, and Diu Countries following a civil law system are typically those that were former French, Dutch, German, Spanish or Portuguese colonies or protectorates, including much of Central and South America. Most of the Central and Eastern European and East Asian countries also follow a civil law structure.³⁹

TRAITS OF CIVIL LEGAL SYSTEM

The important traits of Civil Legal System are as follows⁴⁰:

- (a) judgments rendered by the higher courts do not enjoy binding authority and are not regarded as ‘judicial precedents’;
- (b) judges of the courts are not essentially from a legal background but from diverse fields, such as arbitration, engineering, medicine, accountancy;
- (c) court proceedings are not adversarial in nature, but are called ‘inquisitive’ and the judges play an active role; and
- (d) Laws passed by the legislature enjoy the highest authority.⁴¹

CHARACTERISTICS OF CIVIL LEGAL SYSTEM

Civil legal system is development from codification and originated from Roman jurisprudence along with Germany and France. It has

³⁸ The Splendid Mystery of the Civil Code of Louisiana, 3 LA. L REV. 1 (1974).

³⁹ Sir Thomas Craig, *Jus Feudale* (1655); Sir George Mackenzie, *Institutions of the Law of Scotland* (1684); Andrew Mc Douall & Lord Bankton, *Institute of the Laws of Scotland* (1751-1753), Henry Home, *Lord Kames, Principles of Equity* (1760); and Baron David Hume, *Commentaries on the Law of Scotland Respecting Crimes* (1797).

⁴⁰ H.P. GLENN, *LA CIVILIZATION DE LA COMMON LAW* 596-616 (1993).

⁴¹ W. W. BUCKLAND & A.D. MCNAIR. *ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE* 399 (1952).

development when civilization started in Italy and Rome. So, it is also oldest legal system⁴².

Civil Legal System follows four major characteristics⁴³:

- a. Law are Codified
- b. Constitution is supreme
- c. Administration of justice- justice according to the laws enacted by parliament.
- d. Binding authority of Acts, statutes passed by competent legislature and judges regard these Acts as supreme and do not try to change them by asserting their own authority;
- e. Composition of judicial institutions from a diverse field;
- f. Statutes were the primary source of law and judicial decisions were considered as
- g. Secondary sources of Law.
- h. No binding authority of the judgments delivered even by higher courts & Tribunals; and
- i. Civil Law systems follow Inquisitorial approach of the Court proceedings (rigorous investigation by the court itself.)
- j. There was always a clear division of private law and public law.⁴⁴

INFLUENCE OF CIVIL LEGAL SYSTEM ON NEPALESE LEGAL SYSTEM

Civil Law countries are those in which following major components are present. These are:

- **Codification**- There is generally a written constitution based on specific codes (e.g., civil code, codes covering corporate law, administrative law, tax law and constitutional law) enshrining basic rights and duties; administrative law is however usually less codified and administrative court judges tend to behave more like common law judges.⁴⁵

⁴² S.F.C MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 49 (1981).

⁴³ David M. Walker, *Principles of Scottish Private Law*, THE SCOTTISH JUDICATURE AND LEGAL PROCEDURE 65 (1988).

⁴⁴ LEE HARGRAVE, THE LOUISIANA STATE CONSTITUTION: A REFERENCE GUIDE 2 (1991).

⁴⁵ CROMARTIE ALAN, THE CONSTITUTIONALIST REVOLUTION: AN ESSAY ON THE HISTORY OF ENGLAND 1450-1642 (2006).

Codification is the distinct feature of the Civil law system. The civil law put high the value of the codes which can be reckoned to the first landmark Code, i.e., the Twelve Tables (451-450 BC) in the history of Roman law. It was a collection of basic rules, which was considered as the fountain head of all public and private law. Nepal has the oldest judicial history in the codification of Law.⁴⁶ No other judicial system has a more ancient or exalted pedigree. ⁴⁷In *Kirat* Era, *Kirat* had a philosophy which was called *chong philosophy* and also called *Kha hun*. To implement the rules embodied in this philosophy, a competent person was chosen who was called *lisikudhutho banse* or *Mukhiya* and he had to take oath before yak saying that ‘ *I will do justice without any discrimination between my own son and enemy*’. ⁴⁸King was the ultimate source of justice and those persons to whom king had delegated judicial power had to perform their job independently and impartially. *Yehang Mundhum* and *khantun* were two books regarding the judicial administration prevalent in *Kirat* era.⁴⁹The judicial functions were performed on the basis of *khasen kharonthin* which was panel and procedural law in present sense.⁵⁰

The Lichchhavi kings adopted Hindu polity and their judicial system was rooted in the Hindu religious teachings of the Dharmashastras.⁵¹ *Lichhavi* kings were in favor of justice.⁵² The aim of justice in this era was supposed to maintain social discipline, pleasure and peace of the people.⁵³ The chief judicial authority was *maha sarbadanda nayak* who used judicial power delegated by the king.⁵⁴ The king had

⁴⁶ T. R. VAIDYA, ADVANCED HISTORY OF NEPAL 194 (1994).

⁴⁷ BIPIN ADHIKARI ET AL., COMMENTARY ON THE NEPALESE CONSTITUTION 23 (1998). SURYA PS DHUNGEL, BP BHANDARI (1998).

⁴⁸ IMANSIGH CHEMJONG, HISTORY AND CULTURE OF KIRAT PEOPLE 51-52 (2003).

⁴⁹ There are several indications in *Mundhum* about this issue. Some clear examples of medieval ages and recent centuries are found in Iman Singh Chemjong who has presented several incidences of such actions including those of the tem Limbus’ revolt against eight leaders/kings of their time. See Chemjong 2003/1966, 1948, Hodgson Papers (Khambu-Limbu War against Gorkha).

⁵⁰ RISHI KESH SHAH, MODERN NEPAL: A POLITICAL HISTORY 253 (1990).

⁵¹ NARAYAN PRASAD SHARMA, RUDIMENTS OF CONSTITUTIONAL LAW 40-41 (2016).

⁵² CHANDRA KANT GYAWALI, CONSTITUTIONAL LAW OF NEPAL 15 (2016).

⁵³ DHANABAJRA BAJRACHARYA, LICHHAVI INSCRIPTION 564 (1973).

⁵⁴ Nayan Bahadur Khatri, *Right now the judiciary is in a state of panic*, 6 KANOON LEGAL MAGAZINE.

delegated his judicial power to local authorities also.⁵⁵ Separate judicial authorities including other administrative authorities were established for adjudication process in *Lichchhavi* era.⁵⁶ This era had brought the concept in practice that justice should be carried out by independent authority.⁵⁷

The foundation of independent and impartial judiciary was developed in *Lichchhavi* period⁵⁸ while in *Malla* era the edifice was made on that foundation.⁵⁹ King Jayasthiti Malla is credited with enacting significant social and legal reforms, with the code *Manab Nyaya Shastra* emerging as a keystone of Nepalese law and justice. The king had to punish to all according to the crime even to the father, teacher, friend, mother, wife, son and priest without any distinction. The *kotilinga* and *inta chapali* were the two central courts in Malla period, in which *kotilinga* was civil court and *inta chapali* was a criminal court.⁶⁰ Only the most contentious cases were reserved for the Ministers and Kings, who conferred with the headmen during times of crisis, including war. During the Malla era, the local head men of the *Panchayat* and the governors continued to gain power, particularly when it came to deciding legal disputes.⁶¹ The *thiti* issued in the middle age of Malla era proved that the concept of the rule of law was rightly implemented in this period.⁶²

During the reign of King *Sthitiraj Malla (Jayasthithi)* and Queen *Rajalla Devi* (1380-1396 AD), there were conflicting in the *Smriti*⁶³ and *Shastra* and there were differences in practice, so a code named

⁵⁵ MUKUNDA REGMI, CONSTITUTIONAL DEVELOPMENT AND THE CONSTITUTION OF THE KINGDOM OF NEPAL 134-135 (2004).

⁵⁶ Kusum Shrestha, *Framing the Constitution Some Important Issues* 1 ESSAYS ON CONSTITUTIONAL LAW 1 (1991).

⁵⁷ JANA KALYAN PARAJULI, CONSTITUTIONAL LAW: NEPALESE PERSPECTIVE 14 (2014).

⁵⁸ BISHAL KHANAL, HISTORICAL OVERVIEW OF THE JUDICIAL ADMINISTRATION OF NEPAL 8 (2050).

⁵⁹ BIPIN ADHIKARI, NEPAL: DESIGN OPTIONS FOR THE NEW CONSTITUTION 66 (2010).

⁶⁰ LOK RAJ BARAL, POLITICAL CULTURE AND POLITICAL PROCESS IN NEPAL 317 (1989).

⁶¹ The Report of the High Commission on Judicial Reform 37 (2028 BS).

⁶² Bishal Khanal, *Pre-Making, Making and Remaking: A Nepalese Analogue*, NYADOOT ENGLISH SPECIAL ISSUES 17 (2007).

⁶³ The word 'smrti' literally means to remember and conveys the idea of tradition.

*Manab Nyaya Shastra*⁶⁴ was issued to suit the prevailing behavior in the society.

- **Importance of Acts, Statutes passed by Competent Legislature:** The Acts passed by the Parliament or the competent authorities receive the highest importance in this legal system. Authority of the competent legislature is to assimilate the scattered rules and then draft them according to the modern conditions and get them passed in the Parliament. This is called the process of ‘Codification of Rules’. For example, Rules assimilated and framed in the area of crimes are called ‘Penal Code’. These rules passed by the Parliament are then applied by the judges in the resolution of disputes. Judges regard the rules framed by the Parliament as supreme and do not try to change it by asserting their own authority as in the Common Law family. They may give their own interpretations of the vague language used in the Act, but they would say that it would be not binding except upon the parties to the dispute. Interpretations of the rules framed by the Parliament are given not by the judges but by the legal scholars and academicians. The abstract law passed by the Parliament is given high regard even by the judges and advocates.
- **Presence of tribunals in which judges are appointed from any field, including from the formal judiciary:** Judiciary constituted in the Continental Legal System is from diverse fields as a person of any background can be a judge in this legal system. Persons who have specialized knowledge of any particular field may be appointed as judges. Thus, an engineer or a Doctor or a Scientist may become a judge. There is no requirement to study law as a separate discipline for a requisite number of years and practice in the court of law thereafter. So the judges of the higher courts or trial courts are appointed from diverse backgrounds and without the need of a degree in legal education. Legal education is also imparted in the countries which follow ‘Continental Legal System’, but that is not the only mandatory

⁶⁴ Laws made by King Sthitiraj Malla in Bikram Era 1436 (Nepal Era 500) NYAYAVIKASINI (Manavanayashastrat) (Jan. 22, 2024, 08:00 AM), <http://www.lawcommission.gov.np/documents/2015/08/>.

requirement to become a judge. In Nepal too, we might find that a technical member is sometimes provisioned by some Acts.

For Example, Revenue Tribunal Act, 2031 (1974) Section 3 stated that, *Revenue tribunal shall consist of the following members appointed by the Government of Nepal: (a) Law member, (b) Revenue member, and (c) Accounts member. Section 4 stated that for the law member, one who is incumbent or is qualified to become a judge of the Court of Appeal. For the revenue member, one who, having possessed at least bachelor's degree and has gained at least Seven years of experience in revenue administration, For the accounts member, one who, having possessed at least bachelor's degree and gained at least Seven years⁷ of experience in revenue administration.*⁶⁵

- **Power of the judges to make law:** Judges in 'Continental Legal System' do not make laws and their judgments do not carry authority except in the dispute before the court. They apply the laws made by the legislature and cannot make the law themselves. In other words, the judgments rendered by the judges of even the higher courts do not enjoy the status of 'judicial precedents' as in the Common Law System. Their judgments are given respect by the judges in other cases but they are not bound by them. For example, the judgments given by the highest court of appeal in France, namely, 'Court de Cassation' are not binding on all courts of France. However, the judgment of that Court is given high respect in the judicial bodies. The judges of the highest court cannot strike down the law passed by the legislature; they can only apply the law passed by the legislature. One of the advantages of this system is that the voluminous judgments of courts would not have to be read by the lawyers to know the law which is the case in 'Common Law System' and an advocate has not only to know the law passed by the Parliament and legislatures, but also the judgments delivered by the higher judiciary⁶⁶.

⁶⁵ Section 3 of the Revenue Tribunal Act, 1974.

⁶⁶ RC van caenegem ,The Birth of the English Common Law 67 (1988).

- **Inquisitorial approach of the court proceedings:** Unlike the passive role of the judges in finding the truth and being dependent on the ability of the advocates to establish the fact of the matter, the judges in the ‘Continental Legal System’ play active roles in finding the truth. The approach followed in the court proceedings is not adversarial in nature but ‘inquisitorial’ (the term ‘inquisition’ means investigative). The judges do not simply act as a referee between the prosecutor and the defense but they actively investigate the matter themselves with the co-operation of all disputing parties and try to establish the truth by collection of evidence. Collection of evidence is thus not the sole responsibility of the advocates but the judges too. Judges may go to the scene of the crime and collect evidence on their own if they think that the evidence produced by the advocates of the disputing parties leave some doubts as to the establishment of the truth. Judges are not passive observers but active participants in the quest to establish the truth.

In Nepal, The National Criminal Procedure Code, 2074 (2017), section 108 (1), The National civil Procedure Code, 2074 (2017), Section 181 (2) stated that while taking the deposition of a witness who is unable to appear before the court due to physical infirmity, the judge himself or herself may proceed to or send an officer employees subordinate to him or her to the place where such witness is residing or staying, and the evidence of such witness shall be taken by the judge or by such employee in the form of deposition.

- Only legislative enactments are considered binding for all. There is little scope for judge-made law in civil, criminal and commercial courts, although in practice judges tend to follow previous judicial decisions; constitutional and administrative courts can nullify laws and regulations and their decisions in such cases are binding for all.
- In some civil law systems, e.g., Germany, writings of legal scholars have significant influence on the courts.
- Courts specific to the underlying codes – there are therefore usually separate constitutional court, administrative court and civil court

systems that opine on consistency of legislation and administrative acts with and interpret that specific code;

- Less freedom of contract - many provisions are implied into a contract by law and parties cannot contract out of certain provisions.
- **Sometimes the court proceedings are not adversarial** - Sometimes the court proceedings may not be adversarial. For Example, section 7 of *The Crime Victim Protection Act, 2075 (2018)* incorporates the provision of Right to information relating to investigation, Section 8 provisioned for Right to information relating to prosecution, Section 9 provisioned for Right to information relating to judicial proceedings, Section 12 states that The victim may appoint a separate legal practitioner in the criminal justice process if he or she so wishes, Section 13 states that Right of attendance and participation in hearing, Section 17 make provision for Right to make written application. Article 21 embodied the provision of Right of Victim of Crime.⁶⁷
- **Supremacy legal system:** Article 1 of Constitution of Nepal states that, Constitution is the fundamental law of Nepal. Any law inconsistent with this Constitution shall, to the extent of such inconsistency, be void.⁶⁸
- **Burden of proof on the Defendant-** Section 27 (1) of Evidence Act 2031 state that, If the defendant makes a counter claim (*Jikir*) regarding remission from the penalty or acquittal from the charge (penalty) pursuant to prevailing Nepal law, the burden of proof of proving such fact shall lie on the defendant him/herself.⁶⁹
- **Close hearing system-** For Example, section 6 of *The Crime Victim Protection Act, 2075 (2018)* incorporates the provision of Right to privacy. The victim shall have the right to privacy in the course of investigation, enquiry, prosecution and court proceedings of the following offences: (a) Rape, (b) Incest, (c) Human trafficking, (d)

⁶⁷ Art.21 of the CONST. OF NEPAL, 2015.

⁶⁸ Art.1 of the CONST. OF NEPAL, 2015.

⁶⁹ Section 27 (1) of the *Evidence Act, 1974*.

Sexual harassment, (e) Such other criminal offence as prescribed by the Government of Nepal by publishing a notice in the Nepal Gazette. According to Section 25 of Administration of Justice Act 2073 the case to be heard from Camera Court as per the prevailing laws shall be heard in Camera Court.⁷⁰

- **Quasi-judicial body-** There is a provision of Quasi-judicial body like CDO, LDO, etc.
- **Judge appointment system-** According to Article 129 (2) of Constitution, The President shall appoint the Chief Justice on recommendation of the Constitutional Council and other Justices of the Supreme Court on recommendation of the Judicial Council.⁷¹
- **Different court is formed** - Different special court are formed. For example, the provision of Court Martial in Army Act, 2063 (2006). Section 2 (q) states that, Court Martial means the General Court Martial, Summary General Court Martial, District Court Martial, ‘Summary Court Martial pursuant to Section 67 and Special Court Martial pursuant to Section 119. Provision of Special Court Act, 2059 (2002) to hear Special types of cases specified by the Government of Nepal by publishing a Notice in Nepal Gazette for the purpose of Sub-section (1) of Section 3.
- **Double bench and special bench of court-** According to Administration of Justice Act, 2073, Supreme Court Regulation, 2074, High Court Regulation, 2073 and District Court Regulation, 2075 there is a provision of different kinds of bench.

I think that Nepal’s Legal System is primarily influenced by ‘Common Law System’ with only a few features of Civil Legal System.

⁷⁰ Section 25 of the *Administration of Justice Act, 2016*.

⁷¹ Art.129 (2) of the CONST. OF NEPAL, 2015.

Justice Delivery System in Common Law System and Civil Legal System

Common Law System- Adversarial Justice System	Civil Legal System- Inquisitorial Justice System
The common Law system followed the adversarial model of Justice system.	Civil Law System adopted & followed inquisitorial system of law, where the investigation is done by the court itself.
The responsibility to gather evidence is with the parties, police and defense.	Pretrial process is part of the process to seek the truth.
Trial is the exclusive forum for determining the truth by allowing the defense.	The decision making is limited.
Decision making is in the hand of the parties.	Conduct of trial is in the hand of the Court.
Court's role is to confine to the given evidence.	Victim has a more recognized role.
Victim has no recognized status	

Comparison of Adversarial System and Inquisitorial System

	Adversarial system	Inquisitorial system
Trial Process	common law follows adversarial system of trial	civil law system followed inquisitorial system of trial.
Evidence	In adversarial model, responsibility for gathering evidence rest with the parties, police and Independent evaluation of the evidence done by a neutral judge.	In the inquisitorial system, the investigation is done by the court itself. The criminal in serious cases is typically seen by an independent prosecutor or an examining magistrate.
Pre Trial process	adversarial system the trial is by the exclusive forum for seeking out and determining the truth by allowing the defense to test and counter the evidence	while in inquisitorial model the pretrial processes are an indispensable part of the process for seeking the truth.
Conduct of trial	In adversarial model the decision making is in the hands of the parties. All parties determine and court's role is confined to the evidence given in adversarial system Similarly conduct of trial is in the hands of the court and victim has no recognized status in either pretrial or investigation nor in the trial itself,	where as in inquisitorial system it is limited and prosecution must take place in all cases. While conduct of trial is in the hands of the court in the inquisitorial system. while in inquisitorial system victims have a more recognized role

SOCIALIST LEGAL SYSTEM

Socialism is a range of economic and social systems characterized by social ownership of the means of production and workers' self-management, as well as the political theories and movements associated with them. Social ownership can be public, collective or cooperative ownership, or citizen ownership of equity.⁷² There are many varieties of socialism and there is no single definition encapsulating all of them, with social ownership being the common element shared by its various forms.⁷³

An important legal system which has influenced the development of many other legal systems of the world is called 'Socialist Legal System'.⁷⁴ This Legal System was adopted by those countries which had started following socialist and Marxist philosophy especially after the First World War of 1914-19. We might be aware that the socialist philosophy was practically adopted by the former U.S.S.R. and China. When the U.S.S.R. disintegrated in the late 1980s, all breakaway countries adopted this Legal System with some modifications, such as *Ukraine, Kazakhstan, and Uzbekistan*. Apart from China, other countries, such as Mongolia, North Korea and Cuba follow this legal system. We cannot say that this legal system is quite different from Common Law and Continental Legal System. Instead we must know that the 'Socialist Legal System' has been influenced by Continental and Common Law systems. However, there are certain features of this legal system which have distinguished it from other legal systems.⁷⁵

TRAITS OF SOCIALIST LEGAL SYSTEM

The important traits of Socialist Legal System are as follows:

Socialist Legal System' means a Legal System in which some of the basic traits are present, namely:

(a) Law is considered to be of revolutionary character and not static.

⁷² K. ZWIEGERT & H. KOTZ, INTRODUCTION TO COMPARATIVE LAW (H. KOTZ Preface to the 3rd edn., 998).

⁷³ A. Uzelac, *Survival of the Third Legal Tradition?* 49 SUPREME COURT LAW REVIEW 377-396 (2010).

⁷⁴ J. N. HAZARD, W. E. BUTLER & P. B. MAGGS, THE SOVIET LEGAL SYSTEM: THE LAW IN THE 1980S 320 (1984).

⁷⁵ R. Manko, *Is the Socialist Legal Tradition, Dead and Buried?, The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure*, T. Wilhelmsson et al. (eds), PRIVATE LAW AND THE MANY CULTURES OF EUROPE 83-103 (2007).

- (b) Public law is given more prominence than any other branches of law
- (c) Acts of administration and the laws passed by the legislature are normally not reviewed. The examples of such a legal system are: Russia, China, Mongolia and North Korea.⁷⁶

FEATURES OF SOCIALIST LEGAL SYSTEM

The salient features of Socialist Legal System are as follows⁷⁷:

- a. Legal rules are not considered permanent;
- b. Importance of public law;
- c. No judicial review of administration and law passed by the legislature; and
- d. Great influence of Continental Legal System.

Socialist Legal System is that system in which Private Law is given little importance whereas Public Law is regarded as Supreme. Judiciary normally does not review administrative actions and laws passed by the legislature.

COMPONENTS OF SOCIALIST LEGAL SYSTEM

Socialist Law Countries are those in which following major components are present. These are:

(a) Legal Rules are not considered permanent

According to the adherents of this legal system, law is considered to be of temporary character and a time would come when law will not be necessary to govern. The moment everybody would become economically equal, there would be no requirement of law. To promote economic equality, courts and law are required. Law, in 'Socialist Legal System', is of revolutionary nature.

Unlike Continental Legal System where law is of static character, the 'Socialist Legal System' throws away any law which promotes private

⁷⁶ Z. KUHN, THE JUDICIARY IN CENTRAL AND EASTERN EUROPE: MECHANICAL JURISPRUDENCE IN TRANSFORMATION? 293 (2011).

⁷⁷ M. Safjan, *Wiewiórowska-Domagalska A., Political Foundations of European Private Law: Rethinking the East-West Division Lines* R Brownsword et al. (eds), THE FOUNDATIONS OF EUROPEAN PRIVATE LAW 265-284 (2011).

property and wealth. For example, when the former U.S.S.R. adopted Socialist Legal System, all the laws promoting private and commercial rights were abolished. Those laws were called 'bourgeoisie law'.

Socialist laws are revolutionary in the sense that they do not recognize old laws which sustained capitalism based on private rights and free markets. It aims to overthrow those power relations which build a capitalist system.

(b) Importance of Public Law

In 'Socialist Legal System', Private Law has no space and all law has to be in the nature of 'Public Law' which means that all law deals with State matters or public matters, such as Constitutional Law, Administrative Law, and Criminal Law.

By Constitutional Law, we mean that law which determines the nature of the State and the structure of the government. It is above and superior to the ordinary law of the land.

Administrative Law deals with the structure, powers and functions of the organs of administration, the limits of their powers etc.

Private Law, which regulates and governs the relations of citizens with each other, is either abrogated or is given less importance than the Public Law. Examples of Private Law are the law of torts, contract, property, and intellectual property rights. In 'Socialist Legal Systems', many branches of Private Law have shifted and have become a part of Public Law.

Thus, Law of Contract which was considered to be a law regulating the contractual freedom of individuals has also now been substantially controlled and the freedom to contract has been severely restricted in this Legal System.

(c) No judicial review of administrative action and law passed by the legislature

Socialist Law theorists traditionally argue that the legislature is conceived to be the supreme expression of the will of the people and

beyond the reach of judicial restraint. Legislation, not judicial decisions, is recognized as the sole source of law.⁷⁸

They do not believe in the theory of 'separation of powers' according to which the legislature, executive, and the judiciary are independent and separate from each other. Instead, it believes in the unity of all State organs and above all superiority of legislature.

It is assumed that the legislative body is responsible for maintaining the constitutionality of State actions and that constitutional review could not be exercised by extra-parliamentary bodies, such as the judiciary. The Constitutions of socialist countries are recognized as the supreme legal force.

The judiciary cannot have the power to review the law passed by the legislature and rules framed by the executive under the authority of legislature. The power of 'judicial review' is considered as a tool of the bourgeoisie.

(d) Influence of Continental Legal System

The 'Socialist Legal System' is greatly influenced by the 'Continental Legal System'. The members of the socialist family of legal systems are those countries which formerly belonged to the 'Continental Legal System' and the characteristics of that Legal System is still preserved in it except the importance of Private Law.

The judges do not enjoy the power to authoritatively interpret the law and to modify it. Judicial precedents cannot be made by the judges who enjoy only the power to apply the given laws and promote social and economic justice thereby. Further, the court proceedings are not adversarial in character but it follows the inquisitorial approach and public prosecution is regarded as provider of justice rather than punishing the offenders.⁷⁹

⁷⁸ R DAVID & J. E. C BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 98 (1968).

⁷⁹ DAVID R. & BRIERLEY J. E. C., MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 59 (1968).

The legal field is also not strictly divided among criminal, civil, and intellectual property. This legal system is an integrated one where lawyers may move from one area to another (e.g., from criminal to civil law or from being a defense attorney to a prosecutor) without additional entrance requirements.⁸⁰

INFLUENCE OF SOCIALIST LEGAL SYSTEM ON NEPALESE LEGAL SYSTEM

Socialism in Nepal is not understood in the Russian context where all resources are owned by the state and the state secures the welfare of all. Socialism, as envisioned in the Nepalese Constitution, aims at elimination of inequality in income, status and standards of life. In various precedents laid down by Supreme court of Nepal have interpreted 'socialism' to mean a kind of social democracy which comes closer to the conception of a social welfare state as seen in the Constitutions of France and Germany. The Constitution of Nepal itself, however, does not define the term, but merely implies the above meaning through the rest of its provisions.

In exercise of socialism, the Constitution of Nepal provides what are called the Directive Principles, Policies and Obligations of the State in Part four. These principles are not justiciable in a regular court of law, meaning that one cannot file a proceeding because a Directive Principle has not been enacted or been denied. However, this does not render them redundant as they recognize the long-term but fundamental goals of a welfare state which help in defining the path of development the country is to follow, and it is the duty of the State to apply them while making laws. By their very name, they are "Directive" principles, principles which help the government direct their functions in order to make Nepal what the Constitution-makers wanted it to be. Further, Article 50 provides a mandate for the State to 'establish a public welfare system of governance, by establishing a just system'.

⁸⁰ B. Cross Frank, *Identifying the Virtues of the Common Law*, SUPREME COURT ECONOMIC REVIEW 219 (2007).

Article 50 lays down four Directive Principles. Some of these are to ensure means of equal livelihood to men and women, ownership and control of resources be distributed to serve the best interests of the people, there is no concentration of wealth, there is equal pay for equal work of men and women, etc.

Socialist family of law is based on the philosophy, ideology and principle of Marxism and Leninism. Nepal has also adopted or received some concept and idea from socialist legal system. I think that Nepal's Legal System is primarily influenced by 'Common Law System' with only a few features of socialist Legal System.

SCOPE AND ENFORCEABILITY

Preamble of Constitution

“...Being committed to socialism based on democratic norms and values including the people's competitive multiparty democratic system of governance, civil liberties, fundamental rights, human rights, adult franchise, periodic elections, full freedom of the press, and independent, impartial and competent judiciary and concept of the rule of law, and build a prosperous nation...”

Article 4 of Constitution of stated that,

Nepal is an independent, indivisible, sovereign, secular, inclusive, democratic, socialism-oriented, federal democratic republican state.⁸¹

- Article 18: Right to equality
- Article 22: Right against torture
- Article 24: Right against un touch ability and discrimination
- Article 29: Right against exploitation
- Article 34: Right regarding labor
- Article 33: Right to employment
- Article 42. Right to social justice
- Article 43: Right to social security

⁸¹ Art. 4 of the CONS. OF NEPAL, 2015.

- Directive principle, policies, and responsibilities of state
- Adopted scientific land reform programmed and ended feudalistic land ownership
- Follow a policy of protecting and promoting national industries and resources
- Repeal all discriminatory law
- Establishment of public enterprises
- The Lands Act, 2021(1964)
- *Birta* abolition
- Investment for promotion of industries and trade
- Policy of establishing the rights of all citizen for education, health, housing, employment, and food sovereignty
- Promote economically backward class
- The Labor Act, 2017 (2074)
- Hindus, law is a branch of dharma, which give more emphasis on Morality, social harmony and solidarity.
- Nepalese legal system was totally based on Hindu legal system before 2007 B.S.
- Some influence of Hindu legal system are:
- Morality was regarded as law
- Many festivals are celebrated by varies caste, culture, in variety of ways
- Slavery and sati pratha was in practice
- Right to religious freedom
- *Ghumto, Chhaupadi, kumaripratha* are still prevailing in some society
- Right to language and culture
- Division of different caste
- Different language and dress according to culture
- Offence regarding religious Act 2074
- Brahman are regarded as “Mahapurush”
- “*Dharmashastra*” has made influence on “*Manabnyaysastra*”
- During Kirat, Lichhavi, Malla period punishment was given according to caste
- Edicts of king
- Law made from *Manusmriti, Naradsmriti*

The advantages of Socialist Legal System in Nepal would be:

- (a) Judiciary will not waste its time in reviewing the law passed by the Parliament/State Legislatures.
- (b) Majority of time consumed by the lower courts in settling private disputes would be saved.

The disadvantages of Socialist Legal System would be

- a. private property, which is considered a status symbol for every individual, would not be legally protected
- b. Arbitrary acts of executive would increase.

I do not think that Nepal should adopt Socialist Legal System because Nepal has been following its own indigenous Law System for the last many years and adopting another legal system would be costly and chaotic. There is no need to adopt another system, but instead to reform the existing system.

HINDU LEGAL SYSTEM

For the Hindus, law is a branch of dharma. The word dharma is derived from the root *dhr*, which means to uphold, sustain, and nourish. “Dharma” is a comprehensive term, that encompasses notions of duty, morality, ritual, law, order, and justice. Law embraced all of life and was synonymous with virtue.

Dharma pervades throughout the Hindu philosophical thought and the Hindu social structure. Law in this sense is considered as a branch of dharma.⁸²

According to Manu “Dharma” is what is followed by those who are learned in Vedas and what is approved by the conscience of the virtuous who are exempt from hatred and inordinate affection.⁸³ Manusmriti the code of Manu compiles all the laws that were scattered in pre-smriti sutras and *gathas*. Commentaries (*bhasya*) take the form of linguistic

⁸² P.V. Kane, *History of dharmasastra* 1 (rev. ed. Poona 1968) [hereinafter cited as KANE]. Kane’s monumental work, in five volumes, is the principal sourcebook on dharma and law. Volume 3, addressing Hindu law, appeared in 1946.

⁸³ Manu’s Code of Law: A Critical Edition and Translation of the Manavadharma Sastra (Patrick Olivelle edn., 2005).

exegeses, hypothetical examples, and theoretical disquisitions on a single Dharmasastra text.⁸⁴ According to him there are four types of Caste system.⁸⁵ They are

- ❖ *Brahmanas*
- ❖ *Kshtriyas*
- ❖ *Vaisyas*
- ❖ *Sudras*⁸⁶

Further, *Medhatithi*, one of the early commentators on Manu, says that the term “dharma” stands for ‘duty’. It signifies the sum total of religious, moral, social and legal duties. From this aspect, it has been said that Hindu system is a system based on duties.

The Hindu word for law- “dharma”-shows following derivation.⁸⁷

- ❖ *Shruti* means “what is heard”.
- ❖ *Smriti* means “what is remembered
- ❖ *Smritis* can be divided into two – First Dharma Sutra (Prose) and second Dharmashastras (Poetry).

Hindu law is a law which emanates from Smritis expounded in Sanskrit commentaries and digests. These Smriti texts do not make any clear-cut distinction between rules of law and rules of morality or religion. These rules of religion and morality were dealt with at one and the same place with the rules of law.⁸⁸ Dharmasutras were mostly written in prose form but also contain verses. It is clear that they were meant to be training manuals of sages for teaching students. Important are-

- ❖ *Gautama*-inheritance, partition, and *stridhan*
- ❖ *Baudhayan*- marriage, son ship, and inheritance

⁸⁴ G. JHA, THE LAWS OF MANU 67 (1920).

⁸⁵ The caste system in the present day very largely turns on occupation, and the tendency is to form smaller and smaller endogamous groups ... Below the high castes there is an immense array of lower castes. The census enumerates over 2300 minor castes.” Holderness, Peoples & Problems of India, pp. 96-99.

⁸⁶ The Sudra in quest of a living might adopt any country as his own, 5 Sacred Books of the East, p. 33.

⁸⁷ ROBERT LINGAT, THE CLASSICAL LAW OF INDIA 8 (1973). Ludo Rocher, *Hindu conceptions of law*, 29 HASTINGS LAW JOURNAL 1284, 1293 (1978).

⁸⁸ The sacred Books of the east (F.M. Muller ed., G. Biihler trans. 1886) [hereinafter cited as MANUI. For editions and translations of the texts, see bibliographies cited in note 6, supra.

- ❖ *Apastamba*- rejected *prajapatya* marriage
- ❖ *Vashistha*- remarriage of virgin widows

Dharmashastras were mostly in metrical verses and were based of Dharmasutras. However, they were a lot more systematic and clear. They dealt with the subject matter in three parts-

- ❖ *Aachara* : This includes the theories of religious observances,
- ❖ *Vyavahar* : This includes the civil law.
- ❖ *Prayaschitta*: This deals with penance and expiation.

In the case of *Shri Balsu*, the privy Council distinguished between mandatory (legal) rules and directory (moral) rules.

The High Courts in India have tried to lay down some tests (See e.g. *Ram Harak v. JaganNath*, (1938) 53 All. 815 approved in *Abhiraj v. Devendra*, 1962 S.C. 351). On this basis an entire body of Hindu law has been built up. Even during the Mohammedan rule in the country, the Smriti law was continued to be fully recognised. Hindu concept of law does not conform to the Austinian view. According to analytical jurists most of the rules of Hindu law would be termed as no more than mere positive morality. However, it is now very well accepted that a rule of law to be called as such need not emanate from a determinate or particular authority and it need not be imposed on others by such an authority. Rules of Hindu law were as much rules of law as the commands of Austin's sovereign, because they were obeyed by the people for whom they were made.⁸⁹

HINDU LAW IN PRESENT CONTEXT

Hindu law is a personal law. In addition to Nepal and India, it is also applied to Hindus in other countries such as Burma, Malaya, Kenya and Tanzania. Hindu law is a personal law. In addition to India, it is also applied to Hindus in other countries such as Burma, Malaya, Kenya and Tanzania.⁹⁰

⁸⁹ CHANDRASEKHARA AIYAR, *MAYNE'S TREATISE ON HINDU LAW AND USAGE* 238-39 (1950).

⁹⁰ Albrecht wezler, *Dharma in the veda and the dharmasastras*, 32 *JOURNAL OF INDIAN PHILOSOPHY* 629, 629-54 (2004).

The word “Hindu used to refer to the ethnic group of people of Nepal and India and, in the thirteenth century, the word “Hindu” was more widely used to distinguish them from the Islamic kingdoms within India.

Hindu law as administered by the Courts of India is applied to Hindus, But, in fact, it is not the original Hindu law which is applicable to Hindus in India.⁹¹ It is an amended and modified law which has changed and altered a considerable portion.⁹²

Original Hindu law does not apply to all the matters. It is subjected to alterations and modifications. Original Hindu law has been interfered with by the changing demands and needs of the society. For instance, the nature of Hindu marriage is materially altered by the passing of the Hindu Marriage Act, 1955; ·Adoption among Hindus is governed by the Hindu Adoption and Maintenance Act, 1956; For matters of succession there is the Hindu succession Act, 1956; ·Minors are dealt with by the Hindu Minority and Guardianship Act, 1956 etc. The provisions of these legislative enactments are prevailing over the original Hindu Law.

‘Hindus’

In the earliest time the term ‘Hindu’ had a territorial significance. It only denoted nationality. In fact the word ‘Hindu’ is of foreign origin. This designation came into existence with the advent of Greeks who called the inhabitants of the Indus valley as “Indoi” and later on this designation was extended to include all persons who lived beyond the Indus valley.

In the case of *Yagnapurusholasji v. Vaishya*, the Supreme Court of India elaborately considered the question as to who are Hindus and what are the broad features of Hindus religion. The Supreme Court of India has observed that the word Hindu is derived from the word Sindhu, otherwise known as Indus river. The Persians pronounced this word Hindu and named their Aryan brethren ‘Hindus’.

⁹¹ Digest of Hindu Law, bi. 5, ch. 4, 273. The text which prescribes the adoption of a sapinda, or relative, is only a religious injunction, but the prohibitions as to difference of caste and as to adoption by women have been held to be positive laws. See Trevelyan, 107, 132, 133, and cases there cited.

⁹² A history of ancient Sanskrit literature (1859).

Dr. Radha krishnan has also observed that the Hindu civilization is so called since its original founders or earliest followers occupied the territory drained by the Sindhu (Indus) river system corresponding to the North West provinces in Punjab.

This is recorded in Rig Veda, the oldest of the Vedas. The people on the Indian side of the Sindhu were called Hindus by the Persians and later Western invaders. That is the genesis of the word Hindu. Thus, the term Hindu had originally a territorial and not a creedal significance. It implied residence in a well-defined geographical area. Today, the term 'Hindu' has lost its territorial significance. It is also not a designation of nationality.⁹³

APPLICATION OF HINDU LAW

"Hinduism" was used during the British Rule in the nineteenth century to refer to the Hindu religious culture group as distinct from Christianity and Islam.

Hindu law applies to all the persons who are Hindus but there is still no precise definition of the term Hindu either in any statute or in any judicial pronouncement. However, the question as to who is a Hindu can be understood in a different way. It can be taken as to whom the Hindu law applies. The following people are considered to be Hindu with respect to application of Hindu Law.

1. Any person who is a Hindu. Jain, Sikh or Buddhist;
2. Any person who is born of Hindu Parents;
3. Any person who is not a Muslim, Christian, Parsi or Jew and who is not governed by any other law.

On the basis of the description of persons as above it can be said that following persons are Hindus: -

1) Hindu by Religion: Following two types of persons fall in this category:

⁹³ R DONALD JR DAVIS, THE BOUNDARIES OF HINDU LAW: TRADITION, CUSTOM, AND POLITICS IN MEDIEVAL KERALA 87 (2004).

i) Followers of Hindu Religion:

Any person who follows Hindu religion either by practising it or by professing it is a Hindu. An attempt to define Hindu in terms of religion was made by the Supreme Court in *Shastri v. Muldas* (1966 S.C. 1119.). The Court through Gajendragadkar J. said that “beneath the diversity of philosophic thoughts, concepts and ideas expressed by Hindu philosophers who started different philosophical schools, lie certain broad concepts which can be treated as basic. The first among these basic concepts is the acceptance of the Vedas as the highest authority in religious and philosophical matters. This concept necessarily implies that all the systems claim to have drawn their principles from a common reservoir of thought enshrined in the Vedas.⁹⁴ The other basic concept which is common to the system of Hindu philosophy is that all of them accept this view of the great world rhythm, vast periods of creation, maintenance and dissolution follow each other in endless succession. It may also be said that all the systems of Hindu philosophy believe in re-birth and pre-existence”. This judgment of the Supreme Court gives a good working elaboration of Hindu religion in positive terms. But it is equally true that any definition of the ‘Hindu’ in terms of religion will always be inadequate.⁹⁵

ii) Converts and Reconverts to Hinduism:

Under the codified Hindu law any person converted to Hinduism, Jainism, Buddhism or Sikhism is a Hindu. The Supreme Court in *Perumal v. Poonuswami*⁹⁶, observed that a person may be a Hindu by birth or by conversion. No formal ceremony of purification or expiation is necessary to effectuate conversion. But at the same time a mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him to a Hindu, nor is a bare declaration that he is a Hindu sufficient to convert him to Hinduism. But, a bona fide intention to be converted to the Hindu faith accompanied by conduct unequivocally expressing that intention may be a sufficient

⁹⁴ PATRICK OLIVELLE, THE ASRAMA SYSTEM: THE HISTORY AND HERMENEUTICS OF A RELIGIOUS INSTITUTION 92 (1993).

⁹⁵ WILFRED CANTWELL SMITH, WHAT IS SCRIPTURE? A COMPARATIVE APPROACH 142–43 (1993).

⁹⁶ *Perumal vs. Poonuswami*, S.C. 2352 (1971).

evidence of conversion. A person who is a reconvert to Hinduism, Jainism, Buddhism or Sikhism is also a Hindu. A person who ceases to be a Hindu by converting to a non-Hindu religion will, again, become Hindu if he reconverts to any of the four religions of Hindu.⁹⁷

2) Hindu by Birth:

Following persons are deemed to be Hindus by birth:

- i) When both the parents are Hindu: Children born of Hindu parents are Hindus. Such a child may be legitimate or illegitimate. It is also immaterial that such a child does or does not profess, practice or has faith in the religion of its parents.
- ii) When one Parent is Hindu: When one of the parents of a child is Hindu and he is brought up as a member of Hindu family, he is a Hindu. It is clear by the explanation (b) of Section 2(1) of Hindu Marriage Act, 1955 that child's religion is not necessarily that of the father.

For instance, a child is born of Hindu mother and Muslim father. The child is brought up as a Hindu. Subsequently, mother converts to Islam. Nonetheless the child is Hindu. In *Ram Prasad v. Dahin Bibi*⁹⁸, is a good example on the point.

3) Persons who are not Muslims, Christians, Parsis or Jews:

The codified Hindu law lays down that a person who is not a Muslim, Christian, Parsi or Jew is governed by Hindu law, unless it is proved that Hindu law is not applicable to such a person. Those persons who are atheists or who believe in all faiths or in conglomeration of faiths may fall under this class. Under the codified Hindu law such persons will be Hindus for the purpose of the application of Hindu law. Therefore, the modern Hindu law is a body of rules of personal law applicable to Hindus as well as several non-Hindu communities. In the modern Hindu law all those persons to whom Hindu law applies are called "Hindus".⁹⁹

⁹⁷ CHANDRASEKHARA AIYAR, MAYNE'S TREATISE ON HINDU LAW AND USAGE 2 (1950).

⁹⁸ *Ram Prasad vs. Dahin Bibi*, Pat. 420(A.I. R. 1924).

⁹⁹ PATRICK OLIVELLE, THE ASRAMA SYSTEM: THE HISTORY AND HERMENEUTICS OF A RELIGIOUS INSTITUTION 49 (1993).

CLASSIFICATION OF HINDU LAW

The Hindu law, as we all know, got divided into two branches the Mitakshara and the Dayabagha.

Mitakshara

Mitakshara is one of the most important schools of Hindu law. It is a running commentary of the *Smriti* written by *Yagnvalky*. This school is applicable in the whole part of India except in West Bengal and Assam. The Mitakshara has a very wide jurisdiction. However different parts of the country practice law differently because of the different customary rules followed by them.¹⁰⁰

Mitakshara is further divided into five sub-schools namely

- ❖ *Benaras* Hindu law school
- ❖ *Mithila* law school
- ❖ *Maharashtra* law school
- ❖ *Punjab* law school
- ❖ *Dravida* or madras law school

These law schools come under the ambit of Mitakshara law school. They enjoy the same fundamental principle but differ in certain circumstances.¹⁰¹

Dayabhaga School

Dayabhaga school predominantly prevailed in Assam and West Bengal. This is also one of the most important schools of Hindu laws. It is considered to be a digest for the leading smritis. Its primary focus was to deal with partition, inheritance and joint family. According to Kane, it was incorporated in between 1090-1130 A.D.¹⁰²

Dayabhaga School was formulated with a view to eradicating all the other absurd and artificial principles of inheritance. The immediate

¹⁰⁰ R. Donald *et al.*, *A Realist View of Hindu Law*, 19 RATIO JURIS: AN INTERNATIONAL JOURNAL OF JURISPRUDENCE AND PHILOSOPHY OF LAW 287 (2006).

¹⁰¹ J.H. NELSON, A VIEW OF HINDU LAW AS ADMINISTERED BY THE HIGH COURT OF JUDICATURE AT MADRAS 2 (1877).

¹⁰² K.P. JAYASWAL, MANU AND YAJYVALKYA, A COMPARISON AND A CONTRAST 56 (1930).

benefit of this new digest is that it tends to remove all the shortcomings and limitations of the previously established principles and inclusion of many cognates in the list of heirs, which was restricted by the Mitakshara school.¹⁰³

In Dayabhaga school various other commentaries were followed such as:

- ❖ *Dayatatya*
- ❖ *Dayakram-sangrah*
- ❖ *Virmitrodaya*
- ❖ *Dattakachandrika*

The difference arose because two different interpretations were given by the commentators to one word '*pinda*'.¹⁰⁴

Influence of Hindu legal system on other legal System

- ❖ Marriage rites transmitted through Greece to Rome, i.e. after the birth of a child the rite of purification was performed.
- ❖ Ceremony of tonsure spread to China and Japan.
- ❖ Greece adopted belief to have a son
- ❖ Father considered as head of the family in Rome
- ❖ In Rome at the time of the Twelve Table, like Hindu father, could sell his offspring only in cases of extreme necessity in order to save both from privation.
- ❖ Woman must never seek independence, Roman and Greece, adopted the principle of perpetual guardianship for women.¹⁰⁵

CONCLUSION

This analysis demonstrates how common law, civil law, Socialist law and Hindu Legal system influence Nepalese legal system. In fact, The Nepali legal system is a mixed in many regards. Nepal was not colonized by a British, and the indigenous Hindu legal system therefore dominated all sphere of law until the middle of the 20th century. Since

¹⁰³ L. STERNBACH, 23 ANNALS OF THE BHANDARKAR ORIENTAL RESEARCH INSTITUTE, 528-43 (1942).

¹⁰⁴ Iudo Rocher, *Law Books in an Oral Culture: the Indian Dharma Sastras*, 137 PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY 254-267 (1993).

¹⁰⁵ R DONALD & JR DAVIS, THE BOUNDARIES OF HINDU LAW: TRADITION, CUSTOM, AND POLITICS IN MEDIEVAL KERALA 107 (2004).

the 1950s there has been a greater influence of common law. It is probably for this reason that comparative classifications that include Nepal's legal system as a mixture of common law and customary law. However, other mixtures mark the Nepalese legal system. French law inspired the ruler in the 19th century, and that influence can still be found in the regular formal law. In addition, the plurality of Nepali society made it necessary to provide space for different customary regimes to coexist with the formal Hindu law. When it comes to innovations within the legal system, including international law, the different ingredients interact.

