

Religion and Law in Nepal

I. INTRODUCTION

Nepal is a multi-racial, multi-lingual, multi-cultural and multi-religious country. The population of Nepal is estimated at 27 million. Hinduism is the dominant religion in Nepal. The census of 1981 puts Hindu membership at 89.5 % of the total population; in 1991 shows the percentage was 86.5%. In the census of 2001, Hindu percentage was 80.62%. The decline in number may have several reasons. First, the percentage counted in 1981 may have been inflated, or since the dawn of democracy, which guaranteed freedom in religion, the fear of revealing one's religious identity was past, and a true picture has emerged. A second reason may be that some people are frustrated with the Hindu caste system, and that a large-scale conversion of Hindus (specially the people belonging to the lower caste) into some other religion is underway. Although change in religion is not permitted by law, some people (especially non-Hindus) say that everyone should have the freedom to choose what religion he or she wants to practice.

The Constitution of Nepal says that every person shall have the freedom to profess and practice his own religion which has come down to him from time immemorial according to the traditional custom, but no person shall be entitled to forcibly change the religion of any other person. Many non-Hindus consider this statement on religion in the constitution to be unnecessary as it is well-accepted that religion has always been a subject of enquiry owing to various factors.

II. RELIGION IN THE NEPALESE LAWS BEFORE THE UNIFICATION OF NEPAL

Nepalese laws since the ancient period until the establishment of democracy in 1951 were based on religion, local customs, and royal edicts. Law is considered to be a branch of religion. Prior to the codification of the Country Code (Mulki Ain) of 1854, the legal system of Nepal was very much influenced by religion. In ancient times, there was no differentiation between law and religion, between law and native religion.

Customary law and royal edicts were also sources of law. The Legal and Justice System of Kirat period can be understood from the Kirat Veda viz "Kirata Mundum." Mundum was just like four Vedas of Aryans. The early 6th century B.C. has been accepted as the initial period of Kirat reign in Nepal. In early Kirat society, the Mundum was the only law of the state.

Many of the rules were based on the social customs, traditions, culture values, and religion during the reign of Lichhivis as well. Traditional concepts of fairness and impartiality under the laws of religion were basic rules of justice. The kings of subsequent dynasties began to promulgate laws with the advice of Dharmadhikara (the owner of justice) and pundits. Laws during Malla period were Sruties, Smirities, Manab Nyaya Shastra. The practice of ordeal (trial) was legalized in the administration of Justice. Prior to the unification of Nepal (1768), the whole system was governed by the Hindu religious text book and the local customs.

III. RELIGION IN THE NEPALESE LAWS AFTER THE UNIFICATION OF NEPAL

Nepal as the viable political entity that exists today came into existence during the third quarter of the 18th century. Before unification, Nepal was divided into several principalities and petty kingdoms. King Prithivi Narayan Shah of Gorkha laid the foundation of unified modern Nepal in 1768.

KANAK BIKRAM THAPA is Professor of Law and Former Dean, Faculty of Law, Tribhuvan University of Nepal, Kathmandu.

Before the unification of Nepal, the common feature among the principalities was the recognition of law based on the dharmashashtra viz Veda smirities, puranas, commentaries. Nibandha usage costumes sanads were issued where dharmashastras customs usage were silent in particular needful situation

King Prithivi Narayan Shah assigned the responsibility of justice to Dharmaadhikara. King was the foundation of law and justice. He established both the trial and appellate courts in all provincial and district level courts. Pundits of Brahmin caste were appointed as representatives of dharmadhikari, who were responsible for the application of law and religion in all cases. Principles of equality were ignored; the caste system was prevalent, and criminals were treated in accordance with their caste status. The king and his descendants ruled the country with the help of the royal edicts (panjapatra), customs, conventions, and moral law, local custom, and religious instruments. The laws before the codification (country code) were based on Hindu religious texts and practice, and disputes were settled by the village chieftains, pundits, and local land lords. There were many other legal charters in the form of sanads, sawal, lalmohar, and so on.

Jung Bahadur Rana, an ambitious and shrewd courtier, installed the Rana regime in 1846, and made the position of prime minister hereditary to the Rana family and maintained the status quo in every field. Jung Bahadur visited England and France in 1849 to observe their legal structure. The English and French court structure, the Code Napoleon and Civil Code of France, influenced him. During his visit, he was impressed by the governmental institution of their mode of functioning as well. After his return from Europe, he started to review the laws of Nepal, and in 1851 he appointed a Law Council (Ain Kausal). The Ain Kaushal worked diligently for almost three years, and finally on 5th January 1854, the Country Code (Muluki Ain) was promulgated. The code has 163 chapters and covers about 1400 pages. It deals with criminal and civil law, as well as provisions relating to administrative law, land law, regulation for the management of revenues administration, land survey, and so forth.

The Code (Muluki Ain 1854) embodied the various Nepali customs, laws, uses, social norms, and royal proclamations, including untouchability and punitive action for breaking of the caste hierarchy, making legal the traditional rules of the caste-based discrimination in Nepal. The country code of 1854, the first code of modern Nepal, was thus based on Hindu jurisprudence and incorporated the diverse castes and ethnic groups of Nepal into the framework of national caste hierarchy.

The preamble of Muluki Ain of 1854 mentioned that the code came into existence to bring uniformity in legal administration into the country. The Code of 1854 was modified and redrafted from time to time, and underwent up to thirteen minor and major amendments. It continued as the main source of law in the country until 1963, for about 110 years, until it was replaced by the Country Code (Muluki Ain) of 1963.

IV. RELIGION IN NEPALESE LAW AFTER 1951

The revolution in 1951 overthrew the Rana regime and introduced multiparty democracy into the country for the first time. With this political change, the Nepalese legal system has replaced the traditional lawmaking procedure and system of adjudication with a Western system. In the Nepalese constitution, the legislative, executive, and the judicial bodies are organized in appropriate Western fashion. The Country Code of 1963 was based on the principle of equality before the law and doing away with caste and religious considerations. It has been serving as the common criminal code and civil code, and is equally applicable to Hindus, Buddhists, Muslims and others in matters such as marriage, adoption, inheritance, and succession. After 1951, changes in the legal system influenced private law, public law, criminal law, constitutional law, administrative law, contract law, commercial law, and private property. Changes also occurred in the areas of the investigative system, prosecution system, legal system, and the system of adjudication.

The Nepalese legal structure has begun to address socio-economic justice, fair society, fair justice, equality, rules of law, just law, and fraternity. The Country Code of

1963 codified all the laws of Nepal – civil, criminal, religious, and customary laws. The code abolished all forms of discrimination and untouchability. The Code also recognized customary rules and practices of certain indigenous communities. It prohibits converting another person from one religion to another. An attempt to convert another is punished with three years imprisonment, a successful conversion of another is punished with six years strict punishment. If the person is a foreign national, after serving six years he/she will be expelled from the country.

V. RELIGION IN THE CONSTITUTIONS OF NEPAL

The constitution is the supreme and fundamental law of the land. The term “constitution” describes a document having a special legal sanctity, and sets out the framework and the principal functions of the bodies of the state and declares the principles governing the operation of these bodies. The constitution is legally binding on the state and all subjects within it. In Nepal, since 1048, six constitutions have been promulgated, and the constitutional assembly is working on a seventh.

The first three constitutions of Nepal, namely The Government Act 1948, Interim Government of Nepal Act 1951, and The Constitution of Kingdom of Nepal 1959, guaranteed fundamental rights which were protected by the due process of law. They contained directive principles of state policy, and the rule of law was assured. They provided to the citizen of Nepal freedom of person, speech assembly, and worship, but they did not mention anything about the right to freedom of religion or in fact anything regarding any religion.

In 1962, the king dismissed the parliamentary system and introduced the so-called party-less democracy known as the “panchayat system.” Ultimately, on 16 December 1962, a new constitution was promulgated, which laid the foundation of the panchayat democracy in the country. It was said that this was a constitutional innovation and that the system was essentially Nepali in character and spirit. While introducing the system, King Mahendra claimed the panchayat system has its roots in the soil of our country, and is capable of growth and development in the climate prevailing in the country. Some claimed that the constitution was nationalist in the background and democratic in tendency. Basic fundamental rights and due to process of law, except the right to form political organization, were granted to the people.

The 1962 Constitution of Nepal for the first time declared that Nepal is an independent, indivisible, sovereign, monarchical Hindu kingdom. Religious freedom has been granted, though but conversion of religion was prohibited. The Constitution of Nepal 1962 had mentioned that the word “His Majesty” means His Majesty the King currently reigning, being descendant of the Great King Prithivi Narayan Shah and adherent of Aryan culture and the Hindu religion. The constitution also gave fundamental rights to religion, according to which every person should have the freedom to profess and practice his own religion as handed down to him from ancient times having due regard to traditional practices, providing, however, that no person should be entitled to attempt to convert another person to a different religion.

The 1962 Constitution of Nepal was replaced when the Constitution of the Kingdom of Nepal 1990 was introduced. The 1990 Constitution of The Kingdom of Nepal introduced the multi-party parliamentary system in the country, but the provision of the Hindu Kingdom and prohibition of conversion of one religion remained intact.

After the success of the People’s Movement of 2006, the 1990 Constitution of Kingdom of Nepal was repealed and the 2007 Interim Constitution was introduced. The Interim Constitution of Nepal declares the nation in Article 3 as “having common aspiration united by bonds of allegiance to national independence, integrity, national interest, and prosperity of Nepal; all the Nepalese people collectively constitute the nation having multi-ethnic, multi-lingual, multi-religious, and multi-cultural characters.”

Article 4 of the Interim Constitution declares that the state of Nepal is “an independent, indivisible, sovereign, secular, inclusive and fully democratic state.” Article 23 provides that the right to religion as a fundamental right means that every person has

the right to profess, practice, and protect his or her own religion as handed down to him or her from ancient time, having due regard to the existing social and cultural practices. Provided that no person shall be permitted to convert another person from one religion to another, and that no act or action shall be done in such a manner as to jeopardize the religion of another, every religious denomination shall have the right to maintain its independent existence and to operate and protect its religious site and religious trust in accordance with law.

VI. CONCLUSIONS

The 2007 Interim Constitution declares that Nepal is a secular state, and guarantees the rights of citizens to profess, practice, and preserve their religion, social order, or cultural tradition. It also prohibits the right to convert religion. Thus the Interim Constitution guarantees only the right to profess and practice one's own religion insofar as it is done without infringement upon the religion of another, and it completely prohibits the conversion of one religion to another religion. It is apparent that the constitution prevents the right to practice the religion of choice because of the prohibition of conversion.

Besides these constitutional and other statutory provisions, Nepal is a party to various binding International Human Rights instruments. The Nepal Treaty Act of 1991 explicitly provides the primacy of International Treaties over national laws. In pursuance of this, the government may be required to analyze some of the provisions of international instruments such as the Universal Declaration of Human Rights and International Covenants on Civil and Political Rights. Article 27 of the International Covenant on Civil and Political Rights of 1966 states that in those states in which ethnic, religious, linguistic minorities exist, persons belonging to such minorities shall not be denied community rights to enjoy their own culture, to progress in and practice their own religion, or to use their own language.

Article 18 of the Universal Declaration of Human Rights has declared that every one has rights to freedom of thought, conscience, and religion or belief in teaching, practice worship, and observance, either alone or within a community in public or private. This provision, which ensures freedom to change one's religion, contradicts the provision of Article 23 (1) of the Nepal Interim Constitution and the chapter on etiquette (Adal) of the Country Code of 1963, which prohibits converting from one religion to another.

Although, constitutionally, Nepal is a multi-cultural, multi-religious, secular country, the philosophy of the separation of religion from the state philosophy of secularism is not observed. Nepalese social structure is still based and guided by the old values, norms, customs, and practices of the Hindu religion and rituals. The overwhelming majority (80 percent) people in Nepal identify themselves as Hindu. The Interim Constitution of Nepal does not setup a wall or partition between religion and the state. Therefore, Nepal is not a secular state (separating religion from the state) as understood in the West. But neither is Nepal a theocratic country, because none of the essential characteristics of theocracy are found in Nepal. Democracy in Nepal, as structured by the Interim Constitution, incorporates the philosophy of secularism.

It will not be an exaggeration to say that Nepal has envisioned in the construction of the Constitution the idea of the secular state. The ideology of secularism or the secular state is reflected in the Constitution in light of the Nepalese historical and social background, which is different from the Western World. The Interim Constitution is not anti-god or anti-religious. It recognizes that religion has relevance and validity in the lives of many, though not necessarily all citizens. It emphasizes that while religion may be relevant in life, it cannot hamper or frustrate the progress of Nepalese democracy in its allotted task of creating a new secular order.

If we are looking for the doctrine of secularism, dedicated to the certain cause of creating a new social order, founded on justice, and a socio-political and economic base, we will have to emphasize the limitations imposed upon the exercise of the right to freedom of religion.

The idea of secularism has been thought important in the social and political development of Nepal ever since People's Movement for democracy in 2006. Since the success of People's Movement it has, however, acquired a new emphasis and poses many difficult problems, because it now needs to be transformed into practical principles and formulated in a manner capable of implementation through the choice of community values.

It is through the constitutional drafting process that the law and legal theory in Nepal should make an effort to forge out new approaches, using an approach which supports the development of a general moral consciousness irrespective of religious consideration, and at the same time accepting all religions and upholding that state which will support and treat all religious communities equally.