

An Analysis of Major Provisions of Nepalese Law of Contract (Part-V of Muluki Civil Code, 2074)

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Abstract

This doctrinal study has adopted exploratory, descriptive and analytical methods. The analysis is based on primary sources of law drawn from statutes and judicial decisions, and some secondary data drawn from articles, books and treatises on the given issue. The nascent Muluki Civil Code, 2074 contains various provisions which are important from the jurisprudential point of view of the law of contract. This paper thrives to explore the major provisions of the current law of contract in Nepal, analyse the major provisions and jurisprudence of the law of contract, while also highlighting the differences between the new and old laws regulating contract in Nepal.

Article Type: Research Paper

Key Words: Contract law, Civil Code, Major provisions.

Introduction

In general parlance, contract is a legal agreement between two or more parties. Any agreement between two or more persons to do or not to do any act enforceable by the law is deemed as a Contract.¹ The law of contract deals with the formation of a contract limits of contractual obligation, performance and discharge, remedies for breach of contract, as well as vitiating factors of contract.²

According to the Nepalese Supreme Court, any deed where both parties agreed for a commission or an omission of an act for a certain consideration of something is called a Contract.³ Though the law of contract has been a thing in Nepal since the *Lichhavi* era to the modern era, the statutory law regulating contracts has a short history, which traces back to the *Muluki Ain*, and then to the Act Relating to Contract, 2023, which was repealed and replaced by the Contract Act, 2056. Today, contract is regulated again by the 'general law', i.e.

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1 *Muluki Civil Code, 2074, Section 504(1).*

2 Beatson, J. (2000). *Anson's Law of Contract (28th ed.)*. New York: Oxford University Press, 20.

3 *Prithvi Bahadur Maharjan v. Birat Bahadur Khadka*, NKP 2064, 1100.

the *Muluki Civil Code*,⁴ which in Part-V contains various legal provisions regulating contract and liabilities.

The nascent *Muluki Civil Code, 2074* has come after an indeed long wait in order to fulfil the gaps in the erstwhile law of contract of 2056 BS. Whether the current law of contract has managed required legal frameworks for the fulfilment of need of the society or not? It is the need of the time to discuss and analyse those major provisions of contract laws provided in Part-V of the *Muluki Civil Code, 2074*. It is essential to highlight the major legal provisions regarding the law of contract in the *Muluki Civil Code, 2074* and analyse the jurisprudence and major provisions in the existing law of contract in Nepal.

Objectives of the Study

This study has the following objectives: -

- To explore the legal provisions and principles regulating contracts in Nepal
- To analyze major provisions in the current statutory law of contract in Nepal

Literature Review

A working paper presented by Justice Bharat Bhadur Karki⁵ highlights the provisions of contract and other liabilities in the *Muluki Civil Code, 2074* (then called the *Muluki Civil (Code) Act, 2074*). The author opined that the Code has tried to fulfil the expectations of mercantile sectors; behavioural issues are managed in the unified manner, simplified version and presented clearly; private law issues are managed adequately; and that nascent provisions of tortious liability are contained in the Code.

Advocate Shuvan Raj Acharya⁶ in his article ' *Muluki Civil Code: A Context of Contract Law*' describes the nascent issues in the law of contract, such as principles of the creation of liability, contract without consideration, interpretation of contract, addition of nascent categories of specific contracts such as those relating to hire purchase, lease, wages, etc. (contract of hire purchase, contract of lease, contract of wages, etc.). He analyses that the turban of special law of this law of contract has been abolished and included it in general law of civil law.

Similarly, Justice Gyaindra Bahadur Shrestha in his book⁷ highlights the different modes of this law in different periods of history. He provides description of how during the *Vedik* period (i.e. ~2500 years ago), there were some religious texts called *Smritis* (such as *Yagyavaljyasmriti*, *Naradsmiriti*, *Manusmriti*) to regulate eastern society, which also contained provisions to regulate the business practices, which were largely based on business customs and usages.

4 *Muluki Civil Code, 2074*, Section 3.

5 Karki, B.B. (2018, December). *Provisions Relating to Contract and other Liabilities provided in Muluki Civil Code, 2074*. (Working Paper). Kathmandu: Nepal Law Campus.

6 Acharya, S. R. (2076). *Muluki Civil Code: A Context of Contract Law (Nepali Version)*. *Sarvochcha Bar Journal*, 16, 104-120.

7 Shrestha, G.B. (2007). *Legal System of Nepal (Nepali Version)*. Kathmandu: Pairavi Prakashan, 7.

Author S.N. Kalika⁸ in his book 'Principles of Business Law' has described the major provisions among various issues of Nepalese law of contract. He describes different aspects of law of contract of Nepal.

Research Methodology

Being a study of a qualitative nature, this research work is analytical, descriptive and follows doctrinal approach. The data used in this study are secondary in nature, albeit from both primary and secondary sources of law. The primary sources include the statutory laws and the precedents established by the Supreme Court of Nepal. As a qualitative study, this is focused into the provisions of the statutes, in addition to focusing on the *ratio decidendi* of the relevant case laws. Similarly, the secondary sources of data are derived from books, articles, working papers and relevant treatises. The method of citation used in this work is APA method, with footnotes, as is done in legal research. This study is limited to the legal provisions, principles and judicial responses relating to contract within Nepal. It deals with the exploration of the concerned statutory provisions, legal principles and analyse them from jurisprudential point of view.

Results and Discussion: Analysis of Major Provisions of Law of Contract of Nepal (Part-V of the Muluki Civil Code, 2074)

1. Chronology of Law of Contract in Nepal

During the regime of Junga Bahadur Rana, a codified law called *Ain*, later known as *Muluki Ain* was enacted, on Poush 7, 1910 B.S. The code, *inter alia*, had incorporated some provisions regulating transactions and contracts; such as, the chapters of *Lenden Byabaharko*, *Sahu Mahajanko*, *Registrationko Mahals*, etc. It was replaced by the *Naya Muluki Ain* enacted by King Mahendra on Bhadra 1, 2020, which had in it various provisions regulating contracts, such as Section 4 of *Prarambhikko Kathanko Mahal*, Section 37 of *Lendenko Mahal* and Section 1 of *Naso Dharotko Mahal* came into practice as the laws relating to contract.

Soon this was replaced by the Act Relating to Contract, 2023, which came into force on Poush 1, 2023, B.S. as the first specific law of contract in Nepal. With this effort, the regulations of business transactions were better done, and were done in terms of principles of common law. This was replaced by another specific law, i.e. the Contract Act, 2056, which came into force on Ashadh 14, 2057 B.S., by repealing and replacing the Act Relating to Contract, 2023 as well as the provision of *Naso Dharot* of *Muluki Ain*, 2020.

This Act has also been replaced⁹ by the *Muluki Civil Code*, 2074. In addition to containing other legal provisions regulating civil matters such as those relating to family law, property law, etc., this comprehensive Code in its fifth part also contains legal provisions relating to

8 Kalika, S.N. (2018). *Principles of Business Law* (7th edn.). Kathmandu, Buddha Publication, 65.

9 It should be noted that the Contract Act, 2056 was repealed not by the *Muluki Civil Code*, 2074, but by the Act to Amend, Unify, Adjust and Repeal Some Nepal Laws, 2074 (See, Act to Amend, Unify, Adjust and Repeal Some Nepal Laws, 2074, Section 39(1)(o)).

contract and other liabilities. During the drafting of Part-V of the *Muluki Civil Code*, seventy percent of the provisions in Part-V were carried from the erstwhile Contract Act, 2056, ten percent from judicial decisions (precedents) relating to the law of contract, and twenty percent from societal experiences.¹⁰ After being passed from the then Legislature-Parliament, the *Muluki Civil Code*, 2074 was granted the Presidential assent on Ashwin 30, 2074 B.S. However, it came into force only on the 1st of Bhadra, 2075 B.S.,¹¹ after a 'cooling period' of 12 months.

2. Major Provisions of Law of Contract in Nepal

The *Muluki Civil Code*, 2074 has incorporated the universally accepted uniform rules of contract law in common law jurisdictions. It has got new trends of business law which are spreading over 16 chapters (Sections 493-671) of Part-V of the Code.

S.N.	Major Provisions
1.	Special to General law
2.	Creation of Liability
3.	Inclusion of new law of contracts
4.	Definitions of Terms
5.	Essential Elements of Valid Contract
6.	Autonomy of Parties
7.	Void and Voidable Contracts
8.	Formation and enforceability of Contract
9.	Indirect Contract
10.	Contingent Contract
11.	Provisions on Specific Contracts
12.	Frustration and Suspension of Contract
13.	Performance and Assignment of Contract
14.	Breach of Contract and Remedies
15.	Statute of Limitation
15.	Drawback

Source: *Muluki Civil Code*, 2074, Part-V

The major provisions contained in the above table are discussed and analysed below:

i) Special to General law

A key feature of the prevailing Nepalese law of contract is that it has been arranged in a 'General Law' in contrast to being arranged in a 'Special Law'. The earlier laws relating to contract were mostly separate laws/enactments, i.e. specific law. But the prevailing law of

¹⁰ Karki, B.B. (2018, December). *Provisions Relating to Contract and other Liabilities provided in Muluki Civil Code, 2074 (Nepali Version)*. (Working Paper). Kathmandu: Nepal Law Campus.

¹¹ *Muluki Civil Code*, 2074, Section 1(2).

contract in Nepal is arranged as a part of the *Muluki Civil Code, 2074* which is a general law.¹² It means, if the prevailing law contains separate provisions in the matters regulated by this (Code) Act, the provisions of this (Code) Act shall not affect in those matters. This is a departure from the then existing regime, which existed from the entry into force of the Act Relating to Contract, 2023 to the entry into force of this Code in 2075 B.S.

ii) Creation of liability

The Chapter 16 of Part five of *Muluki Civil Code, 2074* has contained various issues in sections 178 between sections 493 to 671. The section 493 of chapter one has contained provisions relating to obligation to be created. It reads 'If there is a legal compulsion for one to do or to abstain from doing any act, an obligation is created if one omits to do or does such act. The obligation to be created pursuant to sub-section (1) shall be created, maintained and determined pursuant to this Chapter. The obligations shall be created and maintained by: (a) By a law, (b) By a contract, (c) By an indirect or quasi-contract, (d) By an unjust enrichment, (e) By a unilateral commitment of any person to assume obligation, (f) By an act to be treated as tort under law, (g) By an act to be treated as a quasi-tort under law.

iii) Inclusion of new law contracts

It has included the provisions relating to the general contract as well as specific contracts such as bailment and pledge, indemnity and guarantee, agency, carriage of goods and sale of goods. It has incorporated some other types of specific contracts such as: lease contract, hire-purchase contract, wage and labour contracts.

iv) Definitions of Terms

Like its predecessor contract law (i.e. the erstwhile Contract Act, 2056), the *Muluki Civil Code, 2074* also provides the definitions and explanations of the concerned terms for interpretation.¹³ The relevant sections in Part-V also contain definition of key terms for the sake of ease in interpretation of the statute by the Courts. For instance, the definitions of contract, proposal (offer), consent (acceptance) and consideration of the contract are provided in the Code. Besides those, indemnity and guarantee, bailment and pledge, sell of goods, principal and agent, law of carriage and void and voidable contracts are also defined in the Code. These definitions are more extensive in comparison to the erstwhile contract laws in Nepal and will be useful in interpreting the statute.

v) Essential Elements of Valid Contract

The *Muluki Civil Code, 2074* contains various provisions relating to the essentials of a valid contract e.g., offer, acceptance, agreement, free consent, capacity of contracting parties, intention to create legal relationship, legality of objective and consideration, subject matter to be declared void by the law and legal formalities for the specific contracts. It however does not mention 'Consideration' as an essential element of valid contract, thereby moving away

¹² Section 3 of the *Muluki Civil Code, 2074* carries the notion that the Law of Contract is a general law and not a specific one.

¹³ *Muluki Civil Code, 2074*, Section 2.

from the principle of *No Consideration No Contract*. This is a departure from the then existing legal regime.¹⁴

vi) Autonomy of Parties

The Code provides that the contracting parties are autonomous to choose nature of contract or subject matter; to determine the terms and conditions of the contract and the nature of remedy in its breach, as well as measures for resolving disputes arises under the contract.¹⁵ But this Code has not given much importance to 'Consideration' as erstwhile Contract Act of 2056 had made it compulsory to a valid contract.

vii) Validity of Contract

Chapter 3 of *Muluki Civil Code, 2074* has given broad section title as validity of contract. It brings about a list of circumstances in which a contract becomes void or voidable. Section 517 declared almost a dozen types of circumstances in which the contract will be as void *in initio*, whereas Section 518 provides the four circumstances – coercion, undue influence, fraud and deceit – for a contract to be voidable. It provides that Void Contracts are void *in initio*, while voidable ones are to be made void only by the party to the contract.¹⁶

viii) Formation and enforceability of Contract

This Code provides for the procedure of formation of general contract. Where a proposal put forwarded by the *offerer* and is accepted by the *offeree* which changes into promise, it is to be deemed that a Contract has been concluded.¹⁷ Such acts create a contract and the prescribed stipulations of the contract are binding as rights and obligations to the contracting parties. The offer and acceptance may be specific and general.

The section 505 provides a provision that the Contract is enforceable by law where it fulfils the following conditions:

- a. The consent expressed by a party to a contract to bind himself or herself,
- b. Capacity or qualification of a party to a contract to conclude the contract,
- c. Certain matter for the creation of an obligation,
- d. Lawful obligation.

The Sub-section 2 of Section 505 of the Civil Code, 2074 contains that a contract can be made in written form, verbal form or by conduct of the parties to it. Notwithstanding anything contained in the above sub-section (2), if there is a requirement that a particular contract be concluded in fulfilment of any particular procedure or formality, such contract may not be enforceable unless such procedure or formality is completed.

¹⁴ See, erstwhile Contract Act, 2056, Section 4.

¹⁵ *Muluki Civil Code, 2074*, Section 507.

¹⁶ *Muluki Civil Code, 2074*, Sections 517, 518.

¹⁷ *Muluki Civil Code, 2074*, Section 504.

ix) Indirect Contract

The Code also contains provisions regarding indirect or quasi contract, which is not created by the offer, acceptance by capable parties with free consent of the consideration by the contracting parties but by the operation of law. A prime example is the provisions relating to the 'finder of lost goods of others'.

x) Contingent Contract

This code also contains provisions relating to contingent contract.¹⁸ Such contract will be created by the occurrence of collateral event. Such events are uncertain at the time of its creation.

The Section 648 has contained provisions regarding indirect or quasi-contract. It reads, notwithstanding anything contained in Chapter-2 of this Part, if any person does any certain, lawful, voluntary or unilateral act that may give rise to a juridical relationship and an indirect-contract or quasi-contract shall be deemed to be made. If such indirect-contract or quasi-contract is made pursuant to sub-section (1), an obligation under this Chapter shall be created from the same fact.

xi) Provisions on Specific Contracts

This Code has provided various legal provisions relating to some 'specific' contracts in contrast to the general law of contract, and the rules governing such specific contracts. For instance, Chapter 7 contains the rules regulating the contract of Indemnity and Guarantee, Chapter 8 and 9 discuss the contracts of Bailment and Pledges, Chapter 6 provides the regulation of contract of Sale of Goods, Chapter 10 contains provisions relating to the contract of Agency, Chapter 11 provides an extensive framework relating to the contract of Carriage. The regulations of these types of specific contracts were managed also in the erstwhile Contract Act, 2056. Similarly, as nascent provisions, this *Muluki Civil Code, 2074* contains provisions also on the specific contracts of Lease, Hire-purchase, and Wage-labour, in the twelfth, thirteenth and fourteenth chapters, respectively

xii) Frustration and Suspension of Contract

The Code provides for certain circumstances in which a contract can be frustrated (*clausula rebus sic stantibus*). The contract which is valid at the time of its creation but it becomes frustrated at the time of performance because of subsequent impossibility.

The section 531 provides a provision that a contract discharges¹⁹ if it becomes impossible to perform the contractual obligation as a result of fundamental change in the circumstance existed at the time of making the contract. The act according to the contract need not be performed in such situation.

¹⁸ *Muluki Civil Code, 2074, Section 648.*

¹⁹ *Muluki Civil Code, 2074, Section 531.*

Emergence of any of the following circumstances shall be deemed to constitute a fundamental change in the circumstance existed at the time of making a contract:

- If the contract becomes illegal and thereby it cannot be performed,
- If it becomes impossible due to emergence of situations beyond human control such as war, flood, landslide, fire, earthquake and volcanic eruption,
- If the subject matter essential for the performance of the contract is destroyed or damaged, or exists no longer or such subject matter could not be obtained,
- If the contract is so concluded that its performance depends on the personal ability, skill or talent of a person, and the performance of the contract becomes impossible by the reason of death or insanity or incapacity (physical or mental).

However, none of the following circumstances shall be deemed to constitute a fundamental change and excused from performance in the circumstance existed at the time of making the contract:

If the performance of the contract has become difficult, it results in less profit or in loss, if any third party to the contract defaults or becomes incompetent, in there is event of a strike or lockout, if additional tax, fee or other revenue is required to be paid, if the contract is made with more than one object and some of the objects cannot be fulfilled, or there is negotiation to review or alter the terms and conditions of the contract.

xiii) Performance and Assignment of Contract

This Code has clearly provisioned the place, time and manner of the performance of the contract. There are the supportive provisions of the doctrine of private of contract. Only the private parties are entitled to ask for the performance of contract.²⁰

xiv) Breach of Contract and Remedies

The *Muluki* Civil Code also contains provisions relating to breach of contract prescribes various types of remedies to the aggrieved party/parties. There are provided the remedial provisions to the aggrieved party in case of breach of contract, for the sake of recovering amount, cancellation of contract, *quantum meruit* and seeking the order of 'specific performance'.²¹

xv) Statute of Limitation

The erstwhile Contract Act, 2056 had provided for the Statute of Limitations vis-à-vis the legal remedial rights of the aggrieved party.²² However, this present *Muluki* Civil (Code) Act, 2074 (Part-V) contains the provisions relating to the Statute of Limitations in various Chapters. If a time limit is prescribed by any particular law that is applicable also in case of this Code. For instance, in case of void contract it has no Statute of Limitations, whereas the case of voidable

²⁰ See, *Muluki* Civil Code, 2074, Part-5, Chapter 4.

²¹ See, *Muluki* Civil Code, 2074, Part-5, Chapter 5.

²² See, erstwhile Contract Act, 2056, Section 89.

contract it prescribes a Statute of Limitations of 1 year after the date of knowledge of the cause; while 2 years are available to those whose has the right of claim. These provisions are progressive in comparison to the provisions provided in the earlier laws relating to contract.

Drawbacks

Existing law of contract has managed the provisions of the fundamental rule of contract and some specific law of contract. It has arranged for the sake of benefit of the business community. Being a progressive law of business relating to contract there are some short-comings, too. For instance, insufficient provisions relating to consideration, insufficient rights of the third-party being beneficiary and the imposition of liability on the third party, silence. Similarly, although this law has been hailed as a much progressive document, it remains silent on the contractual capacity as well as liabilities of artificial persons.

Conclusion

This *Muluki Civil Code, 2074* part five has brought some unique Major Provisions in the country which are of paramount importance to the mercantile sectors as well as general people of the country which are discussed and analysed below. The history of the current form of law of contract in Nepal is not so long, albeit however, the business transaction in Nepal was regulated by different Smiritis, e.g. Manusmiritis, Yagyavalkyasmritis, Naradasmritis, etc.

The modern law of Nepal initiated by the *Muluki Ain* enforced in 1910 B.S., at the time of Janga Bahadur Rana. It has incorporated the provisions of *Lendenko Mahal, Prarambhikko Mahal, Nasodharotko Mahal, etc.*

The separate law of contract was the law relating to contract 2023, which was replaced by the erstwhile Contract Act, 2056, and it has also been replaced by the current *Muluki Civil Code, 2074*. Part-5 of the Code contains provisions related to Contract & Liabilities. It possesses certain features such as, inclusion of general law of contract and specific contracts, formation of contract, autonomy of parties, binding nature, and time limit for the legal remedy.

The major provisions incorporated in Part-5 of this Act are; Special to general law, definition and explanation of technical terms, essentials of contract, formation and enforceability of contract, autonomy of parties, validity of contract, provision of void and voidable contract, contingent contract, provision of indirect and quasi contract, specific contracts such as contract of agency, contract of sale of goods, contract of bailment and pledge, contract of carrier, contract of indemnity and guarantee, contract of contract of Lease (Chapter 12); contract of Hire-purchase (Chapter 13); and contract of Wage-labour (Chapter 14) etc. It has given a separate chapter for the contract relating to quasi contract and contract based on unjust enrichment.

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