

Features of the Country Civil (Code) of Nepal

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Introduction

The Codes not only amend the prevailing Nepali domestic laws and Muluki Ain, 2020, but also incorporates many new legal provision according to demand of present Nepalese society. Similarly, the Codes introduce new concepts and dimensions in comparison with the international best practices. The newly enforced Civil Code provides indifferent and important legal provisions that are closely connected to people's daily life and economic activities. The Code included the contract laws with some new legal provisions. The Civil Code attempted to cover all most all areas of principle of contract law. The features of Civil Code included the tort law, prior to the Muluki Ain, only a few legal provisions can be found in scattered forms. The Code introduced law relating to guardianship, curatorship and inter-country adoption. The requirements of inter-country adoption has clearly mentioned under the Civil Code.

Enforcement of the new Country Civil (Code), 2074 and other four Code namely Country Criminal (Code) , 2074, Country Civil Procedure (Code) Act, 2074, Country Criminal Procedure (Code), 2074 and Criminal Offence (Punishment Determination and Enforcement) Act, 2074 on 1st Bhadra, 2075. These are the major laws and milestone for Nepalese people and the persons who are directly concerned with the legal fraternity. The said Codes not only amend the prevailing Nepali domestic laws and Muluki Ain, 2020, but also incorporates many new legal provision according to demand of present Nepalese society. Similarly, the Codes introduce new concepts and dimensions in comparison with the international best practices.

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Structure of the Country Civil Code

The structure of Country Civil (Code) Act, 2074 (hereinafter referred to as "Civil Code"), consists of six parts. The first part is related to the preliminary legal provisions consisting Sections 1 to 29. The second part is related to law of person consisting Sections 30 to 66. The third part is related to family law consisting Sections 67 to 250. The fourth part related to property law consisting Sections 251 to 492. The fifth part related to contract law and other liabilities consisting Sections 493 to 691 and the sixth part related to private international law consisting Sections 692 to 721.

The Civil Code Nepal has influenced three different legal systems i.e.; Institutions System, Pandekten System and Nepalese Legal System. The law of persons, law of things and law of various transformation style of ownership and rights, falls under the institutions system of the Civil Code of France, 1804. The general part; law of obligation, law of property, family law and law of succession falls under the Pandekten System of the Civil Code of Germany, 1900 and the Civil Code of Japan, 1896. The legal provisions are mentioned under the Civil Code of Nepal i.e.; preliminary, law of persons, family law, law of property, law of contract and other liabilities are the recent changes and mixture of Institutions system and Pendekten system.

Features of the Civil Code

Rights and Duties of Citizen: The Civil Code has been stated under the Sections 5 to 13 regarding the civil liabilities of the citizen. The civil liabilities includes, ignorance of law is not excusable, obedient to law, public interest, interest of neighbors, community interest and interest of a person who is under protection. The civil liabilities are the fundamental basis of maintaining the rule of law in country. The civil liabilities are totally different from criminal liabilities. (Sec.14) Section 17 all are equal the eye of law. No person shall deny the equal protection of law.¹ The similar provision has also been mentioned under Constitution of Nepal. The civil rights of the citizen has been broadly provided under the Sections 18 to 28. The civil rights includes equality rights, personality rights, freedom of entering into contract, property rights and right to make complaint before the competent authority which provides access to justice for all citizens.

¹ CONSTITUTION OF NEPAL Art. 17, 18, 20, 25, 28, 48 (2015).

Capacity of Natural Person: The legal status of a natural person is acquired by birth. (Sec.30) The person who is above 18 in age, s/he has legal capacity or competency becoming a major. (Sec. 32) The person under the age of 10 has no legal capacity or unsoundness of mind. (Sec.33) The person who has age of 10 to 18 years regarded as quasi-competent. (Sec. 34.1) A quasi-competent person can exercise a right, obtain the consent of guardian or curator or exercise the right through the guardian or curator. (Sec. 34.3) A guardian or a curator shall have the power to sale property of the person under his/her guardianship or curatorship (Sec. 415.1) However; immovable property cannot be sold without the permission of court. (Sec. 415.2) The natural person may transplant or donate his any organs by a will. (Sec. 38) The address of a natural person should be the place of residence, abode or business. (Sec. 39) The importance of address can be determined on the basis of legal communication.

Insolvency of Natural Person: There is clear legal provision under the Civil Code regarding the insolvency of natural person. The main purposes of provisions on insolvency are: (a) liquidation of assets held by an insolvent person to pay the liabilities on the basis of priority order of payment. (Sec. 61) (b) Rehabilitation of an insolvent person. (Sec. 54.2b) and (c) Status of insolvent person, remains for 12 years to be terminated by paying all the debt and liabilities. (Sec. 65)

Capacity of Legal Person: Legal capacity and legal status of a legal person is acquired by registration and/or incorporation according to prevailing laws. (Sections 42.1,2 and 43) *Ipso facto* acquisition of legal personality and capacity in regard to the state, central and local government organizations, public purpose organizations, community schools etc. (Sec. 44) The operation of business to be made by the decision of directors. (Sec. 47)² The director or a person who did the act is personally liable. If any loss is caused by an act beyond the objective or capacity of the legal person or dishonestly, (Sec. 51)

Family Relations: The Civil Code has been mentioned in relation to the provisions on the family relations as under Sections 67 to 250. The provisions of marriage, divorce, relationship between parents and children and parental authority, guardianship and curatorship, adoption and inter-country adoption by permission etc are clearly defined. It has mentioned regarding the provisions on the partition and succession. The legal provisions related to apportionment of a property in common to coparceners (husband, wife, father, mother, son and daughter). Under

² Company Act Sec. 94(4) (as amended), 2063).

the explanations of Sec. 237, devolution of liabilities and rights of the deceased person is based upon heirs in accordance with law. Similarly, the role of a successor will donate organs as according to Sec. 38.

Properties to be protected by Law: The concept of property has been clearly defined by Civil Code under the part four³. Property means any cash, goods, (physical property), work. (Sec.251) Immovable property means land; building or structure fixed thereto, trees, plants, natural water, etc. (Sec. 253) Movable property means the properties other than the immovable property including intellectual property, a right in security, a trade in security, a trade good-will or franchise, etc. (Sec. 254)

Concept of Land and Building: The Civil Code clearly defined the relationship and differences between land and building. The building has been made on the land as a separate property. (Sec. 279) No person shall build a house in a land without obtaining written consent of the owner of that land. If any person builds a house in a land without obtaining written consent of the owner of the land, the land-owner may desire or purchase the house on payment of the price that is less up to twenty-five percent of the market price of that house. If the land-owner does not want to purchase such house, the house-owner may, purchase the land on payment of the price that is higher up to twenty-five percent of the market price of the land where the house is located. If both parties do not agree to purchase and sale the house or land, the person who has built the house shall demolish the house and take away his or her materials within a period of three months of the date on which the house was so built. If the house is not demolished within the period of three months, such house shall belong to the land-owner. It means that a house built without the consent of land-owner belongs to the builder initially, and it shall be transferred to the landowner only after the procedure as mentioned above.

Classification of Property: The Civil Code has classified the property on the basis of ownership rights as follows: (Sec.255) (a) private property (b) property in common (c) joint property (d) community property (e) public property (f) government property and (g) trust property. Sec. 256 defines the private property clearly. Sec. 257 deals the property in common. Sec. 258 and 259 defines the joint property. The following requirements shall be fulfilled in case of management; protection and maintenance of joint property: (Sec.260) (I) consent of the owners,

³ CONSTITUTION OF NEPAL Art., 25, (2015).

(II) decision of majority members, (III) Owner who has the largest share, (IV) all owners who has the equal share on an equal basis. As according to the legal provision mentioned in Sec. 260, alteration may be made by the consent of all the owners. The Civil Code specifies some essential conditions to sale the joint property as follows: (Sec. 418)

- (I) A joint property may be sold and transferred with the consent of all its owners,
- (II) Even though all the owners do not agree to transfer the joint property as mentioned above, any owner may transfer the property of his or her right or portion,
- (III) If, in making a transfer, as mentioned in (I), it is technically not possible to separate the right or portion of any owner from the joint property, and another owner intends to acquire such property, that other owner shall be entitled to obtain it at the price mutually agreed upon between the owners.

The community property means any land held by a community for its use, any structure built in such land or other property owned by it. (Sec.301) The community property is different both from public and private property. This legal provision has more significant and helps to recognize the community property.

Rights of owner and Possessor: The Civil Code clearly defines the right of owner and right of possessor under the Sec. 267. The owner may use sale, mortgage, and pledge, take benefits of the property. The possessor may uninterruptedly possess the property and claim reimbursement of essential expenses from the owner while it was possessed bona fide. (Sec. 271) The possessor may obtain ownership by three-year (in case of movables) or thirty-year (in case of immovable) adverse possession. (Sec.273). The Civil Code provides some legal provisions in relation to the protection of bona fide possessor are as follows: (Sec.421)

- (I) No person shall transfer a property to another person in which any one else has right and ownership.
- (II) If any person transfers a property in against of above mentioned clause, such a deed or transaction shall be void.
- (III) If the real owner makes a claim in the property transferred as mentioned in (I), the transferee of such property shall return it to the concerned owner.
- (IV) If a person finds any lost or stolen property, the owner of such property may claim it, along with evidence showing his or her ownership, within three years after the date on which the property was lost or stolen.

- (V) If any person claims such property as mentioned above in clause (IV), the finder of that property shall return it to the owner, by collecting the amount of expenses, if any, incurred in its preservation or maintenance.
- (VI) Notwithstanding anything mentioned in clause (IV), if a person has acquired any stolen or lost property by way of purchase at a public market or auction or bidding made publicly by any person or body, the person shall not be bound to return such property to the real owner unless and until he or she obtains the real value of such property and the fees or amount, if any, paid by him or her in the acquisition of such property.

The Civil Code provides the legal provision in regards to the protection of third party in case of voidable contract. (Sec. 518) The party caused to enter into a contract may, instead of having the contract voided, demand that his or her position be restored into the position that would have been had the contract not been concluded. If a contract is made with the person who is under his her influence and whose will can be dominated by him or her, the party who claims that he or she has not exercised such undue influence shall have the onus to prove that the contract has not been caused by undue influence. A voidable contract shall be enforceable as if it was a lawful contract, before it is voided. If a voidable contract under this section is voided by the court, it shall not affect the act done under such contract before the voidance. If any contract is declared void, the legal right or interest of a bona fide third party prejudiced only by the reason of such voidance.

Use of Property Affecting Neighbors: Some additional new legal provisions mentioned in Civil Code related to the use of property affecting neighbors. The Muluki Ain, 2020, part three, chapter eight⁴ has provided in regards to the use of another person's property. The Civil Code provided and added some new legal provisions under chapter three and four various Sections 276 to 286 and 287 to 298 of three and four. If a person who needs to build a waterway through other's land to cultivate and requests for land, the concerned owner of the land shall provide the land for the construction of the waterway through the place where the concerned landowner considers appropriate. In consideration for the land provided for build of waterway by it, the person who builds the waterway shall provide a substitute land, amount according to the existing price of the land used in the construction of the waterway or reasonable compensation to the concerned landowner. If the waterway is constructed in a public or government land, there

⁴ Muluki Ain, 2020, Jagga Awad Garneko. (Land Cultivation)

no need to provide substitute land, price of land or compensation for the land used in construction of waterway.

Concept of Usufruct: The Civil Code introduced new legal concept relating to the usufruct as under the Sections 352 to 367, part four, chapter eight. When a person gives free a property in which he or she has title and ownership and fruits, benefit, income or facility to be yielded from that property to another person entitling that other person to enjoy such property and fruits, benefit, income or facility thereof, usufruct shall be deemed to be concluded. The provision of usufruct shall remain valid for the period set forth in the contract. Because of the concept is based on contract. Under this concept, the property can be used as own property and structure of the property cannot be changed or misused without the permission of real owner of property.

Concept of Servitude: This concept has been newly adopted in context of Nepal. The Civil Code, Part Four, Chapter Eight, Sections 368 to 382 provided the various aspects of the concept of the right to servitude. As according to this concept, the owner of a property may use another person's immovable property. If it is not possible to extend the basic services of water supply, electricity, gas and telephone services to the house of a person by his or her own land or public, government or community land, the person shall be entitled to put pipe or line in the neighbors' land in such manner as not to cause any loss or damage to the owner of such land. Reasonable compensation shall be paid to another person's immovable property.

Provision of House Rent: The Civil Code states significant legal provisions related to house rent under the Part Four, Chapter 9, and Sections 383 to 405. Legal provisions, clearly defines the rights and duties of house owner and tenants. Except and otherwise mentioned in the house rental agreement, the tenant shall be obliged to repair and maintain the rented house, as required. If the agreement states that the house owner is obliged to repair and maintain the rented house and it is required to carry out any repair and maintenance of the house, the tenant shall give a notice in writing to the house owner within the specified time as mentioned under the house rent agreement.

Donation and Gift:⁵ The Civil Code covers and extends the legal provisions of donation and gift as under the Part Ten, Sections 406 to 412. According to the said legal provisions, if a person grants free of cost a property in which the

⁵ Muluki Ain, 2020, Part Three, Chapter 9, Dan Bakasko Mahal.(chapter on Donation and Gift)

person has right and ownership to another person or for any religious, social, public or community purpose such an act shall be deemed to be a donation. If a person grants free of cost a property in which the person has right and ownership to another person as a reward, prize, or tips in consideration for merits to him or her by that other person by way of fostering him or her or otherwise or for family love or affection such an act shall be deemed to be a gift. In effecting a donation or gift as mentioned above, such donation or gift may be so effected that it is effective immediately or after the death of its maker. If a donation or a gift becomes effective only after the death of the maker of such donation or gift, it shall be deemed that he or she has executed a testamentary donation or testamentary gift. Execution of deed is necessary except for a donation or gift up to 1, 00,000/- Rupees.

Transfer and Acquisition of Property: The Civil Code widely defines the transfer and acquisition of property under the Part 11, Sections 413 to 434. Transfer of property means, if a person sales, donates, gifts or otherwise transfers a property in which he or she has right and ownership to another person. Any person, other than a person who is not competent to enter into contract as according to prevailing laws in force, may, subject to the prevailing laws, transfer a property in which he or she has right and ownership to one or more than one person jointly or severally. The competency or incompetency shall be determined on the basis of whether he or she was competent or incompetent at the time of the transfer of property by him or her. A person may, transfer a property in which he or she has right and ownership to another person with immediate or testamentary effect. In transferring a property, a deed shall be executed in fulfillment of the legal requirements .But it is not required to execute a deed to donate or gift any movable property or cash amounting up to one hundred thousand rupees.

If any person transfers his or her property to another to another person, his or her ownership in that property shall cease to exist from the date of such transfer and the transferee shall have ownership in such property. If a person transfers the right in his or her property to be effective with testament, the transferee shall have ownership in such property only after the death of the transferor. (Sec.414) No person shall re-transfer to another person a property which he or she has already transferred to some other person. If any person transfers a property as against the provision mentioned above, the deed of transfer registered at an earlier date shall get legal validity if the transfer of an immovable property has been made, and if the transfer of a movable property has been made, the transfer to the person who acquires the property earlier shall be valid. (Sec. 422)

Transactions of Immovable Property: The Civil Code provides the legal arrangements in regards to the registration of immovable property transactions. Under the Part Four, Chapter 14, Sections 463 to 473, provides the certain requirements to register the deeds related to immovable property. This legal provisions succeeding the legal provision as mentioned under the Muluki Ain⁶. The person who wants to transact the immovable property, he has duty to register in concerned authority within the thirty five days from the date of transaction of immovable property. (Sec. 297) This provision recognizes the duty to register the transaction of immovable property. The person who has not ownership right over the immovable property, he cannot transfer to another person. (Sec. 296)

Pre-emption of Immovable Property: If a person transfers, in any manner, any immovable property in which that person has right, ownership and possession to another person and anyone who is in neighbor of such property redeems it in accordance with the legal provisions as mentioned under the Sec. 454. The term “in neighbor of” includes a situation where a water supply, ditch, passage, exit etc. for one will be closed by the reason that one does not have other’s house or land that is bordering one’s house or land and has been transferred. The Civil Code covers in this regard under the Sections 455 to 458, the heir in neighbor of the property, tenant, the other owners of the same house etc. has pre-emption of immovable property. The same legal provision was arranged under the Part Three of Muluki Ain, 2020⁷.

Mortgage of Immovable Property: The Civil Code provides the legal requirements in case of mortgage the immovable property under the Part 4, Chapter 12, and Sections 435 to 453. The same legal provision was arranged in Muluki Ain⁸. Except as otherwise mentioned in the deed of mortgage, no property in mortgage with possession (Bhogbandaki) may be possessed and utilized for a period exceeding ten years. (Sec.442.1) No period of a mortgage without possession (Drishtibandaki) in a property shall exceed five years. (Sec.443.1) The limited period of mortgage without possession is shorter than that with possession. The Civil Code also provides relating to remortgage. A person has obtain a property in mortgage shall be entitled to remortgage such property or any part thereof to another person in consideration for an amount which is equal to, or lesser than, the amount specified in the deed of mortgage, and in such a case, a remortgage is deemed to be created. Provided that a mortgaged property

⁶ Muluki Ain, 2020, Part Three, Chapter 21.

⁷ Muluki Ain, 2020, Part 3, Chapter 17, Nos.11 to 13 and Chapter 21, No.. 35.

⁸ Muluki Ain, 2020, Part 3.

shall not be the object re-mortgage prior to the existence of the possessory right in such property. The period of possession and utilization of the re-mortgage given as mentioned above shall not exceed the period of possession and utilization under the mortgage. (Sec.445), According to Sec. 452, not to be mortgaged or transferred in duplication. No property once mortgaged may be mortgaged or transferred again, in duplication, to other person.(Sec.452(1) If a person mortgages a property in duplication as against of sub-section (1), the deed registered at an earlier date shall be valid and the subsequent deed shall *ipso facto* be void. 452(2).

Provisions of Transaction: The Civil Code defines the concept of transaction under the Part 4, Chapter 15, and Sections 474 to 492. This kind of provision was stated in the Muluki Ain.⁹ According to Sec. 474, if there is give and take of any amount or goods between two or more persons subject to any condition, transaction shall be deemed to have been made between them. If a transaction is made as mentioned above, the receiver of amount or goods shall return the same to the giver of amount or goods. For the purpose of transaction as under this provision, the term “amount” includes the price of goods.

Contract and Other Liabilities: The laws relating to contract in Nepal was introduced firstly in 2023 BS. It was provided the general principle of contract. When it was repealed by Contract Act, 2056 BS, attempted to cover almost all areas of contract law. The Contract Act, 2056 has also been repealed by the Civil Code. The Civil Code provided the laws of contract and other liabilities under the Part Five including 18 Chapters. Most of the legal provisions as mentioned under the Civil Code taking from the contents of the Contract Act, 2056. There are two reasons of revising the Contract Act, 2056. The Reasons are to avoid confusion in future trade practices and to emphasize the continuity with the prevailing laws. The Civil Code attempts to modernize some provisions of contract law adopting the universal principle for unifying.

Provisions of Obligations: The Civil Code deals the provisions relating to obligations under the Chapter 1, Sections 4933 to 503. It covers the good faith principle. The person who is bound to fulfill the obligation created as under the related laws shall be fulfill it in good faith. In case of obligations owed by multiple parties, each person shall fulfill an obligation equally. Such obligations may be divisible.

⁹ Muluki Ain, 2020, Part 3, Chapter 17.

General Principles of Contract: The Civil Code provides the general principles of contract as under the Chapter 2 to 5. The Chapter deals the formation of contract. There is a new provision relating to interpretation of contract under Sec. 515. The Chapter Three covers the validity of contract; Chapter Four covers the performance of contract and Chapter Five deals the remedies for the breach of contract. The Chapter Five to Fourteen deals the special types of contracts. The contract of lease and hire-purchase contract are new legal provisions in context of Nepal.

Law of Tort: The Civil Code defines the law of tort firstly in the legal history of Nepal as under the Chapter Seven, Sections 672 to 684. A tort is a civil wrong which is not exclusively a breach of contract and breach of trust for which the law provides the remedy to the injured party. According to the new legal provisions, tortious liability arises from the breach of duty; the duty is primarily specified by laws.

Provision of Unjust enrichment: The Civil Code covers new legal provisions relating to unjust enrichment under the Part Five, Chapter 16, and Sections 664 to 671. If any person gets any benefit or advantage from another person, without for the reason of doing any lawful act or fulfilling any obligation, the person who so gets the benefit or advantage shall be deemed to have got an unjust enrichment.

Provision of Private International Law: The Civil Code introduced the private international law firstly in the history of Nepalese legal system under the Part 6, Sections 692 to 721. The Civil Code to be applied in case of international relations. i.e.; legal capacity of foreigner, presumption of disappearance or death of foreigner, succession of a foreigner having resided in Nepal, determination of the nature of corporate body, marriage of a Nepali citizen in abroad, marriage of a foreign in Nepal, consequences of marriage, paternal authority, adoption, guardianship or curatorship etc. Similarly, it covers the issues of separation of bread and board, divorce, content of ownership or possession, goods in transit, contract, deed, donation or gift, tort liability, quasi-contract or unjust enrichment, nationality, court of foreign country and Nepal and party of treaty etc.

Provision of limitation: The Civil Code describes about the limitation period for a lawsuit mentioned separately by the provisions in each Chapter¹⁰. The limitation period is from three months to three years depending on the nature of civil rights and duties. Limitation period shall be counted from the date on which a certain act was done or the date of knowledge of a certain act.

¹⁰ The provisions relating to limitation in each and every Chapter

Conclusion

The Civil Code has been introduced in comparison with international standard. It covers the important legal provisions in case of various aspects of civil laws applying all over the world. The law of persons, law of things and law of various transformations styles of ownership and rights are falls under the institutions system of the Civil Code of France, 1804. The general part, law of obligation, law of property, family law and law of succession are falls under the Pandekten System of the Civil Code of Germany, 1900 and the Civil Code of Japan, 1896. The Civil Code enforced with new legal dimensions and modern jurisprudential approaches. The Civil Code directly influenced by Civil Code of France, Civil Code Germany and Civil Code of Japan. Law is dynamic in nature and it has always chances to amend as according to the wants of the society. Laws and legal system may affect by the social values and norms. It means law can be different society to society. Laws have also affected by the court practices including legal profession. Mostly applies the laws in case of delivering justice by the courts. Changing the law is process of development and is based on political environment of country.

