

# THE NATIONAL CIVIL CODE OF NEPAL

A Brief Commentary by Japanese Professors



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राष्ट्रिय न्यायिक प्रतिष्ठान, नेपाल  
National Judicial Academy (NJA), Nepal

Supported by



# The National Civil Code of Nepal

A Brief Commentary by Japanese Professors

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### **Disclaimer**

The perspectives shared by the authors in this Book are deeply personal and reflective of their individual experiences. Please note that these views do not inherently represent the stance of NJA-Nepal, JICA or any other institutes.

The comments by the authors in this book are made referring the English translation published by the Ministry of Law, Justice and Parliamentary Affairs on its website.

(chrome-extension://efaidnbmninnbpcjpcglclefindmkaj/https://www.moljpa.gov.np/en/wp-content/uploads/2018/12/Civil-code.pdf) (referred on March 5, 2024)

Thus, there are possibilities that the comments are based on a different or incorrect understanding of the exact meaning of the Nepalese original text of law.

## MESSAGE

I am really delighted to know about the collaborative effort between the National Judicial Academy of Nepal (NJA-Nepal) and the Japan International Cooperation Agency (JICA) resulting in the publication titled **"The National Civil Code of Nepal: A Brief Commentary by Japanese Professors."**

Having had the privilege to coordinate and lead the experts' drafting Task Force for both the Civil Code and Civil Procedure Code of Nepal in the past, which subsequently became the National Civil Code and Civil Procedure Code of Nepal in 2017, I am particularly gratified by this development. The Task force meticulously reviewed all existing provisions pertaining to civil laws and procedures within the then *Muluki Ain*, other specific legislations and judicial precedents. Subsequently, we proposed separate bills for the National Civil Code and Civil Procedure Code of Nepal, amalgamating and codifying elements of various special laws.

The bills underwent rigorous deliberation in the Parliament and were ultimately enacted as the National Civil Code and Civil Procedure Code encompassing laws and procedures concerning persons, family, property, contracts, obligations, private international law matters, among others. The National Civil Code, 2017 is the first Civil Code in modern term in South Asian Region that covers various aspects of private laws.

I distinctly remember the invaluable assistance and cooperation extended by JICA and the civil law experts' team led by Professor Hiroshi Matsuo from Japan during the drafting process of both codes. It is my belief that the insights shared in this book hold the potential to enrich Nepal's legal literature. Furthermore, it serves as a tool for the exchange of knowledge and experiences.

I would extend my best wishes for the success of this publication and express my gratitude to NJA-Nepal and JICA for this commendable endeavor.

Kathmandu  
March 2024



**Khil Raj Regmi**  
Former Chairman, Council of Ministers  
and  
Former Chief Justice of Nepal





# Preface

This book is an overview of the National Civil Code of Nepal enacted in 2017 (hereafter referred to as the NCC) by Japanese experts who collaborated in the process of drafting the NCC, mainly by providing comparative legal information. It was written to make the contents and features of the NCC known to as many people as possible in Nepal and abroad.

In Nepal, the Constitution was enacted in 2015 and the NCC was enacted in 2017. The Civil Code is meant to be a constitution of civil society. These codes are expected to consolidate the foundation of the basic laws of the state and civil society in Nepal, leading to political democratization and economic development.

In this age of globalization, international trends cannot be ignored, even in the enactment and amendment of national laws. At the same time, it is necessary to take into account the particularities of each country, such as its unique history, culture, political structure, and economic conditions, and to arrange legal reform programs that are compatible with the development process unique to each country. To this end, it would be of great mutual benefit for countries to share their various experiences in legal reform. For this reason, international cooperation for legal reform is developing in many countries. This has led to the globalization of law. Cooperation between Nepal and Japan in the field of legal development is part of this phenomenon of legal globalization. It benefits both sides.

The Civil Code, along with other codes, is a part of the social system and should change constantly with the transformation of society. It may sometimes point out the code of conduct to the citizens, one step ahead of the existing rules of society, in order to lead the changes in society. In any case, the Civil Code is not finished once it is enacted, but needs constant revision. I would be happy if this book could be used as a reference material for exploring the direction of the future change.

The current international situation is unstable, with many international conflicts occurring in various parts of the world. It is not easy to achieve peace in such a situation. However, the only way to achieve international peace is to make the civil law permeate society in as many countries as possible, to foster civil society, to promote democratization, and to gradually foster constitutional government and the rule of law. We believe that the NCC and its development can serve as a model for the process of approaching such international peace.

We hope that through this publication, the concept of the NCC will be shared by many people in Nepal and abroad, and that it will serve as a bridge to promote further international exchange and cooperation.

Last but not least, I would like to express my sincere respect to Rt. Hon. Khil Raj Regmi, the Chairperson of the Civil Law Reform and Improvement Task Force and former Chief Justice of Nepal, and the former Chairperson of the Council of Ministers, Mr. Madhav Paudel, former Secretary of the Ministry of Law, Justice and Parliamentary Affairs and former Chairperson of Nepal Law Commission, and other members of the Task Force, Hon. Baidya Nath Upadhyay, the Executive Director, Hon. Kedar Paudel, Deputy Executive Director, and other members of the National Judicial Academy, Nepal, Ms. Lila Devi Gadtaula, Secretary, Office of the Prime Minister and Council of Ministers, and all friends in Nepal who have been making efforts to promote the Civil Code after its enactment. I would also like to express my sincere gratitude to Mr. Akimitsu Okubo, Ms. Miha Isoi, Mr. Aman Maharjan, and other staffs and experts of the Japan International Cooperation Agency and the International Cooperation Department of the Ministry of Justice, and all the people concerned.

March 4, 2024

On behalf of the Authors

Hiroshi Matsuo

# Foreword

Japan International Cooperation Agency (JICA)'s assistance in the development of the National Civil Code in Nepal was initiated in 2009 when the Government of Nepal requested JICA to support to develop the National Civil Code, replacing Muluki Ain, which had previously implemented as an integrated law of civil and criminal matters. The Government of Nepal requested the Government of Japan, which has a history of incorporating the advantages of both systems of the civil law and common law, to support for the development of the Civil Code of Nepal.

JICA's support for developing laws in other countries is based on its commitment to democratic development that respects fundamental freedoms and protects and promotes human rights, while honoring the partner countries' own decisions.

JICA's approach that respects the culture of the partner country is appropriate especially for the cooperation related to the Civil Code, since the Civil Code is deeply related to the people's everyday lives.

Nepal was the first partner country of JICA in South Asia at that time in relation with legal technical cooperation. JICA established the Advisory Group on the Civil Code of Nepal in 2009, consisting of renowned Japanese professors, lawyers, and prosecutors, and started from understanding the status of the Government of Nepal's work in drafting the Civil Code and its legislative process.

The Advisory Group on the Civil Code of Nepal assisted the Civil Law Reform and Improvement Task Force with the drafting of the Civil Code by providing comments from comparative viewpoints. The final draft bill was eventually completed in 2010, after repeated discussions between Japanese side and Nepali side through training in Japan, on-site seminars, and TV conferences. The bill was submitted to the Constituent Assembly in 2010 and 2011, and to the Legislative-Parliament in 2014. After that, it was finally enacted by Legislative-Parliament in 2017, and enforced in 2018.

Even after the National Civil Code was enacted, the Advisory Group has consistently supported the Government of Nepal in various ways including introducing interpretations of issues in foreign countries and fostering discussions on the further reform of the National Civil Code.

This book presents a collection of explanations and comments on the National Civil Code, drawn from the knowledge and experience of the members of the Advisory Group.

I would like to express my deepest gratitude to the authors and the stakeholders of the Government of Nepal.

I hope that this book will be of a help for deepening your understanding of the National Civil Code, its implementation and further discussion on the new issues in line with changing social situations.

Akimitsu OKUBO  
Chief Representative  
Japan International Cooperation Agency Nepal Office



# राष्ट्रिय न्यायिक प्रतिष्ठान, नेपाल

## National Judicial Academy, Nepal

(Estd. under the National Judicial Academy Act, 2006)

"...Center of Excellence for Judicial Education."



### Preface

Established as an institution dedicated to the enhancement of judicial capacity and publication of legal and judicial resources, National Judicial Academy, Nepal (NJA-Nepal) has consistently endeavored to upgrade the work efficiency through comprehensive training initiatives and the dissemination of scholarly works.

In our pursuit of excellence, NJA-Nepal has forged a collaborative partnership with the Japan International Cooperation Agency (JICA) aimed at enriching the discourse surrounding Family Law by developing resource material on family law. However, the genesis of this publication stems from a request by JICA for a joint endeavor to publish a book authored by esteemed Japanese Professors, entitled "The Civil Code of Nepal: A Brief Commentary by Japanese Professors." It is with a profound sense of accomplishment that we present this work to you the readers.

While Nepal continues to practice its National Civil Code, enacted five years ago, it is our keen hope that this book will serve a clarity and offer invaluable perspectives on pertinent legal provisions. We believe that it will not only facilitate an understanding of the subject matter but also contribute to the implementation of legal frameworks.

In presenting this book, I am honored to extend my sincere appreciation to the former Chairperson of the Council of Ministers/former Chief Justice Rt. Hon'ble Khilraj Regmi for his invaluable encouragement and endorsement, graciously conveyed through his thoughtful words which have significantly enriched the publication process. Chief Justice Regmi played a pivotal role as the Chair of the Working Committee for both the Civil Code and Civil Procedure Code before their enactment, during his tenure as a Justice in the Supreme Court of Nepal.

I extend heartfelt gratitude to the JICA Nepal for their support and trust in NJA-Nepal. Special recognition is extended to Professors Hiroshi Matsuo, Satoshi Minamikata, Hiroyuki Kihara, and Taro Morinaga for their scholarly contributions, which have been instrumental in the creation of this publication.

Furthermore, I wish to acknowledge the dedication and hard work of Ms. Miha Isoi, JICA Legal Support Advisor to Nepal, and Mr. Aman Maharjan, National Legal

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"... Center of Excellence for Judicial Education."

Consultant of JICA Nepal, whose contributions have been indispensable to the fruition of this endeavor. Similarly, I would like to extend thanks to Hon. Dr. Diwakar Bhatta, District Judge of Nepal for editorial works in the book in a very short time.

Last but not least, I extend my gratitude to Director Mr. Shreekrishna Mulmi and Research Officer Ms. Karuna Thapaliya and other concerned for their tireless efforts in bringing this publication to a success. As we present this work to the world, NJA-Nepal eagerly awaits the feedback and suggestions of our esteemed readers.

Warm regards,

  
Baidya Nath Upadhyay  
Executive Director, NJA Nepal



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IV Family Law	Prof. Satoshi Minamikata
V Law of Property	Prof. Hiroshi Matsuo
VI Contract Law	Prof. Hiroyuki Kihara
VII Law of Other Liabilities (1) – Indirect or Quasi-Contracts and Unjust Enrichment	Prof. Hiroshi Matsuo
VIII Law on Other Liabilities (2) – Tort	Prof. Hiroyuki Kihara
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X Future of the Civil Code of Nepal	Prof. Hiroshi Matsuo

# Abbreviations

NCC: The National Civil Code of Nepal (2017)

NPC: The National Penal Code of Nepal (2017)

FCC: The Civil Code of France (1804)

GCC: The Civil Code of Germany (1900)

JCC: The Civil Code of Japan (1896)

MA: Muluki Ain (the Country Code)

(\* Unless otherwise stated, the Muluki Ain in this book refers to the revised version of the Muluki Ain 1854 in 1963.)

If only the number of a section (for example. Sec. 279) is provided in the text, it means that of the NCC.



# I Introduction

Prof. Hiroshi Matsuo

## 1. Origin of the National Civil Code of Nepal

On 25 September 2017 (*Ashwin* 9, 2074 in the Nepali Bikram Calendar), the Bill of the Civil Code of Nepal was passed by the Federal-Parliament, together with the Bills of the National Civil Procedure Code, National Penal Code, National Criminal Procedure Code, and the Criminal Offense (Sentencing and Execution) Act (herein after referred in to the Sentencing Act). It was authenticated on 16 October 2017 (*Ashwin* 23, 2074) and came into effect on 17 August 2018 (*Bhadra* 1, 2075).

The cooperation between Nepal and Japan for the draft of Civil Code was started since February 2009, when the first seminar on democratization and peace building was held. After the preparation survey conducted in February 2009, the taskforce to draft the civil code was set up on the Nepali side in April 2009. On the Japanese side, the advisory group was set up in March 2009 (first meeting was held in June 2009) to cooperate for drafting the Civil Code of Nepal.

The Nepali Taskforce and the Japanese Advisory Group organized meetings in Nepal and Japan, including TV meetings, to discuss every Section of the draft provisions until the end of 2010. The first draft was submitted by the Ministry of Law and Justice<sup>1</sup> to the Government of Nepal, the Cabinet in January 2011, and the Bill was submitted by the Cabinet to the Constituent Assembly in February 2011. However, before the discussion of the Bill, the Constituent Assembly was dissolved in May 2012.

After the reelection for the members of the Constituent Assembly held in November 2013, the Bill based on the second draft of the Civil Code was submitted to the Constituent Assembly in December 2014. After the Constitution of Nepal was promulgated in September 2015, the Bill of National Civil Code was passed by the Federal-Parliament in September 2017 as mentioned above.

## 2. Structure of the National Civil Code of Nepal

The National Civil Code of Nepal (the NCC) consists of 6 parts and includes 721 Sections in total. Part 1 is Preliminary [Secs. 1-29], Part 2 is Law Relating to Persons [Secs. 30-66], Part 3 is related to Family Law [Secs. 67-250], Part 4 is Law Relating to Property [Secs. 251-492],

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<sup>1</sup> The name is as it was at that time.

Part 5 is on the provisions Relating to Contracts and Other Liabilities [Secs. 493-691], and Part 6 is on the provisions Relating to Private International Law [Secs. 691-721].

Some provisions are based on the existing laws, including the *Muluki Ain* (the then Country Code) and other related legislations. In contrast, some are newly created, sometimes by reference to the Civil Code and related laws in foreign countries.

### 3. Characteristics of the National Civil Code of Nepal

There are two major systems of Civil Code, known as the *Institutiones* system and the *Pandekten* system. On the one hand, the *Institutiones* System consists of (1) Law of Persons, (2) Law of Things, and (3) Law of Various Transformation Styles of Ownership and Rights. It is logically ordered from the subject of rights, object of rights, and transformation of rights. It is typically found in the Civil Code of France, which was first promulgated in 1804.

On the other hand, the *Pandekten* System consists of (1) General Part, (2) Law of Obligation, (3) Law of Property, (4) Law of Family Relations, and (5) Law of Succession. It starts from the general provisions to the specific provisions, so that it can logically cover all the matters to be provided by the Civil Code. It also divides the provisions of transformation of rights into the law of property and the law of obligations. The *Pandekten* System was typically adopted by the Civil Code of Germany in 1900, and the Civil Code of Japan promulgated in 1896 which followed the *Pandekten* Style.

The NCC can be characterized as a subtle combination of the advantages of the *Institutiones* System and those of the *Pandekten* System. [1] In the NCC there are elements of the *Institutiones* System, in that after the Preliminary it stipulates the Law of Persons, followed by Family Law, then Law of Property, and Law of Contract and Other Liabilities. [2] It also holds elements of the *Pandekten* System in that 1) it starts from Preliminary as a General Part; 2) It distinguishes Law of Persons from Family Law; 3) It also makes distinction between the provisions of succession and the transformation of rights; 4) It makes a clear distinction between the provisions of transformation of property rights and those of claim rights. [3] The NCC has a streamlined structure reflecting the basic rules of a citizen's life, starting from a person and a family, moving to property, and to relations with other parties, becoming the Asian standard, which tends to emphasize the basic importance of family relations.<sup>2</sup>

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2 For instance, the Civil Code of Lao P. D. R., which was adopted by the National Assembly on 18 December 2018, promulgated on 18 January 2019, and brought into effect on 25 May 2020, consists of (1) General Provisions, (2) Individual and Juristic Person, (3) Family, (4) Asset, Ownership and Other Asset Related Rights, (5) Contractual Obligations, (6) Non-contractual Obligations, (7) Secured Transactions, (8) Inheritance, and (9) Final Provisions.

# II General Provisions

Prof. Hiroshi Matsuo

## 1. Overview

### 1.1 The Purpose of the Civil Code

Before entering into Part 1, it is important to confirm that the Preamble, prescribed before Part 1, shows that the NCC, authenticated on 16 October 2017, is rooted in the Country Code of Nepal, and it amended and consolidated its provisions for the purpose of maintaining morality, decency, etiquette, convenience, and economic interest, which will contribute to creating harmonious relationships between various castes, races, and communities in Nepal.

### 1.2 Meaning and Structure of Part 1

After the Preamble, Part 1 of the NCC, named as “Preliminary”, contains three Chapters. They are Preliminary Statement (or General Provisions), General Principles of Civil Law, and Provisions Relating to Civil Rights. They can be construed as the General Part of the NCC.

### 1.3 Some Technical Provisions Relating to the Civil Code

#### 1) Source

Chapter 1, Part 1, from Section 1 to Section 3 provides for some technical matters for the convenience of the usage of the NCC.

#### 2) Contents

1. Short title and commencement
2. Definitions
3. Not to prejudice special legal provisions

#### 3) Summary

The NCC, to be called as "Muluki (National) Civil Code 2017", shall come into effect on 17 August 2018 (Sec. 1). As for the terms which will appear frequently in this Code such as court, law, person, lawsuit, etc., Section 2 simply defines them. The Civil Code is the general law of the state, and therefore any special legal provisions shall not be affected by the corresponding provisions mentioned in the NCC (Sec. 3).

#### **4) Key points**

Among the definitions of the basic terms set out by Section 2 (e) is an important substantive provision which stipulates that the majority age of a person in Nepal shall be eighteen years..

## **2. General Principles of Civil Law**

### **1) Source**

Chapter 2, Part 1, from Section 4 to Section 16 provides for some basic principles of the NCC.

### **2) Contents**

4. Principles and provisions applicable generally
5. Ignorance of the law is not to be excused
6. Acts against public interest not to be carried out
7. Acts contrary to law to be invalid
8. A wrongdoer to bear liability for loss or damage
9. Acts causing nuisance to other not to be done
10. Not to enjoy benefit of wrong
11. Acts against interest to be invalid
12. Personality to be recognized
13. Good neighborhood to be maintained
14. Not to be relieved from civil liability
15. Custom or tradition contrary to law not to be recognized
16. Applicable to foreigners as well

### **3) Summary**

General principles stipulated in Chapter 2, which are applicable to the matters of civil law (Sec. 4), can be classified into the following categories. (i) First, there are basic norms as code of conduct to be kept by the members of civil society (Secs. 6-13). (ii) Second, they include basic rules on the application of law (Secs. 5 and 16). (iii) Third, Section 15 provides for the validity of customs and traditions. (iv) Fourth, Section 14 clarifies the distinction between civil liability and criminal liability.

### **4) Key Points**

#### **4.1) Basic norms as code of conduct in the civil society (Secs. 6-13)**

Any actions against public interest are prohibited by Section 6. It does not mention the effect of such actions. However, if they are legal actions, they shall be regarded as invalid

(void) just as the action contrary to law, which is stipulated in Section 7. Likewise, actions of guardians, curators, etc. against the interest of a person who is under their guardianship, curatorship, subjection, influence or likely be under influence shall be invalid (Sec. 11). If actions are regarded as wrong (wrongful actions), the actors and concerned persons may have a duty to compensate for damages caused by those actions in accordance with the provisions of tortious liability (Chaps. 16 and 17, Part 5) as emphasized by Section. 8.

Any benefits accrued from wrongful actions must also be returned as compensation or unjust enrichment (Chap. 16, Part 5) as mentioned by Section 10.

Section 9 and Section 13 stipulate the basic norms to be kept mutually by members of society in order to maintain a community. If their actions are regarded as wrong, they may cause a tortious liability as emphasized by Section 8.

Finally, Section 12 stipulates that the personality of a person must be recognized and respected. It can be regarded as the central norm in the code of conducts and the core value of the Civil Code.

#### **4.2) Basic rules on the application of law (Secs. 5 and 16)**

Section 5 provides that the law shall be applied to a person regardless of his/her knowledge about that law.

Section 16 confirms that the civil law provisions are applied not only to the Nepali citizens, but also to foreigners unless provided otherwise. It is the principle on the application of the law of a state to be derived from the sovereignty of that state. Special treatments may also be given by the provisions of law which are also the decision of a state based on its sovereignty.

#### **4.3) The validity of customs and traditions (Sec. 15)**

Section 15 stipulates that customs and traditions may be valid if they are not contrary to the law. It is the basic requirement for the validity of customary law.

#### **4.4) The distinction between civil liability and criminal liability.**

Section 14 provides that no person shall be relieved from a civil liability under the law merely on the ground that the proceeding of criminal offense is initiated or not initiated against him or her. It clarifies the distinction between civil liability and criminal liability. Major sources of civil liability are provided in the Civil Code. However, if any special provisions of other laws (including criminal laws) provide for the civil liability, such as the compensation for damages to be paid to the victims, those provisions shall be applied as special legal provisions instead of those of the Civil Code (Sec. 3), as provided by Section 683 (1) concerning tort liability.

#### **4.5) Provisions of basic norms before those of civil rights**

Chapter 2, Part 1 provides the obedience to law, public interest, interest of neighbors, community interest, and interest of a person who is under protection (Secs. 5-13). The reason



for starting from those civil duties may be that they are recognized as the fundamental basis for the promotion of the rule of law in Nepal.

### **3. Civil Rights**

#### **3.1 The Concept of Civil Rights**

The civil rights are the basic rights of every individual to be recognized in a civil society. However, the content of civil rights can be influenced by the historical development of legal system in every state. The NCC provides the civil rights in Chapter 3 under Part 1. They can be classified into two categories. (i) The first category is the right of every individual concerned with the personality, such as the right of life, body, freedom, privacy, etc. (Secs. 21, 21, 22 and 24). The right of personality must be recognized and protected equally for every individual since the birth until the death of a person (Secs. 17 - 19). (ii) The second category is the right of property which can be recognized in the external things to be acquired through various causes, such as possession, contracts, succession, and other causes provided by law. It is implemented and protected in accordance with the provisions of law (Secs. 23 and 25).

Chapter 3, Part 1 also includes the right of filing a case to the court and concerned provisions (Sec. 26-28). It is the right to bridge between the substantive rights, such as the right of personality and the right to property and the court procedure to protect and implement those substantive rights. It is the feature of the NCC to provide the right of filing a lawsuit as a kind of civil rights.

#### **3.2 Civil Rights Provided in Preliminary**

##### **1) Source**

Chapter 3 on Provisions Relating to Civil Rights (Secs. 17-29) stipulates various kinds of civil rights.

##### **2) Contents**

17. To be equal before the law
18. Discrimination not to be made
19. Discrimination not to be deemed where special provision is made
20. Guarantee of freedoms and rights
21. Right to privacy deemed to be violated
22. Right to make contracts
23. No taxation except in accordance with law
24. Not to employ in work against will

25. Property not to be acquired, requisitioned, auctioned, or forfeited
26. Complaints may be filed
27. Compensation to be awarded
28. Compensation for filing a false complaint
29. Statute of limitations

### **3) Summary**

Chapter 3, Part 1, stipulates various rights of citizens. The right to claim for equal treatment (Sec. 17) and no discrimination without any reasonable causes (Secs. 18 and 19), personal liberty (Secs. 20 (1) and 26) and freedom of expression, association, union, residence, profession, business, transaction, education, religion, language, culture, privacy, etc. (Secs. 20 (2) and 21) together with no taxation without law, no work against a person's will, and the property right (Secs. 24-26) are also public law matters to be provided in the Constitution, because they cannot be infringed, but rather must be guaranteed by the state.

Personal liberty, the right of privacy, freedom of transaction (Secs. 20 (1), 26, and 20 (2) (k), (g), (k)), and freedom of contract (Sec. 22) are private rights which are the major contents of the Civil Code.

The nature of compensation provided by Sections 27 and 28 can be regarded as the tortious liability, which is provided by Chapter 17, Part 5. Compensation for filing false complaints with the intention of causing pain may include mental suffering together with the court fees and lawyer's fees (Sec. 28 (1), (2)). If an official or employee working in a governmental or public body is held to have knowingly violated civil rights, the official or employee shall personally be responsible for compensation for damages to personal liberty (Sec. 27 (2)).

### **4) Key Points**

#### **4.1) The right of personality (personality right)**

Personal liberty (Secs. 20 (1) and 26) and the right of privacy (Secs. 20 (2) (k) and 21) are typical examples of the right of personality (personality right), which is one of the major types of private rights. Section 21 provides the content of the right of privacy in detail (Sub-section (1)) and its limits (Sub-section (2)).

For the protection of personal liberty, Section 26 provides for the legal remedies of *habeas corpus* (Sub-section (1) to (3)), release (Sub-section (4)) injunction (Sub-section (5), and claim for compensation (Sec. 27).

## **4.2) The right of property**

Section 25 provides for the protection of property right, which is also one of the major types of private rights. It includes the right to transfer property and carry out any other transactions of property as provided by Section 20 (2) (g).

## **4.3) The freedom of contract**

The right to make contracts provided by Section 22 can be regarded as the source of freedom of contract, which is also major content in the system of private rights.

# **4. Limitation Period**

## **4.1 How to Provide Limitation Period**

One of the characteristics of the NCC is that it provides for a limitation period for bringing the case to the court at the end of each Chapter which provides for legal remedies.

## **4.2 Provisions of Limitation Period in the Civil Code**

### **1) Source and contents**

At the end of each Chapter which provides for legal remedies, the NCC stipulates the limitation period with the title of "Statute of limitations," such as Sections 29, 41, 59, 66, 84, 92, 104, 123, 134, 152, 168, 187, 204, 235, 250, 265, 275, 286, 298, 313, 351, 367, 382, 405, 412, 434, 453, 462, 473, 492, 503, 516, 520, 534, 544, 562, 574, 584, 590, 601, 609, 623, 639, 647, 663, 671, 684, 691, etc.

### **2) Summary**

Length of the limitation period ranges from 3 months to 3 years, depending on the nature of claims. The length of the limitation period is to be determined depending on the nature and relevance of the substantive rights.

### **3) Key Points**

#### **3.1) Length of the limitation period**

Length of the limitation period provided in the NCC from 3 months to 3 years after the cause of action is created (except for the case of arrest or detention in which an aggrieved person may claim remedies at any time as provided by Section 29) seems to be shorter than that in other Civil Codes. However, it depends on the capacities and conditions for the court to treat the civil cases.

For instance, concerning the remedies for infringement of civil rights, Section 29 provides that a person aggrieved from any act done or action taken under this Chapter [Chap.

3, Part 1] may file a lawsuit any time in the case of arrest or detention, and within a period of six months after the date on which such an act or action was done or taken, in other cases. The same period of six month after the date on which such an act or action was done or taken is provided by Section 684 for the tortious action.

### **3.2) Counting rules of the limitation period**

The NCC provides that the limitation period shall be counted from the date on which a certain act was done or the date of knowledge of a certain act without any interruption.

For example, Section 41 provides that a person aggrieved from any act done or action taken under Chapter 1, Part 2, Provisions Relating to Natural Person may file a lawsuit (a) within three months after the date on which an act was done in the case of physical examination or change of organs as provided by Section 36, (b) within one year after the date of knowledge of the judicial declaration of a person's death in the case of a petition to obtain a judicial declaration to be annulled by that person who came back alive as provided by Section 40 (4), and (c) within six months after the date on which such an act was done in the cases other than (a) and (b) above.

Thus, in the case of (b) above, a person aggrieved from the physical examination or change of organs must file a lawsuit within three months after the treatment, which seems to be quite a short period of time.

# III Law of Persons

Prof. Hiroshi Matsuo

## 1. Overview

Part 2 is the law relating to persons. One of the characteristics of the NCC is that it provides the law of persons in an independent part after the Part of General Provisions and before the Part of Family Law. It has a good reason to start from the part of persons as the subject of rights after the general provisions. This style of civil code structure seems to be becoming popular, and similar structure is found in recent codifications, such as the Civil Code of Laos enacted in 2018.

Part 2 of the NCC includes three chapters: Provisions on the legal personality of natural persons (Chap. 1), those on that of legal persons (Chap. 2), and those on the bankruptcy of natural persons (Chap. 3).

The reason why the NCC includes the bankruptcy of natural persons is that the bankruptcy of a legal person is treated by the company law. In the future, however, the chapter on the bankruptcy of natural persons (Chap. 3) may become an independent law of bankruptcy, which will include the law of bankruptcy of legal persons.

In the following description, for the convenience of understanding, the legal personality of natural persons (Chap. 1) and the bankruptcy of natural persons (Chap. 3) are treated before explaining the legal personality of legal persons (Chap. 2).

## 2. Legal Personality of Natural Persons

### 1) Source

Section 30 to Section 41 in Part 2, Chapter 1 (Provisions Relating to Natural Persons).

### 2) Contents

30. To be recognized as person
31. Right to Name
32. To attain competency
33. To be considered incompetent
34. To be considered quasi-competent
35. To be according to court decision

- 36. Physical examination or change of organ may be made
- 37. Power to specify method of one's cremation, obsequies rites, or funereal acts
- 38. Power to donate corpse or organ
- 39. To be considered address of residence
- 40. Presumed to be dead.
- 41. Statute of limitations

### **3) Summary**

Chapter 1, Part 2 includes provisions on the acquisition of legal personality of natural persons, the right to name, incompetency and quasi-incompetency, organ transplant, the method of funerals, address, disappearance, and death. It provides the legal capacity of natural persons starting from birth and ending with death.

The right to name (Sec. 31) can be regarded as a part or a kind of personality rights. Other types of personality rights are provided in Sections 20 and 21 in Chapter 3, Part 1.

### **4) Key Points**

#### **4.1) Legal personality of a natural person from birth to death**

##### **4.1.1) Birth of a natural person**

For a natural person, legal personality shall be automatically acquired by birth (Sec. 30). This is the universal principle which is common to Civil Codes in other countries. It stipulates the time when a person shall acquire legal personality as "immediately after birth". It implies that all the natural persons shall be treated equally as a person when the birth is completed. This is the very basis of the equality among citizens and the ultimate source of the basic principle of individualism.

##### **4.1.2) Death of a natural person**

Section 30 also provides the end of legal personality of a natural person by articulating that "until he or she survives". However, there is no definition of the term "survive" (and death in its opposite) in this Section. The meaning of "survive" and the method of judging whether a particular person survives or not depends on the interpretation of the term "survive" in Section 30. For comparative law, in Japan the death of a person shall be judged by a doctor in consideration of cardiac arrest, respiratory arrest, and pupil dilation.

##### **4.1.3) Presumption of several persons' death at the same time**

If a person A died in an accident and there is no evidence of another person B who met with the same accident remaining alive, such a person also shall be deemed to have died at the same time (Sec. 40 (2)).

Although there is no explicit provision in Sect. 40 (2), the same presumption rule would be applied when A died in an accident and B died in another place, but there is no evidence that A died before (or after) B.

However, there is a special rule in Section 40 (3). It provides as follows:

"Where more than one person are dead at one and the same time in an accident, each person so died is deemed, except as otherwise proved, to have been died at the same time, provided that where, for a particular purpose, a question that which of the persons died first in such an accident is required to be settled, the person who was older by age at the time of death shall, unless otherwise proved, be deemed to have died first."

According to this special rule, if A was a father of B and they died at the same accident and there is no evidence showing that A or B died earlier than the other, A shall be deemed to have died first, so that the succession shall occur from A to B, and B's successor(s) can succeed A's property through the succession of B's property. The same rule seems to be applied when A (B's father) died in an accident and B died in another place but there is no evidence about whether A died earlier than B, although there is no explicit rule in Section 40 (3). Section 40 (3) of the NCC seems to be a unique rule from the perspective of comparative law.

#### **4.2) Legal capacity and legal competency of a natural person**

A natural person shall acquire legal capacity (competency) by reaching majority age; that is, 18 years of age (Sec. 32). Legal capacity (competency) should be distinct from legal personality, which is the status as a subject of rights and is provided by Section 30. Legal capacity (competency) means the legal ability to conduct legal actions for himself/ herself without any support by another person.

#### **4.3) Legal incompetency**

Legal incompetency is stipulated as under 10 years of age or unsoundness of mind (Sec. 33). In this context, "unsoundness of mind" shall mean "the condition of being incapable, due to physical and mental ill health, of knowing the act done by oneself in general understanding and consequences thereof" (Explanation to Sec. 33 (1)).

A person who is held as legally incompetent has to exercise the right with the consent of the guardian or curator, or through the guardian or curator, as the case may be (Sec. 33 (2)).

#### **4.4) Quasi-competency**

A natural person from 10 to 18 years of age is regarded as quasi-competent (Sec. 34 (1)). A quasi-competent person shall, in exercising a right, obtain the consent of the guardian or curator or exercise the right through the guardian or curator, as the case may be (Sec. 34 (3)).

A guardian or a curator shall have the power to sell property of the person under his/her guardianship or curatorship (Sec. 415 (1)). However, Immovable property cannot be sold without permission of the court (Sec. 415 (2)).

#### **4.5) Organ transplant**

The NCC provides that any person may, subject to law, have any organ or part or a sample of his or her body transplanted or collected (Sec. 36 (1)). This is the result of the right of self-determination. However, appropriate regulation of organ transplantation is necessary to avoid inhumane transplantation.

For an incompetent person, his or her guardian or curator, as the case may be, shall decide the organ transplant for the interest of this person (Sec. 36 (2)). The institutional protection of the incompetent person is also necessary to guarantee his/her interest.

#### **4.6) Address of a natural person**

It is very important for a person to identify the address of another person to make transactions with him/her, claim something with each other, or bring the lawsuit against each other. The address of a person may also be used to hold whether the person has disappeared or not (Sec. 40).

The address of a person shall be given by him/her with the place of his/her residence, and if he/she does not specify the residence, the place of his/her permanent residence within Nepal shall be regarded as his/her address (Sec. 39 (1)). If a person does not have residence or his/her residence is not traced out, the place of his/her abode for the time being shall be regarded as the address (Sec. 39 (2)). If the temporary abode is not identified, the place where the person carried on business transactions shall be considered to be his/her address for that purpose (Sec. 39 (3)). If a person considers any address as the place of his/her residence for a particular purpose, that place shall be regarded as his/her address (Sec. 39 (6)). During the change of address, the place of temporary residence shall be regarded as his/her address (Sec. 39 (4)).

The address of an incompetent or quasi-competent person shall be the place of his/her permanent residence. If it is not traced out, the place where his/her guardian or curator resides shall be considered to be his/her address (Sec. 39 (5)).

#### **4.7) Disappearance of a person**

If a person disappears from his/her address without any notice for twelve years consecutively, he/she shall be deemed to have died at the completion of five years for a person who has attained eighty years, at the completion of four years after the war had ceased for a soldier deputed to the war-field, at the completion of three years after an accident for a person who was traveling by an aircraft, ship, or other vehicle that met with an accident (Sec. 40 (1)).



In response to a petition filed by the concerned person, the court shall make an order of judicial declaration on the death of a disappeared person by examining the evidence to prove that the requirements provided by Section 40 (1) above are met (Sec. 40 (4)).

The judicial declaration on the death of a person may be annulled or amended if a person who was declared dead comes back alive and files a petition in person to get the judicial declaration made earlier to be annulled or if his/her successor files a petition for amendment to the previous judicial declaration on death for the reason that the date of death of the person declared to have died to be different from the date referred to in the judicial declaration (Sec. 40 (5) main text).

However, if a surviving wife has concluded another marriage after the declaration on the death of her husband, the matrimonial relationship with her husband cannot be re-established (Sec. 40 (5) Proviso [1]).

Although there shall be no adverse effect on the legal right of the person declared to have died (Sec. 40 (5) Proviso [2]), an act which has already been carried out pursuant to the judicial declaration on the death of the person shall not be prejudiced by virtue of the establishment of a new date of death, and the right, interest, or concern of the person provided by law shall not be affected (Sec. 40 (5) Proviso [3] and [4]).

### **3. Legal Personality of Legal Persons**

#### **1) Source**

Section 42 to Section 53 in Part 2, Chapter 2 (Provisions Relating to Legal Persons).

#### **2) Contents**

42. Legal person to acquire competency
43. To obtain legal competency upon incorporation
44. Legal competency deemed to be acquired, ipso facto
45. Address of location of legal person
46. Management and operation of legal person
47. Operation of business of legal person
48. Right or liability to devolve upon merger of legal person
49. Legal person may become agent
50. Not to participate in decision-making in case of conflict of interest
51. Legal person to be liable
52. Assets or liability to be settled

### **3) Summary**

Chapter 2, Part 2 stipulates basic provisions on the legal personality and competency of a legal person. It provides (1) the establishment of a legal person, (2) the management of business to be made by a legal person and its responsibility for its actions, (3) the merger of a legal person with another legal person, and (4) the dissolution and liquidation of a legal person. They correspond to the provisions from birth to death of a natural person.

They are the general rules to be applied to any kind of legal persons, and they shall be supplemented by other provisions of special law.

### **4) Key Points**

#### **4.1) Establishment of a legal person**

##### **4.1.1) A legal person to be established by the application and registration**

In general, a legal person shall be incorporated and acquire legal personality and legal competency through application and registration in accordance with the law (Sec. 42 (1), (2) and (3)). The registration pursuant to the law is crucial for the acquisition of legal competency (Sec. 42 (2)).

An application for the registration of a legal person shall be made to the competent authority by setting out the following matters stipulated in Sec. 42 (3). They are:

- (a) Name of the body corporate,
- (b) Head office of the body corporate, and address of such office,
- (c) Objectives and functions of the body corporate,
- (d) Details of the capital structure, if any, of the body corporate,
- (e) Other necessary details.

They seem to be applied both to an association and a foundation to be incorporated for the acquisition of legal personality and legal competency.

If the application is accepted by the competent authority and registered pursuant to the provisions of law, a body shall be incorporated (Sec. 42 (4)) and acquire legal competency (Sec. 42 (2)).

The body incorporated pursuant to Section 42 (3) and (4) shall become an autonomous body corporate with perpetual succession, and may carry out any activities as a legal person subject to law (Sec. 42 (6)).

This means that it can acquire, hold, earn, possess, dispose of, sell, or manage a property; execute a contract, exercise rights and discharge obligations generated by the contract, or

assume rights or obligations (Sec. 42 (6) (a), (b)). It can also frame statutes or by-laws required to operate its own functions, proceedings or business; and appoint necessary employees to carry out its functions (Sec. 42 (6) (c), (d)).

It can open branches or other offices, subject to its statute and by-laws; open and operate an bank account in its own name; and carry out other functions according to the law (Sec. 42 (6) (e), (f), (g)).

A legal person may sue or initiate other legal actions and may be sued or subjected to other legal actions by its own name (Sec. 42 (7)).

In addition to the activities mentioned above, a legal person may carry out any other civil and commercial transactions (Sec. 43 (1)).

A legal person has its own address of location as specified at the time of application for the incorporation of the body corporate (Sec. 42 (3) (b)). If the address is not specified, the address of its headquarters or other registered office shall be considered to be its address of location. If such address is not specified, the address where the main administrative office or transaction and business of such a body corporate is located shall be deemed to be its address of location (Sec. 45).

#### **4.1.2) A legal person to be established ipso facto**

The following bodies are legal persons which shall have legal competency ipso facto without application and registration as provided in Section 42:

- (a) The State of Nepal,
- (b) The Government of Nepal,
- (c) The Federal Parliament or Legislature-Parliament,
- (d) A court, constitutional body, or any office thereunder,
- (e) A Ministry, Secretariat, Department of the Government of Nepal, and any other government office,
- (f) A Province,
- (g) The Province Government or Provincial level Government offices,
- (h) A Provincial Assembly,
- (i) A Rural Municipality, Municipality or District Assembly, or Local Level government office under such a body,
- (j) A commission, committee, or other similar body set up in accordance with law by the Government of Nepal, Provincial Government, or Local Level Government,
- (k) A corporation, corporate body, or body set up in accordance with law,

- (l) Any organisation established for public purpose, such as a shrine, temple, deity place, *Chaitya*, monastery, mosque, church, public rest house, public inn, or graveyard remaining in operation from the time immemorial and in possession of a property,
- (m) A community school, college, or university established for public purpose.

However, the distinction between the State of Nepal, the Government of Nepal, the Federal Parliament, courts, and Ministries needs to be clarified. From the viewpoint of comparative law, a state can be a single and unified legal person which includes the legislative, administrative, and judicial bodies of the state.

## **4.2) Management of business and responsibility of a legal person**

### **4.2.1) Management of business by a legal person**

The management of business of a legal person is conducted by one or more directors on behalf of the legal person in accordance with the provisions articulated in its statute of incorporation (Sec. 46 (1), (2)). The legal person shall be responsible for the management conducted by the director or directors (Sec. 46 (2)). In order to operate business of the legal person, the director may delegate powers to other director(s) or other person(s) (Sec. 47 (2)).

A legal person has its own corporate personality and uses a separate seal for its transactions and other activities (Sec. 42 (5)) It can act as an agent of another person (Sec. 49).

A director of a legal person cannot participate in the decision-making process on a matter involving his/her personal interest, to thereby avoid conflict of interest (Sec. 50 (1)). If a decision is recognized to be affected by conflict of interest, it shall be void (Sec. 50 (2)).

### **4.2.2) Responsibility of a legal person**

If a loss or damage is caused to a person by an act done “by a person on behalf of a legal person,” the legal person shall be liable and bear compensation for the loss or damage (Sec. 51, Main text). “A person” usually means the director who caused the loss or damage. It may also include other persons who are delegated by the director and have conducted acts “on behalf of a legal person.”

However, if the loss or damage is caused by an act “beyond the objective or competency of the legal person or dishonestly,” the director or a person committing such act shall personally be liable for the loss or damage (Sec. 51, Proviso).

## **4.3) Merger of legal persons**

A legal person may be merged with another legal person. The existing rights and liabilities (obligations) of the legal person to be merged with another legal person will be specified and treated at the time of the merger (Sec. 48 (1)).

However, if they are not specified at the time the merger, the rights and liabilities (obligations) of the legal person to be merged shall devolve on the merging legal person (Sec. 48 (2)). It is a succession of rights and duties of the merged legal person by the merging legal person.

#### **4.4) Dissolution and liquidation of a legal person**

A legal person ceases to exist when it is dissolved and liquidated. Otherwise, a legal person shall continue to exist even after its dissolution until the liquidation is completed (Sec. 43 (2)).

If a legal person is dissolved for any reason, the assets and liabilities (obligations) of that legal person shall be settled in accordance with law (Sec. 52).

#### **4.5) Limitation period of action**

A lawsuit by an aggrieved person concerning matters on a legal person must be filed within six months after the date of action which caused the matter (Sec. 53). However, in the case of conflict of interest (Sec. 50), a lawsuit must be brought into the court within three months after the date of knowledge of the decision affected by the conflict of interest (Sec. 53).

### **4. Bankruptcy of a Natural Person**

#### **1) Source**

Section 54 to Section 66, in Part 2, Chapter 3 (Provisions Relating to Bankruptcy of Natural Persons).

#### **2) Contents**

54. Bankruptcy proceedings may be initiated
55. Petition to be filed to initiate bankruptcy proceedings
56. Notice to be given to creditors
57. Notice to be given to borrowers
58. Order to be given to initiate bankruptcy proceedings
59. Transactions to be, ipso facto, stayed or void
60. Opportunity to be provided to reconcile sum of debts
61. Priority order of paying debts or liabilities
62. Debt of creditor who shows excess debt not to receive priority
63. Property to be set aside
64. Assets not to be concealed

- 65. Status of bankruptcy to be terminated
- 66. Statute of limitations

### **3) Summary**

The NCC includes the provisions on the bankruptcy of natural persons in Chapter 3, Part 2. They provide the procedure to initiate bankruptcy proceedings, the way of distribution of the remaining assets of a debtor among the creditors, and the termination of bankruptcy proceedings. The purposes of the provisions on bankruptcy are, firstly, the liquidation of assets held by a bankrupted person by making priority order of payment, and, secondly, the rehabilitation of a bankrupted person.

### **4) Key Points**

#### **4.1) Process of the bankruptcy of a natural person**

The bankruptcy proceedings shall be initiated with filing a petition to the court by a person (debtor) who is likely to become bankrupt for himself/herself (Secs. 54 (2) (a), (c), and 55 (1), (2)), or a creditor or group of creditors who have claim of more than 25% of the total debts if the amount of debts is disclosed, or a creditor or group of creditors who have claim of more than five hundred thousand rupees (Sec. 55 (1), (3), (4)).

If the court, after giving a notice to the creditor(s) (Sec. 56) or to the debtor(s) (Sec. 57), has made an order to initiate bankruptcy proceedings according to Section 58 (1), the court shall order a family of the bankrupted person to maintain status quo of the assets (Sec. 58 (2)) or may entrust a person licensed as a bankruptcy professional, a bankruptcy trustee, the concerned ward committee of the Local Level, an officer employee of the court, or a law practitioner designated by the court to manage the assets (Sec. 58 (3)).

After the court has made an order to initiate the bankruptcy proceedings, concluding a contract, payment of a debt, performing obligations, execution, and other transactions shall be stayed (Sec. 59 (1)). If the bankrupted person has concluded a contract, performed obligations or made any transactions in contravention of Section 59 (1), they shall be void (Sec. 59 (2)).

The Local Level, bankruptcy trustee, or a person entrusted to manage the assets as the case may be pursuant to Section 58 (3) shall call a meeting of the debtors, creditors, or other claimants after the assets, debts, and other liabilities are ascertained, to provide opportunity of reconciling sum of debts (Sec. 60).

#### **4.2) Priority order of payment among creditors**

In the bankruptcy proceedings, the debts shall be paid by following the priority order as stipulated by law (Sec. 61 (1): (a) costs incurred in the carrying out of the bankruptcy proceedings; (b) the debt of a creditor secured by a pledge or mortgage; (c) tax, fine to be paid

to the Government of Nepal or other government charges and dues; (d) debts of the creditors other than those referred to in (b) above; (e) claim of the claimants other than those referred to in (b), (c) or (d) above. If there are more than one creditors of the same priority order, the debt shall be paid on a pro rata basis from the assets bankrupted in proportion to the debt of each creditor (Sec. 61 (2)).

If it is held that more debts have been shown from any transaction which has never been made by a collusion between a person likely to become bankrupted and a creditor being guided by a *mala fide* (bad faith) motive to cause loss to other creditor(s), the debt of such a *mala fide* (bad faith) creditor shall be paid only after the debt of other creditor(s) is satisfied (Sec. 62). This is a sanction against the *mala fide* (bad faith) creditor.

However, the following properties shall be set aside from the assets to be distributed to the creditors through the bankruptcy proceedings: (a) any property that remains as the personal property of a person other than the bankrupted person; (b) clothes up to three pairs and shoes up to three pairs being worn or to be worn by the bankrupted person and an undivided family member of him/her; (c) one set of cooking and dining utensils, pots and cups, one set of bedding materials and a reasonable number of pieces of furniture required for the undivided family member of the bankrupted person; (d) medicines and health-related equipment required to the bankrupted person and the undivided family member of that person; (e) books necessary to carry out study and teaching; (f) food necessary for subsistence for a period not exceeding three months to the persons referred to in (b) above; (g) one set of tools or instruments related to the profession and employment of the persons referred to in (b) above (Sec. 63 (1)). In addition, the total value of the properties to be set aside from the assets to be distributed to creditors shall not exceed one hundred thousand rupees (Sec. 63 (2)).

#### **4.3) Rehabilitation of a bankrupted person**

Even if the creditor(s) have made a petition to the court to initiate bankruptcy proceedings, a person likely to be bankrupted may ask for a period of up to five years specifying the period of time to repay the debts of creditors and sources thereof in order to enjoin from initiating the bankruptcy proceedings (Sec. 54 (2) (b)).

Even after the court has made an order to initiate the bankruptcy proceedings, if the bankrupted debtor and creditors reach at mutual agreement to stay the bankruptcy proceedings for the time being, a joint petition may be filed in the court (Sec. 60 (4)), and the court may make an order to stay as requested the bankruptcy proceedings for a period not exceeding five years (Sec. 60 (5)).

The status of a bankrupted person shall remain for a period of twelve years from the date on which he/she became bankrupted (Sec. 65 (1)). However, if the bankrupted person performs all obligations payable to the creditors at the time of the bankruptcy, he/she may file a petition

in the court to terminate the status of bankruptcy by following the procedure stipulated by law (Sec. 65 (2), (3)). If the court has confirmed that the bankrupted person has satisfied all the debts remaining unpaid at the time of bankruptcy, the court may annul the order of initiating bankruptcy proceedings (Sec. 65 (4)). If the order is annulled, the status of the bankrupted person shall be deemed to have been terminated after one year from the date of the annulment of the order (Sec. 65 (5)).



# IV Family Law

Prof. Satoshi Minamikata

## 1. General Overview of Part 3<sup>3</sup>

### 1.1 Component Differences in the Family Part between the National Civil Code 2017 and the *Muluki Ain*, 1963)

Part 3 of the National Civil Code Act, 2017<sup>4</sup> is composed of 11 chapters including marriage, consequences of marriage, divorce, relationship between parent and children, maternal and paternal authority, guardianship, curatorship, adoption, inter-country adoption, partition and succession. The component differences of the NCC and the *Muluki Ain*, 1963 (revised version of the *Muluki Ain* 1854 and hereinafter cited as *MA* 1963) are shown in the chart below. The provisions of ‘last will’ (the testament system) were proposed in the draft of ‘the Bill of Civil Code, Civil Procedure Code and Report, 2010’, but were not implemented due to strong voices against it in the Legislature-Parliament<sup>5</sup>. Though the drafting committee of the NCC discussed the implementation of the testament system, it was finally dropped from the draft of the NCC.

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- 3 The source of this article is the English translated version of NCC 2017. Care must be taken when reading the provisions for precise understanding of the English translated version of NCC 2017 since a term sometimes may not reflect the real meaning of the original Nepalese term. For instance, in Section 112 (2), stipulating that if the father of a person who must mention the name of his or her mother, father and grand-father, grand-mother pursuant to Sub-section (1) is not traced, the person may mention the name of his or her mother and the mother's grand-father, grand-mother, ‘grand-father, grand-mother’ and ‘the mother's grand-father, grand-mother’ are separately used. Accordingly, a relative’s term such as ‘grand-father’ could be interpreted as a relative on the paternal side and a relative’s term on the mother’s side could be added to with a word of ‘maternal’ or ‘mother’s’. (See Sec. 103 and 136.)
- 4 NCC 2017 was revised partly by the Act amending some Nepal acts related to *Muluki Codes* (2075) in 15 April 2019.
- 5 The provisions relating to ‘last will’ in the part of gift of *MA* 1963 (see No. 2 of Part 3 Chap. 19 On Donation and Gift) still seem to be existed partly as ‘a testamentary donation or testamentary gift’ in NCC 2017 (Sec. 406(4), 410 and 411) and those seem to have something in common with a ‘*Donatio Mortis Causa*’. (See 12.3 Summary.)

<b>Part-3</b>	<b>Family Law of the NCC</b>	<b>Related previous provisions</b>
Chap.1	Provisions Relating to Marriage (Secs. 67-84)	← <i>Muluki Ain</i> Part IV, Chaps. 17 and 15
Chap.2	Provisions Relating to Consequences of Marriage (Secs. 85-92)	← <i>Muluki Ain</i> Part III, Chaps. 12, 13 and 14
Chap.3	Provisions Relating to Divorce (Secs. 93-104)	← <i>Muluki Ain</i> Part III, Chap. 12
Chap. 4	Provisions Relating to Relationship of Parents and Children (Secs. 105-123)	← <i>Muluki Ain</i> Part III, Chap. 12 and the Children's Act 1992 Chap. 2
Chap. 5	Provisions Relating to Maternal and Paternal Authority (Secs. 124-134)	← <i>Muluki Ain</i> Part IV, Chap. 12 and the Children's Act 1992 Chap. 2
Chap. 6	Provisions Relating to Guardianship (new) (Secs. 135-152)	← <i>Muluki Ain</i> Part III, Chap. 5 and the Children's Act 1992 Chap. 3
Chap. 7	Provisions Relating to Curatorship (new) (Secs. 153-168)	---
Chap. 8	Provisions Relating to Adoption (Secs. 169-187)	← <i>Muluki Ain</i> Part III, Chap. 15
Chap. 9	Provisions Relating to Inter-country Adoption (new) (Secs. 188-204)	---
Chap. 10	Provisions Relating to Partition (Secs. 205-236)	← <i>Muluki Ain</i> Part III, Chaps. 12, 13 and 14
Chap. 11	Provisions Relating to Succession (Secs. 237-250)	← <i>Muluki Ain</i> Part III, Chaps. 13 and 16

\*Provisions relating to partition are set out in chapters 1, 7, 8, 10, 11, 12 and 14 of Part 4 and chapter 8 of Part 5 of the NCC.

\*\* The Children Act, 2018 shall apply to cases relating to chapters 4, 5 and 6 of Part 3 of the NCC.

## 1.2 Characteristics of Family Law in Part 3

The provisions applied to resolve family disputes were constituted unsystematically in the *MA* 1963. The NCC has been implemented for the purpose of responding to recent changes of family lives and society based on the fundamental principles of the equality of both sexes and of protecting an individual person. At the same time, the NCC takes into account the reality

of Nepalese society and the functioning norms (living law) relating to family life. To fully understand the provisions on the family in the NCC, it is necessary to keep in mind the following points. The norms regulating family life are not simple since Nepalese society is composed of more than fifty ethnic groups with their own religion, lifestyle and cultures. The varieties of family life, cultures and social customs are observed from the highlands to lowlands, from the eastern region to the western region, from large cities to rural areas, and even from one area to a neighbouring area in a local district. In addition, the complex rules relating to social class still continue to function across each section of society, particularly in connection with family matters. Consequently, it is important to understand the precise meanings of the relationship between state law and living law in the case of family matters. This is because the legal issues of family disputes are likely to be affected by the norms and customs of each local area and specific social context. Furthermore, it is crucial to maintain a balance between applying the fundamental principle of family law based on the Constitution and recognizing and respecting the values of individuals and minority groups in the process of legal interpretation.

## **2. Provisions Relating to Marriage**

### **1) Source**

This chapter (Secs. 67-84) mainly carries over the contents of Chapters 15 (No. 1-12) and 17 (No. 1-11) of Part IV of *MA* 1963, which are revised to meet current changes in Nepalese society.

### **2) Contents**

67. Marriage deemed to be concluded
68. Marriage to be an inviolable social bond
69. Freedom of marriage
70. Marriage may be concluded
71. Marriage not to be concluded
72. Marriage to be void
73. Voidable marriage
74. Marriage to be deemed concluded if child is born from physical intercourse
75. No lawful rights of child already born to be prejudiced
76. Marriage to be registered
77. Marriage by registration
78. Decision to be made as to whether marriage is capable of being concluded
79. Deed of consent to be prepared
80. Provisions relating to registration of marriage

81. Provision relating to use of surname by marriage
82. Matrimonial relationship deemed to be terminated
83. Re-marriage may be concluded
84. Statute of limitation

### 3) Summary

A marriage is concluded on the genuine consent of a female and male who regard themselves as wife and husband by any kind of ritual and other action for acquiring public recognition (Sec. 67), and they can make it valid by registering their marriage at the marriage registering authority (Sec. 76(1) and (3)). On an application, the authority shall register the marriage after confirming that the application meets the requirements, and it shall issue the marriage registration certificate within fifteen days after the date of application (Sec. 76(3)). If parties intend to legalise their marriage after they started their relationship not in public, they shall apply to a district court with the deed of consent of marriage according to the law (Secs. 77(1) and 79)<sup>6</sup>. The district court registers the marriage and issues the marriage registration certificate after conducting necessary inquiries within seven days after the date of application (Secs. 78(1) and 80(2)). Under the NCC, a marriage registration is necessary for (as a proof of) valid marriage, but the marriage shall not be deemed to be legally invalid merely for the reason of lack of registration when it was concluded prior to the commencement of the NCC (Sec. 76(8)). As requirements of a valid marriage (Sec. 70(1)), the parties need to have genuine consent of marriage (cf. Sec. 171 of the National Penal Code 2017 (hereinafter cited as the NPC), must not be within prohibited degrees of relatives (cf. Sec. 220(2) of the NPC)<sup>7</sup>, must not be married and have attained the age of majority (cf. Sec. 173 of the NPC). In the case of an unmarried female who has given birth to a child by a particular male, if she proves the fact, the marriage between the man and the woman shall, *ipso facto*, be deemed to have been concluded (Sec. 74(1))<sup>8</sup>. If the parties fail to meet the requirements laid down in Section 72 (1)(a) - (d) (lack of voluntary consent, a case of incest, age requirement or a case of bigamy), and Section 71(2) (misrepresentation of (a) having contracted human immunodeficiency virus (HIV) or Hepatitis 'B' or similar other incurable severe disease, (b) being proved to have no sexual organ, to be impotent or to have no reproductive capability, (c) being dumb or having lost hearing capacity, being fully blind,

<sup>6</sup> As for registration of marriage, the court holds its own marriage registration system.

<sup>7</sup> According to Section 220(2)(d) of NPC 2017, sexual intercourse between persons in other relationship within seven generations of one's own clan may be punishable. However, it is not clear if this rule shall be applied directly to a case of marriage. Meanwhile, Section 220(2)(b) and 220(2)(c) of NPC 2017 shall be applied to a relationship of parent-in-law / child-in-law and of stepparent-stepchild respectively, but there is no mention about an adopting parent-child.

<sup>8</sup> The marriage shall not be deemed to have been concluded in such cases as a child by conceiving pregnancy as the consequence of rape, a child by conceiving pregnancy from a physical intercourse with a man within the relationship punishable by law on incest, violation of the age requirement, and causing polygamy (Sec. 74(2)(a) - (d)).

or suffering from leprosy<sup>9</sup>, (d) being of unsound mind, (e) having been married previously, (f) being pregnant, (g) being convicted of a criminal offense involving moral turpitude by a court and sentenced for the same), a marriage shall be void (Sec. 72(1)) or voidable (Sec. 73(1)). As for provisions relating to marriage, the following issues remain to be discussed. Firstly, no one doubts that either husband or wife is eligible to claim their marriage to be void or voidable when s/he finds a ground stipulated in Sections 72 and 73. However, it is not clearly mentioned in the NCC that another person (an interested third party) can argue validity of the marriage. For instance, if a father of A died after he remarried B, is it possible for A to argue that the re-marriage is void or voidable in order to prevent B<sup>10</sup> from succeeding the property of his father? In other words, shall A be regarded as an interested party with respect to arguing validity of the marriage in the case of succession? Secondly, bigamy is not legally allowed (Secs. 70(1)(c), 74(2)(d), and Sec. 175 of the NPC), but Section 82(c) of the NCC states that the matrimonial relationship shall be deemed to have been terminated if the wife concludes another marriage before effecting divorce pursuant to law. If Section 82 is interpreted literally, a new marriage can be concluded while the previous marriage still exists, which indicates that the law does not deny bigamy. However, Section 72(1)(d) stipulates that a marriage shall be void if another marriage is concluded by a man or woman whilst the current marital relationship is still prevalent except in the situation of being separated by taking partition according to law. The relation of those sections may need to be clarified. Meanwhile, Section 175(1) of the NPC (prohibition of bigamy) stipulates that no married man shall, during the continuation of the marital relationship, conclude another marriage, but it does not mention the woman. Section 175(2) of the NPC says a woman shall not conclude marriage with a man knowing that he is already married,<sup>11</sup> but it mentions nothing about an unmarried man. As a result, it could be interpreted that a ‘married’ woman is allowed to remarry an unmarried man and to terminate her previous marriage. Thirdly, a party to marriage can claim that the marriage is to be voidable if the marriage is concluded by way of misrepresentation pursuant to Section 71(2). It is not mentioned in the NCC, however, whether Section 73 (voidable marriage) shall be applied to a *bona fide* party who concluded the marriage, for instance, by misrepresentation of ‘similar other incurable severe disease’. Finally, the provisions relating to conclusion of marriage are ambiguous about the exact date when a marriage becomes valid, the date of wedding rites or of registration at a marriage registration office. It needs to clarify from which date a marriage becomes valid.

9 The ground of ‘suffering from leprosy’ was proposed to be deleted in 2022 by Nepal Law Commission.

10 A husband or wife living in the undivided family is the nearest heir. (See Sec. 239 (1) (a).)

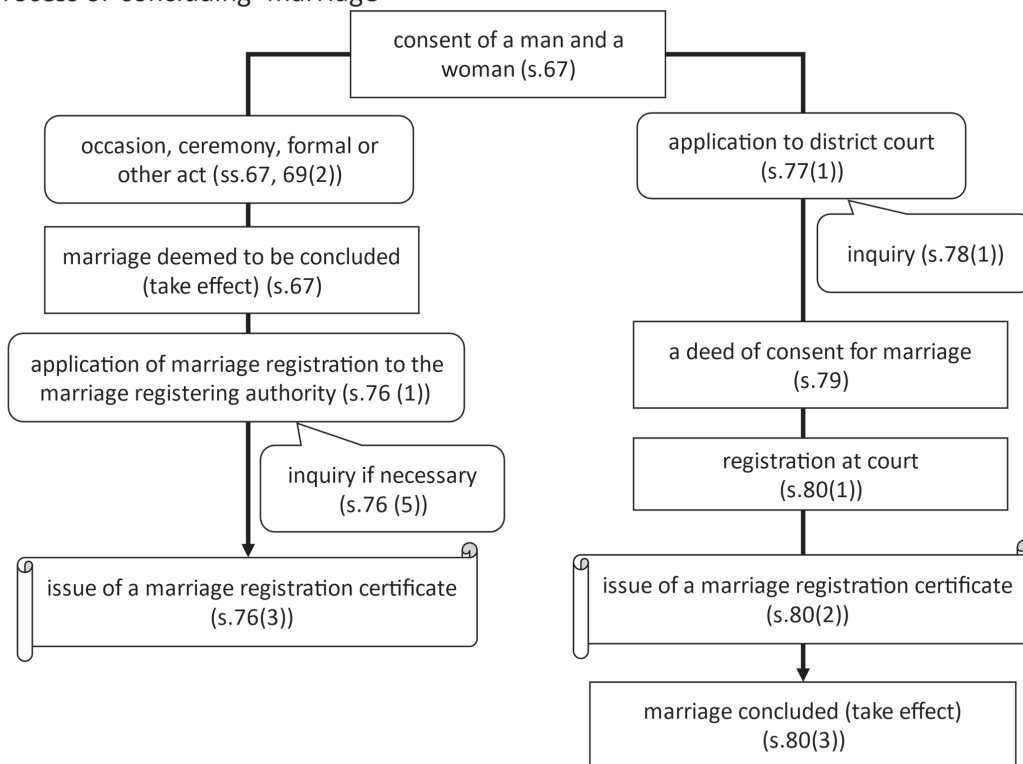
11 This section does not apply if a woman does not know the fact (The Public Defender Society of Nepal, ‘2016 Case Notes’ (<https://www.pdsnepal.org/app/webroot/upload/files/Case%20Notes%202016.pdf>) and The Government of Nepal by FIR of Nirmala Basnet v. Yogita (alias Yogmaya Chimaria Basnet) 8 July 2013 NLR Decision No. 9124 p. 147).

#### 4) Key Points

One of the major changes between the *MA* 1963 and the NCC is about the age of marriage: from 18 years (No. 2 of Part IV, Chap. 17 of *MA* 1963) to 20 years (Sec. 70(1)(d) of the NCC). Accordingly, the parties are not required to obtain consent to marry from their guardian (parents). Marriage is regarded as not only a private matter of husband and wife but also a relative's and public matter affecting social order relating to the family system. Under *MA* 1963, a person violating some provisions on marriage should be punished as a criminal offender and the similar criminal sanction in the current criminal law shall be applied. For instance, the parties within prohibited degrees of relatives should be punished due to their committing incest if they get married (No. 1 of Part IV, Chap. 17 of *MA* 1963 and No. 1 of Part IV, Chap. 15 of *MA* 1963) and the parties committing adultery should be punished (No. 2 of Part IV, Chap. 18 of *MA* 1963). Under the NPC, the marriage between the parties within prohibited degrees of relatives is still sanctioned as a crime by the criminal code (Sec. 172)<sup>12</sup>. However, a new view on marriage appears in a way that adultery is no longer a crime due to changes in attitudes and social trends relating to freedom and decriminalization in family settings.

Chart 1

##### Process of concluding marriage



12 See Section 171 (age of marriage) and Section 173 (child marriage) of NPC 2017.

### 3. Provisions Relating to Consequences of Marriage

#### 1) Source

This chapter (Secs. 85-92) is similar in many of its points to Chapter 13 of Part III of *MA* 1963.

#### 2) Contents

- 85. To be considered husband and wife
- 86. Relation and obligation of husband and wife
- 87. Husband's home to be considered residence
- 88. To be considered each other's agent
- 89. To provide, or cause to be provided, maintenance in accordance with reputation
- 90. Household affairs to be managed by consent
- 91. Not to preclude from exercising profession, business, or occupation
- 92. Statute of limitation

#### 3) Summary

A marriage shall have legal effects on the spouses in terms of their property, maintenance, caring, household affairs, family name and the status of agent. (See chart 2.) Provisions of property matters are mainly stipulated in chapter 10 (partition) and chapter 11 (succession). As legal effects, a wife and husband must cohabit, support financially and care for each other according to their income, capacity, and social status (Secs. 86 and 89). A wife is eligible to take her husband's family name or to use the family name of her father or mother. In addition, she can use both the surnames of her husband and her father or mother (Sec. 81(1)). When a marriage terminates, she may take the family name of her father or mother (Sec. 81(3)). A wife and husband shall deal with household affairs, including property transactions, by mutual consent, and they may act as agent for the other with respect to general household affairs unless there is a legal dispute between the husband and wife (Sec. 90(1) and (2), and Sec. 88).

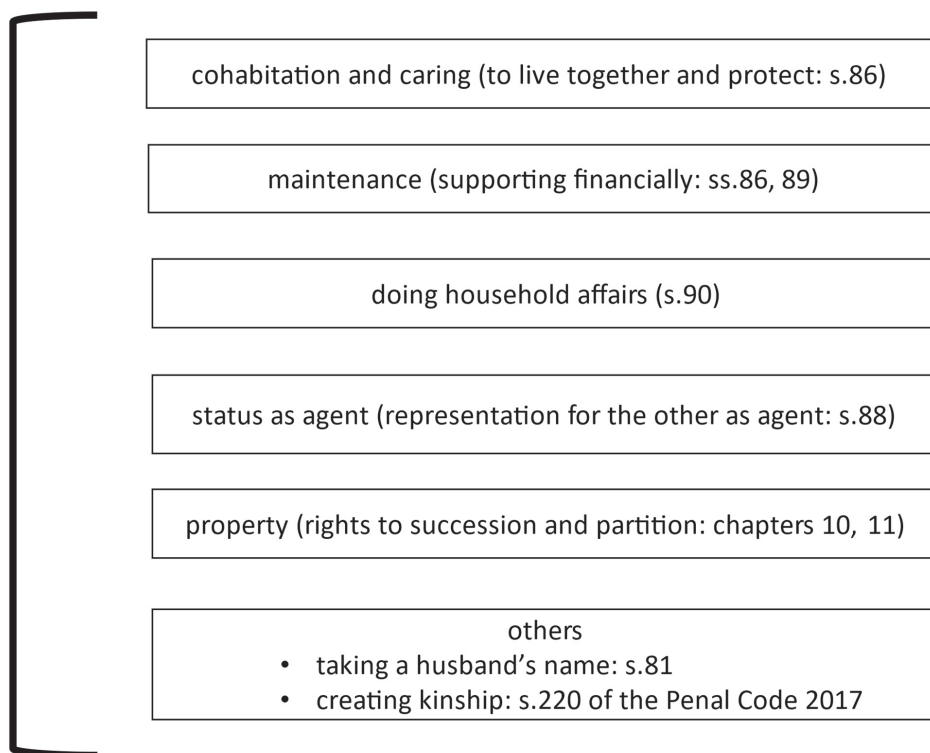
One issue may arise relating to Section 88. Under this section, a spouse shall be liable to make payments for the goods that the other spouse purchased in her/his name as her/his agent. For instance, if the husband ordered a refrigerator for 5,000 dollars for their home as her agent, but their family finance is only 1,000 dollars per month, does she have an obligation to pay as a principal? In this case, the issue of defining 'general household affairs' remains to be examined. Furthermore, a question may arise as to whether he shall also be obliged to pay for the refrigerator of 5,000 dollars as joint-obligator if the transaction of that good is interpreted as 'general household affairs'.

#### 4) Key Points

In *MA* 1963, only a husband is responsible for maintaining and caring for his wife and family members (No. 10 of Chap. 13 of Part III). In the NCC, however, both husband and wife are equally obliged to take care of their family (Secs. 86(3) and 89). In this respect, the equality of husband and wife is achieved in terms of exercising rights and duties relating to family life. As for protection of property, the right to partition is available for a wife as an effect of marriage similar to the legal protection by the *MA* 1963.

#### Chart 2

Legal consequences of marriage



#### 4. Provisions Relating to Divorce

##### 1) Source

This chapter (Secs. 93-104) is similar in many of its points to Chapter 12 of Part III of *MA* 1963.



## **2) Contents**

93. Divorce may take effect by consent of both
94. Husband may effect divorce
95. Wife may effect divorce
96. Petition to be filed for divorce
97. Mediation to be made between husband and wife
98. Divorce to take effect
99. Partition of property to take effect before divorce
100. Order to pay lump sum amount or alimony
101. Order to provide maintenance costs
102. To be according to agreement
103. Previous child or husband to obtain property
104. Statute of limitation

\*See Secs. 82 and 83.

## **3) Summary**

Divorce is one of the procedures for dissolving a marriage (Sec. 82(b)). A husband and wife are eligible to divorce by mutual consent (Sec. 93) or by court decree declared on the grounds of divorce based mainly on the principle of fault divorce when they fail to reach an agreement (Secs. 94, 95 and 96). When a divorce petition is filed to a court, the court can encourage the parties to reconcile, but it shall make a divorce decree if it finds no possibility of reconciliation (Secs. 97 and 98). If the parties refuse to choose a reconciliation process at the time of filing a petition, the court shall grant divorce one year after the date of filing the petition (Sec. 98). (See chart 3.)

In the case of divorce filed on grounds (Sec. 95(b)-(f)), a wife is eligible to claim partition and seek financial protection from her husband following divorce (or separation) (Sec. 99(1)). When the husband does not have his own partition share from his father or other coparceners at the time of claim made by the wife, a court shall cause partition to be apportioned between husband and wife after inquiring into the existence of another coparcener (Sec. 99(4)). In addition, a property in common registered or earned by both names or either name during marriage (see Sec. 257(2)), shall be distributed as partition prior to the completion of divorce (Sec. 99(3)). When a court finds that it will take a lengthy time until partition is finalized, the court shall make a divorce decree and order the husband to make payments to his wife as living expenses unless and until the marriage is completely terminated (Sec. 99(5)). A husband is not, however, compelled to make payments to his wife if the wife concludes another marriage

before effecting partition (Sec. 99(5) Proviso), or when a divorce was filed on the ground of the wife's fault (Sec. 99(6)). The court may order the husband to provide a wife with a lump sum amount, annual or monthly alimony, or expenses if she desires instead of obtaining her partition share unless and until the wife concludes another marriage (Sec. 100). (See chapter 11 partition.)

After divorce, a wife is eligible to claim her maintenance against her ex-husband if she did not obtain any partition share from him at the time of divorce until she gets remarried or if she has a lower income than him (Sec. 101(2)). The parties can make agreements on the property issues caused by divorce as long as the interests of their minor[s] are not infringed upon by their agreements (Sec. 102 Proviso).

As for matters of family name after divorce, a wife is eligible to use the name of her father or mother (Sec. 81(3)).

As issues to be discussed with respect to divorce, firstly, there may be inconsistency in the provisions relating to concluding marriage and divorce. In the NCC, marriage is based on the principle of monogamy, but there may be room for admitting bigamy in some provisions. For instance, the matrimonial relationship shall be terminated if the wife concludes another marriage before effecting divorce pursuant to law (Sec. 82(c)). This may mean that a wife can conclude another marriage while her previous marriage still exists. In the case of remarriage, either spouse is eligible to re-marry if they live separately after obtaining partition share (Sec. 83(c)). However, such a marriage can be said to be a bigamous marriage since they are merely separated but do not take any action for dissolving their marriage. In addition, a wife is eligible to effect divorce if the husband concludes another marriage (Sec. 95(d)). Again, the husband in this case is eligible to conclude another marriage while his previous marriage exists. Those provisions may illustrate the inconsistency of the NCC relating to the connection of provisions relating to marriage and divorce.

Secondly, while it seems that divorce shall take effect based on the grounds only stipulated in Sections 94 and 95, further interpretation may be needed when the parties to whom the grounds in those provisions shall not be applied wish to divorce on a ground different from the grounds (such as irretrievable breakdown of marriage) in those sections in the future.

Finally, in addition to divorce, a term of 'judicial separation' is found in a couple of provisions (Secs. 115(2), 171(2), 175(2) and 176), and 'judicial separation' is explained as being such a circumstance where a person obtains partition in property according to the order of the court or lives separately according to law, or lives separately after separation of bread and board from other coparceners (in 'explanation' of Section 171(2))<sup>13</sup>. However, there is no

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13 In addition to 'judicial separation', it may be necessary to explain the definition 'separation' in sections such as 212, 214(1), 220(1) and (2), 464(1)(f), 469(1)(b) and 705(1).

provision specified for grounds, procedure, and effects of judicial separation in the NCC. More information on judicial separation needs to be provided for the benefits of users.

#### 4) Key Points

In the NCC, divorce mediation is implemented by which the court shall, to the extent possible, remind and convince the parties to consider reconciliation.

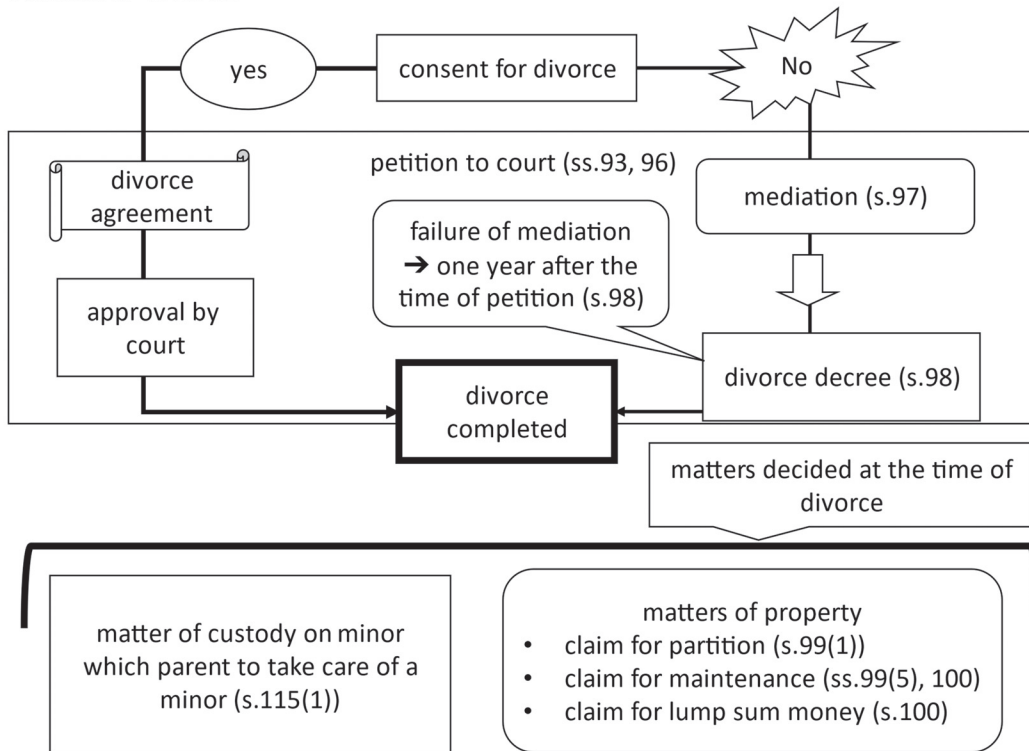
The limitation period for arguing divorce issues changes from one year in *MA* 1963 to three months in the NCC.

The different grounds for divorce between husband and wife reflect the culture of Nepal (Secs. 94 and 95). For instance, a wife can divorce her husband when he concludes another marriage, while a husband can terminate their marriage when the wife concludes another marriage (Sec. 82(c)). These different grounds could be interpreted in such a way that a wife is entitled to file a divorce litigation claiming financial remedies against her husband if he has concluded another marriage. On the other hand, she is not entitled to claim any financial remedies from her ex-husband if she has concluded another marriage; which means her ex-husband can terminate the former marriage without making any payment to his ex-wife. In this connection, as mentioned in the issue of bigamy (Sec. 70(1) (c)), the relation between the divorce ground of 'conclusion of another marriage' and the rule of abolition of bigamy is still unclear, and the provisions of a divorcing wife and husband may need to be re-examined to clarify what those provisions exactly mean.

Similar to *MA* 1963 (No. 4A, 4B and 4C of Part III Chap. 12), a husband is responsible for maintaining and supporting his wife either by providing partition from his share or by making a lump-sum payment or regular payments for the necessity of meeting the wife's everyday needs during the divorce process and after. In this respect, a wife may be secure in terms of financial remedies at the time of divorce as far as the husband has sufficient financial resources and sincere intention of completing his obligation.

**Chart 3**

**Process of divorce**



## **5. Provisions Relating to Relationship of Mother, Father and Son and Daughter**

### **1) Source**

This chapter (Secs. 105-123) is similar in many of its points to Chapter 12 of Part III of *MA* 1963 and Chapter 2 of the Children's Act 1992.

### **2) Contents**

105. Maternity or paternity to be determined from mother or father.
106. Child presumed to be born from married husband
107. Paternity may be denied
108. Son, daughter or paternity to be claimed
109. Paternity of child born from artificial insemination to be of father
110. To be according to court's decision
111. To obtain name and surname

112. Name of mother, father, grand-father and grand-mother may be mentioned
113. Birth of son, daughter to be registered
114. Obligation to care and maintain
115. To be under custody of mother or father
116. Obligation to take necessary care and provide maintenance
117. Facility of visit to be provided
118. Rights of son, daughter remain to exist
119. Prohibition on living separately without consent
120. Minor not to work as labour
121. Decision of father, mother taking custody of minor to prevail
122. Son or daughter to honour, respect and care for mother, father
123. Statute of limitation

### 3) Summary

There is only one category of a child in the NCC, but the difference between a marital child and non-marital child with respect to legal status exists in partition (Sec. 208) and succession (Secs. 238 and 239)<sup>14</sup>. The mother-child relationship is based on the fact that a female gives birth, whilst the father-child relationship is based on the presumption that a male living with the mother at the time of birth of the child shall be the father (Sec. 105). In addition, the rule shall apply to a child who is born after 180 days from the date of the marriage to be concluded or within 273 days of dissolution of marriage (Sec. 106). A husband or his successor is entitled to challenge paternity if a child is born within 180 days after conclusion of marriage (Sec. 107). (See chart 4.)<sup>15</sup> When a child is born, the parent(s) is required to register the birth within three months from the date of birth, otherwise s/he shall be penalized (Sec. 113).<sup>16</sup> If a person intends to claim a minor whose paternity or maternity is not determined or whose paternity is not identified as his/her child, s/he must claim within a period of two years after the child was born or identified (Sec. 108). The rights and duties of a child shall not be affected by the fact of termination of marriage of the child's parents once the parent-child relationship is established (Sec. 118(1)). A child shall be treated equally in such matters as upbringing, education, health care (Sec. 127) and succession (Sec. 239(3)) (See chart 5).

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14 Section 5(1) of the Children's Act 2018 stipulates, 'No discrimination shall be made against any child on grounds of ...marital status, family status...'. This rule shall apply to a blood or adopted child.

15 The husband and his successor are eligible to challenge the paternity of a child of Section 106 presumption but not a child of Section 105 presumption. It is not clear whether a child or mother can challenge paternity.

16 The head of family or other major member of the family shall inform the Office of the Local Registrar within thirty-five days (Sec. 18(1) (a) of the National Identity Card and Civil Registration Act 2019).

A child is eligible to claim partition to his/her father and succession rights against his/her parent. (See Secs. 205, 208, 211(2) and 239(1).) With respect to effects relating to non-proprietary matters, the parents must jointly maintain and take care of their child even in a case where marital relations are declared void or voidable (Sec. 75 of the NCC and Secs. 7(1) and (2), and 17 of the Children's Act 2018). In addition, the parents shall execute their parental authority (Sec. 133 Proviso) and be responsible to take care of a child even over the age of majority if the child is unable or incompetent to carry out daily work because of being physically or mentally impaired (Sec. 128(1)). On the other hand, a child shall take care of, and maintain his/her parents with honour and respect (Sec. 122(1) and (2)).

A child is eligible to use the father's family name in the case of no agreement or dispute between parents, the family name of either parent in the case of agreement between parents, the family name of the mother if the father is unknown, and the family name given by guardians if the parents are unknown (Sec. 111). A child can use a family name from the patrilineal side, such as the grandfather's, if necessary, and that of the matrilineal side if the father is unknown. In addition, a minor can use the name of his/her guardian or curator if the parents' family name is unknown, and an adult can only use his/her name (Sec. 112(2). See Sec. 4 of the Children's Act 2018.)

When parents dissolve their marriage<sup>17</sup>, they can make agreements on the care and maintenance of their child after divorce (Sec. 115(2)). If parents have no agreements or fail to reach agreements, Section 115 shall apply. When a child is under five and the mother intends to take care of the child at the time of termination of marriage, the mother shall take the child whether she is single or remarried (Sec. 115(1)). If a child is five years old or over, the father shall take the child except in a case where the mother is not remarried and intends to take care of the child (Sec.115(1)(b)(c))<sup>18</sup>.

Regarding the financial support of a child, parents must jointly maintain their child during marriage (Sec. 114), a custodial parent (resident parent) shall maintain the child in the case of separation or divorce (Sec. 116(1)), and a non-custodial parent (non-resident parent) must financially support a child under the custodial parent if the non-custodial parent can earn more income than the custodial parent (Sec. 116(2)). If the parent(s) fails to provide support financially, a child is entitled to a claim to separate his/her partition share from the property in common as coparcener. (See Sec. 211(2).)

When a custodial parent dies, the surviving parent shall promptly take over care of the child. However, a mother is not obliged to take charge of the child if she is remarried and the child is over five years old (Sec. 115(4)). In the case of no agreement on care being reached between separating parents, a mother shall take the child under five years old, a father shall take

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17 Dissolution of marriage may include a void marriage and voidable marriage (Sec. 82).

18 In the case of a child above ten years of age, the opinion of the child may be obtained (Sec. 115(3)).

him/her between five and ten years old, and the child shall have the right to choose with whom s/he will stay after s/he reaches ten years of age (Sec. 115(5)).

There are some points to be clarified with respect to the provisions relating to paternity and maternity of the NCC. For instance, firstly, it is not clear who shall be eligible to file a case of challenging paternity or maternity. Is a minor eligible to claim or annul paternity against the husband of his/her mother? Which provision shall be applied in such a claim? Does a third party have a similar right to claim like a minor? Secondly, it is crucial to define the exact date of concluding a marriage for confirming paternity by Section 106 (a), but the provisions on this matter are ambiguous. (See 2.3.) In this respect, further explanation or clarification on this matter may be necessary.

#### **4) Key Points**

As for the obligation of a parent for maintaining a child, a resident parent is basically regarded as the main obligator, while a non-resident parent shall provide financial support only in the following two cases: a resident parent has financial difficulties or the income of a resident parent is lower than that of a non-resident parent (Sec. 116(2)). According to Section 116(2), a child may enjoy more stable maintenance in everyday life after separation or divorce of his/her parents.

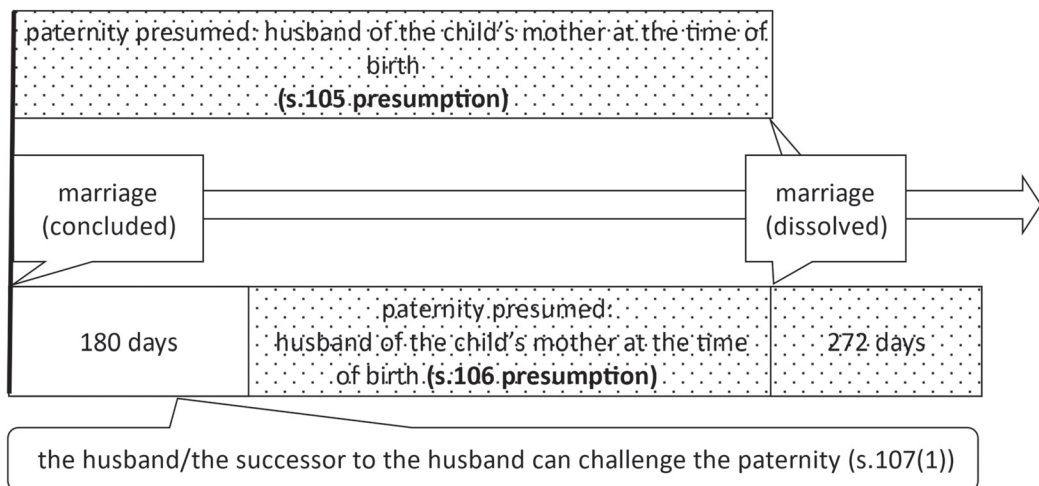
It is defined that a child has the right to contact (visit) in order to maintain a relationship with his/her non-resident parent after dissolution of marriage of his/her parents<sup>19</sup>. This measure may be a great advantage to a minor in terms of developing his/her personality by regular contact with the non-resident parent, and it may work more effectively after dissolution of marriage of his/her parents if the supporting system for the child and parents is operating properly. (See Sec.117(1).) In the NCC, the continuous relationship between child and birth-parents seems to be regarded as important for achieving the welfare of child, and even contact between an adopted child and his/her birth-parent is set out in Section 183.

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<sup>19</sup> The right to contact was set out at the latest in 1992 in Section 8(1) of the Children's Act 1992, stating that in circumstances where parents of a child are living separately due to divorce or any other reason, the child living with the father shall be given an opportunity to maintain a personal relationship and direct contact with the mother and *vice versa* on a regular basis or be allowed to live together with the other parent for some time. For an adopted child, see Section 9 of the Children's Act 1992.

## Chart 4

### 1.Establishing paternity and maternity



### 2.Challenging paternity and maternity and prescription

- paternity or maternity not determined  
→ claim within 2 years after the child born or identified (sec.108(1))
- paternity unknown  
→ claim within 2 years after the child born ( sec.108(2))

## 6. Provisions Relating to Maternal and Paternal Authority

### 1) Source

The provisions of this chapter (Secs. 124-133) mainly come from those of Chapter 12 of Part III of *MA* 1963 and Chapter 2 of the Children's Act 1992.

### 2) Contents

124. To be under the supervision and control of father and mother
125. Parental authority to be exercised jointly
126. Rights, responsibilities and duties of a person exercising maternal and parental authority
127. Prohibition on discrimination
128. Special care to be taken
129. Power to cause a minor to improve conduct and habits
130. Authority deemed to be required to exercise right
131. Guardian or curator may also exercise parental authority



132. Power to restrict parental authority

133. Termination of parental authority

### 3) Summary

The parents jointly hold and exercise the parental authority over their minor<sup>20</sup> on the bases of their mutual consent (Sec. 125) but a parent solely shall exercise the parental authority if either parent is dead, of unsound mind, or if the parents dissolve their marriage or get separated, or if the father is not traced (Sec. 125(2)).

As mentioned earlier, the parents must exercise their authority properly with respect to caring, educating, socializing and developing the physical, mental and intellectual developments of a minor based on the principle of equality among minors (Secs. 126, 127 and 129). For the benefit of a child who is unable or incompetent to carry out daily work due to his/her physical or mental disability, the parents shall make special arrangements for providing particular care, education, treatment and protection (Sec. 128). In addition, the parents have the authority to give a minor consent regarding the minor's residence (Sec. 119) and employment (Sec. 120)<sup>21</sup>. There are no direct provisions on the property matters of a minor, but it could be interpreted that the parental authority includes the power of administering the property of a minor (Sec. 132(1)(e))<sup>22</sup>.

Meanwhile, a parent living with a minor under fourteen years of age under the same roof shall be liable for tort committed by such a minor (Sec. 673).

In addition to parents, a guardian and curator may exercise the authority if necessary. (See chapter 7 guardianship and chapter 8 curatorship.) A teacher or headmaster of an educational institution is eligible to use the authority laid down in Section 129 for educating and upbringing a minor (Secs. 126, 131 and 130).

In order to protect the interests of a minor, a court shall decide to prevent the parents from exercising authority when it finds that the parents have abused or neglected a minor, undermined his/her health and failed to administer the property of a minor properly (Sec. 132(1)(a)-(e))<sup>23</sup>. Then, the court shall appoint a guardian to protect the interests of the minor at the time of suspension of parental authority (Sec. 132(2) and (3)), and it can revoke the decision of suspension if it is satisfied with an application of the parents to revoke the decision

20 As an exception, see Sec. 128(1) and 133 proviso.

21 Cf. Section 640 (1) stipulates that any person who has attained at least fourteen years of age may be employed in a work with his or her consent. Provided that a person who has not attained sixteen years of age shall not be employed in a hazardous business or work.

22 As a guardian who can exercise parental authority (Sec. 131) has power of administering the property of a minor (Sec. 143(1)), it is reasonably presumed that a parent shall have such power.

23 A family member stipulated in Section 136(1) shall take office as a statutory guardian if necessary. (See Sec. 136(1) and (2).)

by considering all the facts from the viewpoint of protecting the interests of the minor (Sec. 132 (4)).

The parental authority shall terminate when a minor attains eighteen years of age or the child lives separately when s/he is employed, but it shall continue to exist if a child attaining the age of majority is physically or mentally impaired (Sec. 133 Proviso).

As mentioned earlier, the parents are entitled to exercise their parental authority over their minor in order to maintain and promote the minor's welfare based on the principle of equality. If they fail to do so, a court can suspend their authority and appoint a guardian who can exercise parental authority in protecting the minor in place of the parents. In fact, it may be difficult to intervene in a case of child abuse or a case of failure of proper execution of parental authority since many cases of misconduct by parents occur behind closed doors. In addition, it is difficult to balance two requirements: on one hand, social or state intervention into private life should be carried out cautiously, but on the other hand, prompt intervention must be necessary for effective protection of an abused child.

#### **4) Key Points**

The parents are entitled to jointly exercise their parental authority over their minor for the purpose of maintaining and promoting the latter's welfare, which indicates that the equality of parents is declared with respect to the matters of their minor (Secs. 114(1), 125(1) and 127, and Article 18 of the Constitution).

In the case of dissolution of marriage<sup>24</sup> or separation of parents, either parent shall exercise parental authority (Sec. 125(2)(c)), and the rule relating to allocation of custody over a minor is stipulated in Section 115(1), while the parents can make arrangements as to who will hold custody over the minor after dissolution of marriage (Sec. 115(2)). In this connection, a minor over ten years of age is eligible to express his/her opinion on a decision with respect to custody (Sec. 115(3)).

As for maintaining the relationship between a child and a non-resident parent, a child shall be allowed to visit or contact a non-resident parent (Sec. 117(1))<sup>25</sup>.

For the purpose of more protection of a vulnerable child, the parental authority shall not be terminated if the child over the age of majority is physically or mentally impaired, except in cases where s/he lives separately by concluding marriage (Sec. 133 Proviso). Moreover, the parents shall make arrangements of special treatment for a child who is physically or mentally impaired or has contracted a deadly disease such as human immune-deficiency virus (HIV) or Hepatitis B (Sec. 128(1) and (2)). It could be said that those provisions work effectively in terms of protection of a vulnerable child.

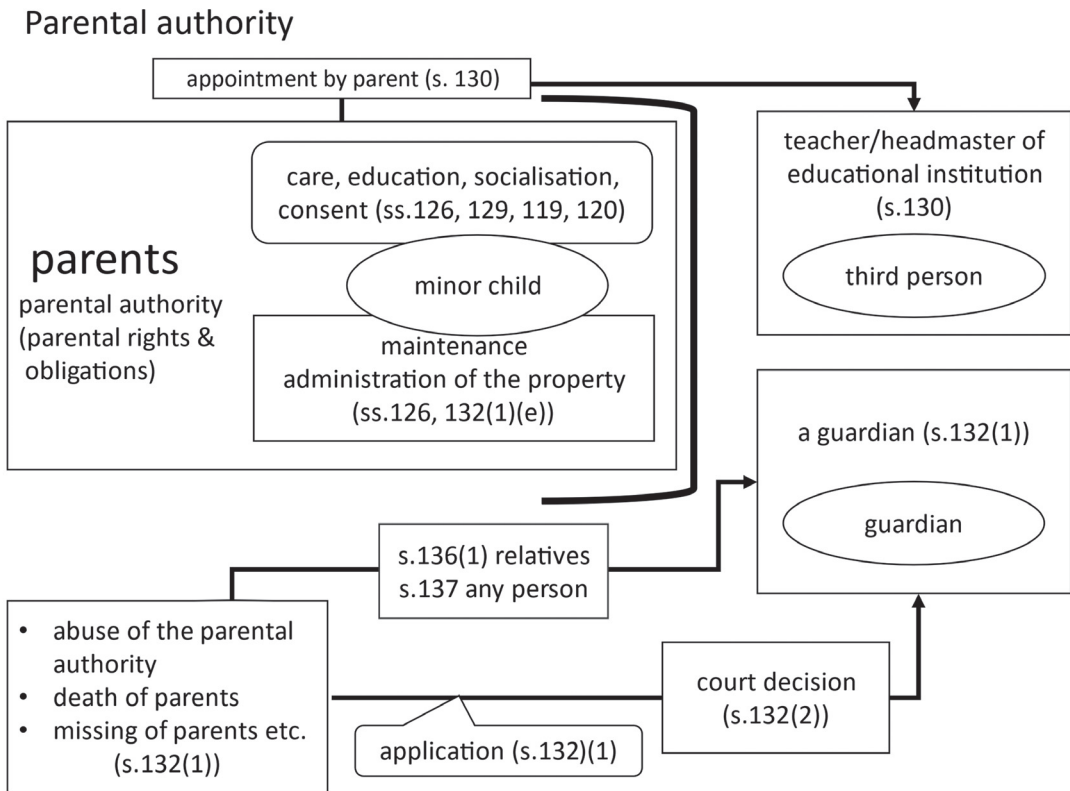
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24 'Dissolution of marriage' (Sec. 125 (2)(c)) may include a void or voidable marriage (cf. Sec. 75).

25 This rule applies to the relationship between an adopted child and birth parent (Sec. 183).

While the parents shall take care of and support their minor/child, the child, perhaps an adult child, shall also support his/her parent according to his or her financial and social status if necessary (Sec. 122(2))<sup>26</sup>.

**Chart 5**



## 7. Provisions Relating to Guardianship

### 1) Source

Most of this chapter's provisions are newly enacted, but some of them have come from the provisions of *MA* 1963 and from those of chapter 3 of the Children's Act, 1992 (provisions relating to the protection of the Child and relating to the Guardian).

\*See the provisions relating to guardian/guardianship found in *MA* 1963; Part II (Chap. 1 On Court Proceedings, Chap. 12 On Medical Treatment, Chap. 14 On rape and Chap. 17 On Marriage) and Part III (Chap. 1 On Document Scrutiny, Chap. 5 On Pauper, Chap. 8A Kidnapping / Abduction and Hostage Taking and Chap. 11 On Human Trafficking).

<sup>26</sup> In the case of succession, even if a child does not accept succession, s/he must conduct obsequies of the deceased in accordance with the rites and rituals (Sec. 244(4)).

## **2) Contents**

- 135. To be considered a guardian
- 136. Priority order of a guardian
- 137. Other persons considered to be a guardian
- 138. Organisations considered to be a guardian
- 139. A guardian may be appointed by a court
- 140. Supervisor may be designated
- 141. Disqualifications of guardians
- 142. Maintenance and care of incompetent or quasi-competent persons
- 143. Property to be supervised, protected and managed properly
- 144. To maintain books and accounts accurately
- 145. Power to institute legal action or defend a case
- 146. Power to act on behalf of an incompetent or quasi-competent person
- 147. Act may be carried out only in consonance with terms
- 148. Termination of guardianship
- 149. Guardianship not to be transferred to successor
- 150. Power to recover expenses
- 151. Amount of loss and damage may be recovered
- 152. Statute of limitation

\* See Sections 17 and 51 of the Children's Act, 2075 (2018).

## **3) Summary**

Guardianship aims at protecting and promoting the welfare of a ward and administering his/her property. (See table 1.) The ward is categorized as two groups: an incompetent or a quasi-competent person (Secs. 135, 33(1), and 34(1) and (3)). (See chart 6.) In addition to guardianship, the system of curatorship that is mentioned in chapter 8 of this part also has a similar purpose when the guardianship is not available for such a legally vulnerable person (Sec. 153(1) and (2)).

When a vulnerable person such as a minor or person of unsound mind needs to be legally protected due to the lack of a legitimate person to protect him/her, a person will take office as guardian if s/he meets the qualification of a guardian laid down in Section 141. There are three types of guardians: a statutory guardian (Sec. 136: Section 136 guardian), a voluntary guardian (Sec. 137: Section 137 guardian), and an appointed guardian who is appointed by a court upon

application by a ward committee<sup>27</sup> or an interested person after obtaining the consent of that person if a suitable person is not available for a Section 136 or Section 137 guardian (Sec. 139: Section 139 guardian). For the benefits of a ward, an organisation is eligible to exercise guardianship if a minor is under the protection of a child welfare organisation (Sec. 138(1)). A supervisor of guardian shall be appointed to be vigilant for administration of guardianship by an appointed guardian for the purpose of further protection of the interests of a ward (Sec. 140(1))<sup>28</sup>.

A guardian is obliged to make arrangements for the maintenance and care of a ward by using the property of the ward or the property of the guardian if no sufficient property of the ward is available (Sec. 142(1) and (2)). In order to maintain and take care of the ward, the guardian can sell the movable property of the ward and sell the immovable property of the ward with permission of a court if the movable property is not available (Secs. 142(2), 415(1) and (2))<sup>29</sup>, and a guardian may carry on any business or transaction by investing the property of the ward (Sec. 143(2)). A guardian is also obliged to administer the property of the ward properly (Sec. 143(1)), and a guardian must accurately maintain the books and accounts of expenditures incurred from maintenance and other tasks of the guardian in order to ensure proper administration of the property (Sec. 144(1))<sup>30</sup>. In addition, a guardian is entitled to act on behalf of the ward, including legal action such as filing or defending a suit (Sec. 145 and 146).

A guardianship shall terminate according to the grounds such as a court's approval of resignation, death of a ward or a guardian, recovery of competence of the ward and removal of a guardian by a court (Sec. 148(1)). In the case of a guardian's death, guardianship shall not be succeeded to heirs of the guardian, but the heirs shall maintain and take care of a ward until a new guardian is appointed (Sec. 149)<sup>31</sup>.

At the time of termination of guardianship, a guardian, except a Section 136 guardian, is entitled to recover his/her expenditure from the ward if s/he spent his/her own property in executing the tasks of a guardian (Sec. 150). On the other hand, a guardian shall be liable to pay the amount of loss or damages of the ward's property caused by the guardian knowingly, deceitfully, fraudulently or dishonestly (Sec. 151). In addition, a guardian shall be responsible for and accordingly bear liability for any loss or damage to another person caused by a ward of unsound mind (Sec. 674). In this respect, it could be said that the task of a guardian does not pay since a guardian works for free but bears some responsibilities.

27 For instance, a ward committee of the rural municipality stipulated in Section 2(f).

28 No provision on a supervisor exists for a Section 136 and 137 guardians.

29 It may happen to infringe upon the property of a ward since this rule shall not apply to a Section 136 guardian (Sec. 142(2) proviso).

30 It may happen to cause loss or damage to the property of a ward by improper administration of the property of a ward since this rule shall not apply to a Section 136 guardian (Sec. 144(1) proviso).

31 This rule shall apply to cases of resignation or removal of a guardian (Sec. 148(2)).

It may be pointed out that the following issues shall be examined because of uncertainty of the law.

Firstly, it is understandable that a person close to a vulnerable person, such as a family member shall assume office as mentioned in Section 136 as guardian since the family members usually have enough knowledge of the vulnerable family member and may take actions for the benefit of him/her on the basis of good will. However, it may happen, for instance, that a son who acts as a guardian of his incompetent mother (Sec. 136(1)(c)) takes the step of surrendering her share at the time of partition (Sec. 215(1) and (4)), and consequently he can obtain more shares in partition than his original share at the expense of his mother's interests. It may be necessary to prepare measures or interpretation in order to protect the interests of a vulnerable person in such situations, but there is no direct provision, such as provision of conflict of interests (see Sec. 50) to prevent such action.

Secondly, a guardian shall supervise and protect the property of a ward (Sec. 143(1)), while a curator shall look after of and protect the property of a ward rationally and carefully (Sec. 162(1)), and a Section 136 guardian is not required to maintain books and accounts of expenditures incurred in executing guardianship. For the purpose of protecting the interest of a ward, it is necessary to consider duty of care of a guardian, such as duty to exercise reasonable care, skill and diligence<sup>32</sup>.

Fourthly, in the case of a Section 139 guardian, the court may, if necessary, designate any person as the supervisor in order to protect the interest of a ward (Sec. 140(1)). However, no such provision is stipulated for Section 136 and 137 guardians. It may be necessary to examine whether a supervisor of a guardian shall be required for Section 136 and 137 guardians in order to protect the interests of a ward.

Finally, as for arrangements for health, one question arises as to whether 'to provide medical treatment' includes giving medical staff 'consent for surgical operations on the ward'<sup>33</sup>. It is generally interpreted that only the ward can decide and give such consent since surgical operation may result in critical consequences for the health and life of a ward. In fact, it could be interpreted that the guardian can make arrangements of medical treatment and provide such consent as part of exercising their legal status since s/he is eligible to exercise the parental authority and fulfill the parental rights and responsibilities (Sec. 131). However, it would be necessary to resolve this ambiguous situation by interpretation in order to assure the legal power of a guardian and improve the welfare of the ward.

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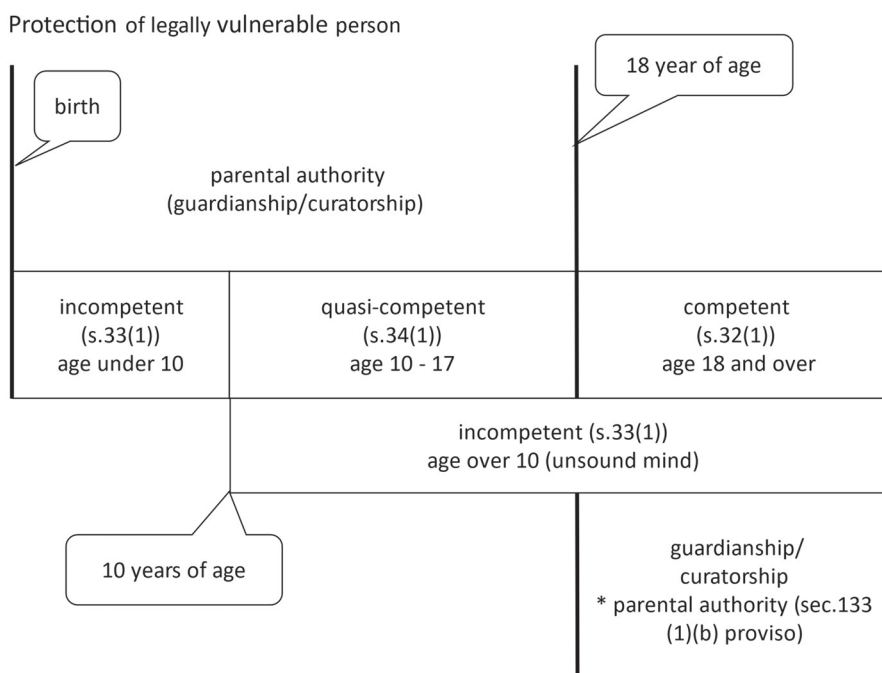
32 See Section 494(1) sets out that the obligation under Section 493 shall be created and maintained as follows: (a) By a law, and Section 494(2) stipulates that the obligation referred to in clause (a) of Section 494(1) shall be created under this Act or other law.

33 See MA 1963 Part IV Chap. 12 On Medical Treatment No. 2 stipulating that 'in cases where a surgery has to be performed to split, burst, take out or cut (*Chirna, Forna, Jhikna, Katna*) from the body for the best interest of the patient, the medical practitioner...may himself or herself perform such an operation upon...receiving the consent of the guardian if the patient is minor or in a state of unconsciousness, ...'.

#### 4) Key Points

In *MA* 1963, the provisions relating to guardianship were stipulated in Part II Chap. 1 On Court Proceedings<sup>34</sup>, Part III Chp .1 On Documentary Scrutiny<sup>35</sup>, Part III Chap. 5 On Pauper<sup>36</sup>, Part IV Chap. 8A On Kidnapping / Abduction and Hostage Taking<sup>37</sup>, Part IV Chap. 12 On Medical Treatment<sup>38</sup>, Part IV Chap. 14 On Rape<sup>39</sup>, Part IV Chap. 17 On Marriage<sup>40</sup>, and Part IV Chap. 19 On Decency<sup>41</sup>. Part 3 of the Children's Act 1992 (Secs. 21-31) stipulated detailed procedures and conditions relating to guardianship of a minor. In the NCC, those provisions are revised and consolidated with new added provisions of guardianship in order to achieve more systematic and effective protection of a minor and legally vulnerable person.

**Chart 6**



- 34 No. 11 for dealing with a minor, No. 24 for acts of a guardian in a lawsuit, No. 25 for authority of a guardian in the case of a handicapped person, No. 41, 42 and 62 for limitation time and an incompetent, No. 83 for legal action of a guardian in litigation, No. 124A for a guardian and bail/security for a minor offender.
- 35 No. 7 for representation by a guardian of a handicapped person.
- 36 No. 4 for caring responsibility of a minor with no guardian.
- 37 No. 1 and 2 for abducting and detaining a vulnerable person without consent of a guardian.
- 38 No. 1, No. 2 for consent of a guardian on medical treatment and No. 12 for caring by a representative.
- 39 No. 10B for appearance of a guardian in court.
- 40 No. 2 for consent to marriage of a minor.
- 41 No. 5 for punishment of a guardian committing a sexual offence.

## 8. Provisions Relating to Curatorship

### 1) Source

This chapter (Secs. 153- 168) is newly enacted.

### 2) Contents

- 153. To be curator of a minor
- 154. Curator of a person of unsound mind
- 155. Mother to become curator of a minor
- 156. Body corporate to become curator
- 157. Court may appoint curator
- 158. Qualifications of curator
- 159. Curator to take custody of property
- 160. Power to use property.
- 161. Power to spend immovable property with court's permission
- 162. Property to be taken care of and protected rationally and carefully
- 163. Transfer of title, ipso facto to be void
- 164. Curatorship to be terminated ipso facto
- 165. Custody of property may be handed over
- 166. Requirement to certification by court
- 167. Application of other provisions
- 168. Statute of limitation

### 3) Summary

There are two types of curatorship. (See table 1.) The first one aims at promoting the welfare and protecting property of a minor and a person of unsound mind when neither parent with parental authority nor a guardian takes office (Secs. 153 and 154). The second one, which has no connection with legal capacity, can be applied to a case where a person is unable to administer his/her property by him/herself while s/he is away from his/her residence for some reasons and cannot continue his/her custody over the property properly (Sec. 165(1)).

A person including a body corporate shall be certified by court as curator (Secs. 156(1) and 166), and on an application by a ward committee, any person shall be appointed *mutatis mutandis* by a court as a curator when s/he satisfies the requirements stated in Section 158<sup>42</sup> (Sec. 157(1) and see Sec. 138).

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42 As for the qualifications of curator, Section 141 (the qualifications of guardian) shall apply accordingly.



The main tasks of curator are to administer the property belonging to a ward (minor or person of unsound mind) and to maintain and care for the ward by using the property under the curatorship (Secs. 159, 160, 161, 270(2) and 428). If the movable property of the ward is insufficient for meeting the expenses of maintaining and caring for the ward, a curator can sell the immovable property of the ward after s/he obtains permission from a court with some restrictions (Secs. 161(1) and 415). A curator is obliged to look after and protect the property of a ward rationally and carefully (Sec. 162(1)). If a curator fails to administer the property rationally and carefully, s/he shall be liable for any loss or damage to the property of the ward caused by his/her failure and s/he may be removed from the office by a court (Sec. 162(3)). A curator must maintain accurately the books and accounts of expenditures incurred from maintenance and other tasks of the curator for ensuring proper administration of the property (Secs. 167 and 144(1)). In addition, a curator is entitled to act on behalf of the ward, including legal action such as filing or defending a suit (Secs. 167, 145 and 146).

Curatorship shall be deemed to have been terminated *ipso facto* in any of the circumstances stipulated in Section 164(1)(a) to (g). In the case of a curator's death, curatorship shall not be succeeded to heirs of the curator, but the heir shall maintain and take care of a ward until a new curator is appointed (Secs. 167 and 149).

At the time of termination of curatorship, a curator is entitled to recover expenditure from the ward if s/he spent his/her own property in executing a curator's tasks (Secs. 167 and 150). On the other hand, a curator shall be liable to pay the amount of loss or damages that s/he caused knowingly, deceitfully, fraudulently or dishonestly (Secs. 167 and 151).

In the case of curatorship stipulated in Section 165 (a second type), a curator must administer the property handed over by a person and return the property to the person on his/her request (Sec. 165(2)).

Some issues may be discussed because of uncertainty with respect to curatorship.

Unlike guardianship (Sec. 148(1)(a)), for instance, there is no provision relating to procedure of resignation from curator (see Sec. 164(1)). In addition, in executing curatorship, a curator must look after and protect the property of a ward 'rationally and carefully' (Sec. 162). At the same time, Section 167 states that Section 151 relating to a guardian shall be applied *mutatis mutandis* to a curator, where a guardian shall be liable for the damages caused by him/her 'knowingly, deceitfully, fraudulently or dishonestly'. It is necessary to clarify the connection between the two requirements in these provisions.

#### 4) Key Points

The curatorship is newly enacted, and it is expected to provide more proper and flexible protection for a legally vulnerable person. In order to improve the protection of minor, two

types of curators can be available: a curator who can take care of a minor as well as protect the property of a minor (Sec. 153(1)) and a curator who can only take care of a minor (Sec. 153(2)). The latter type of curator may not be available in the case of a person of unsound mind (Sec. 154).

**Table 1**

	Guardianship	Curatorship
When	<ul style="list-style-type: none"> <li>• a person loses his/her competency (Secs. 33 and 34)</li> <li>• no parent with parental authority (Sec. 131)</li> </ul>	<ul style="list-style-type: none"> <li>• no guardian for minor or person of unsound mind (Secs. 153(1) and 154(1))</li> <li>• absence of person holding property (Sec. 165(1))</li> </ul>
How	<ul style="list-style-type: none"> <li>• voluntary (Sec. 137)</li> <li>• statutory (relatives) (Sec. 136(1))</li> <li>• appointed by court (Sec. 139(1))</li> <li>*body corporate eligible as guardian (Sec. 138(1))</li> </ul>	<ul style="list-style-type: none"> <li>• voluntary or appointed for minor or adult (certified by court) (Secs. 153(1), 154(1) and 166)</li> <li>• statutory (mother) (Secs. 155 and 166)</li> <li>• appointed by court (Sec. 157(3))</li> <li>• appointed by person and certified by court (Secs. 165(1) and 166)</li> <li>*exception (Sec. 155)</li> <li>*body corporate eligible as curator (Sec. 156(1))</li> </ul>
Qualification	disqualification (Sec. 141)	s. 141 applied (Sec. 158)
What tasks shall be done	<ul style="list-style-type: none"> <li>• parental authority over minor (Sec. 131)</li> <li>• maintenance and care of incompetent or quasi-competent person (Sec. 142(1))</li> <li>• administration of property (Sec. 143(1))</li> <li>• conducting business, etc. (Sec. 143(2))</li> <li>• representation for legal disputes and general matters (Secs. 145 and 146)</li> </ul>	<ul style="list-style-type: none"> <li>• parental authority over minor (Sec. 131)</li> <li>• maintenance, care and protection of property of incompetent or quasi-competent person (Secs. 154(1) and 159(1))</li> <li>• administration, use and disposition of property (Secs. 160 and 161)</li> <li>• representation for legal disputes and general matters (Secs. 167, 145 and 146)</li> </ul>

For whom	<ul style="list-style-type: none"> <li>• incompetent or quasi-competent person (Sec. 33(1) and 135)</li> <li>• minor (Sec. 33(1))</li> </ul>	<ul style="list-style-type: none"> <li>• person of unsound mind (Sec. 154(1))</li> <li>• minor (Sec. 153(1))</li> </ul>
Duty of care	<ul style="list-style-type: none"> <li>• no particular provision</li> </ul> <p>Cf. Sec. 151 ('knowingly, deceitfully, fraudulently or dishonestly')</p> <p>Cf. Sec. 499 (to fulfil it in good faith)</p>	<ul style="list-style-type: none"> <li>• 'rationally and carefully' (Sec. 162 (1))</li> </ul> <p>Cf. Sec. 499 (to fulfil it in good faith)</p>
Termination	<ul style="list-style-type: none"> <li>• statutory grounds (Sec. 148(1))</li> </ul> <p>(a) when a petition filed by the guardian on resignation is accepted by the court</p> <p>(b) when the guardian or the ward under guardianship dies</p> <p>(c) when a ward becomes a competent</p> <p>(d) when the court removes the guardian at the request of the ward</p>	<ul style="list-style-type: none"> <li>• statutory grounds (Sec. 164(1))</li> </ul> <p>(a) when a minor attains eighteen years of age</p> <p>(b) if a person of unsound mind becomes of sound mind</p> <p>(c) when custody of the minor is taken by the mother or father or both,</p> <p>(d) when the guardian is appointed</p> <p>(e) when the court removes a person (Sec. 162(3))</p> <p>(f) if the curator has no qualification (Sec. 158)</p> <p>(g) when the curator or the ward dies.</p>
Others	<ul style="list-style-type: none"> <li>• guardian's right to recover expenses for guardianship (Sec. 150)</li> <li>• responsibility for damages caused by guardian (Sec. 151)</li> </ul>	<ul style="list-style-type: none"> <li>• curator's right to recover expenses for curatorship (Secs. 167 and 150)</li> <li>• responsibility for damages caused by curator (Secs. 167 and 151)</li> </ul>

\* A curator for absent person is not mentioned in this table.

## 9. Provisions Relating to Adoption

### 1) Source

This chapter (Secs. 169-187) is carrying over the contents in Chapter 15 (No. 1-13) of Part III of *MA* 1963.

### 2) Contents

169. To be deemed adopted son or adopted daughter

170. Adoption to be effected in a manner that protects the best interests of the child

- 171. Prohibition on adoption by a person having a child
- 172. Adoption may be effected
- 173. Adoption not to be effected
- 174. Difference of age between adopter and adoptee
- 175. Consent to be obtained for adoption
- 176. Adoption deemed to have been effected by a couple themselves
- 177. Procedures for effecting adoption
- 178. Entitlements and rights of adopted son or daughter
- 179. Surname of adopted son or daughter
- 180. Not allowed to claim partition share of father and mother
- 181. Adoptive person's obligations
- 182. Obligations of adopted son or daughter
- 183. Facility of visit and making correspondence to be provided
- 184. Adoption to be void
- 185. Voidable adoption
- 186. Termination of adoption
- 187. Statute of limitation

### **3) Summary (See table 2 in the end of 10, p.X)**

Adoption aims at protecting and promoting the welfare of a child, who is under 14 years of age by a person who intends to assume the parental responsibilities of a minor of another person as his/her own child (Secs. 169 and 173(1)(a)). As Section 172(1)(a) to (c) states that a couple of up to ten years of marriage with no child and a single person over 45 years of age being widowed, divorced or judicially separated may adopt a son or a daughter, a single person or a married couple is eligible to apply for adoption of a child to a court as long as s/he meets the requirements for adoption (Secs. 171-175).

A would-be adopter must file a petition for adoption to a court with a required deed and the court shall make an order of adoption after inquiring about the case (Sec. 177(1)). (See chart 7.) For filing a petition, the petitioner is required to obtain written consent from the birth parents and from a child who is over 10 years of age, and the birth parents and child must be provided with correct information relating to the meaning of adoption (Sec. 175(1) to (6)). No financial inducement shall be acceptable for obtaining the consent (Sec. 175(7)). In the case of a married couple living jointly, one must obtain consent from the other for making valid adoption (Sec. 172(3)). When judicial separation terminates and cohabitation restarts after adoption has taken effect on a petition by one spouse during a period of judicial

separation, adoption shall be deemed to have taken effect for the couple retrospectively from the time of adoption (Sec. 176).

When adoption takes effect by a court order, an adopted child shall obtain the legal status relating to maintenance, caring and property which are the same as those of a birth child of the adoptive parents, and those shall not be prejudiced despite the adoptive parents have their own child after adoption (Sec. 178 (1) and (2)). In addition, the adopted child is entitled to use the surname of either or both the adoptive parents as well as the surname of the birth parents (Sec. 179). Adoptive parents are obliged to maintain, care for, and exercise parental authority, including administration of the property of adopted child (Sec. 181), and if the adoptive parents do not fulfill the obligations, an adopted child may live separately after obtaining his/her partition share (Sec. 181(2)). Meanwhile, an adopted child must make arrangements for maintenance and care of adoptive parents and protection of the property of adoptive parents (Sec. 182). As for the relationship with a birth parent after adoption, an adopted child shall lose the right to claim his/her partition share in the property of the birth parent (Sec. 180), but the adopted child can be provided to have regular contact with his/her birth parents from time to time (Sec. 183). In this respect, the adoption shall not completely break the relationship with his/her natal parents.

Adoption shall be void when any condition laid down in Sections 171<sup>43</sup>, 172(1) and (2) (a)(b)<sup>44</sup>, 173<sup>45</sup>, 174<sup>46</sup> and 175<sup>47</sup> is violated (Sec. 184). Adoption shall be voidable if an adopted child claims that the adoptive parents fail to meet the conditions in Section 181(1) unless s/he has already obtained the partition share in the property of the adoptive parents (Sec. 185(1) Proviso). Adoption shall be voidable if adoptive parent claims that the adopted child fails to accomplish the obligation laid down in Section 182 or s/he is blamed for his/her misconduct against the adoptive parent (Sec. 185(2)). When adoption is void or voidable, no adoptive relationship shall exist between the parties, but the effects of void or voidable adoption shall not be retrospective (Sec. 186(2) Proviso).

In the NCC, some provisions remain ambiguous and need further explanation.

Firstly, for instance, according to the condition of age difference between adoptive parents and adopted child in Section 174(1), it is not clear whether a petition of adoption can

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43 No adoption shall be granted for a person who has his/her own child, with some exceptions.

44 No adoption for a couple of no child whose marital period is less than ten years, and for an unmarried person of no child who is under forty-five years of age.

45 No one of the following shall be adopted: one who has completed fourteen years of age, one who is the only son or daughter (but for exceptions), one who has been once adopted as a son or daughter, one who is in a higher degree of relationship than the person adopting the child, one who is not a citizen of Nepal.

46 The age difference between the adopter and the adoptee shall be at least twenty-five years (Sec. 174(1)), but no age restriction exists for adoption within the relation of three generations (Sec. 174(2)).

47 Written consent of birth parents or organisation required.

be approved in a case where a husband is 30 years old, a wife 28 years old and a child 4 years old. In this case, the age difference between the husband and the child is 25 years, but only 24 years between the wife and the child. Can this petition be accepted?<sup>48</sup>

Secondly, as for Section 173(2), a child born to the ex-husband of the wife may be adopted even though the child has attained fourteen years of age, but it is not clear whether adoption shall take effect if a child of fourteen years of age was born to the ex-wife of the husband. As a relevant issue to adoption of a stepchild, where a person got married and adopted a child of his wife (stepchild) and they divorced some years later, does the divorce of the adoptive father and the blood mother affect the adoptive relationship? The law is silent about this matter.

Thirdly, the age condition of an adopted child shall not be applied to an adoption between the persons within the relation of three generations or a child born to the ex-husband of the wife (Sec. 173(2)), and the condition of age difference between an adoptive parent and an adopted shall also not be applied to persons within the relation of three generations (Sec. 174(2)). If Section 173(2) literally applies, for instance, it may theoretically happen that a husband of 30 years old can adopt his son-in-law of 18 years old, and it may happen that a grandfather of 60 years can adopt his grandchild of 20 years according to Section 174(2). It seems that no provisions refrain a person from making such an application of adoption, and it is not clear whether a court shall conclude such adoption by considering the principle of adoption in the NCC (Secs. 177(1) and (2), and 170).

Finally, there are no provisions on a person who shall represent and protect the rights and interests of an adopted child (Sec. 170) when a dispute arises between adoptive parents and the adopted child. For instance, as Section 185(1) stipulates that an adopted minor is eligible to claim the adoption to be voidable when an adoptive parent fails to accomplish his/her obligation (Sec. 181(1)(a) to (c)), it is not clear who shall take action for the adopted minor as a representative. It may be necessary to implement additional provisions for the benefit of an adopted child involved in such disputes.

#### 4) Key Points

As for adoption, no significant differences between *MA* 1963 and the NCC exist. The provisions of *MA* 1963 are revised and sophisticated, and some new provisions are added in the NCC. For instance, the legal status of an adopted child is the same as that of a birth child of the adoptive parent and, in particular, the right of an adopted child to claim partition is clearly mentioned (Sec. 181(2)). The responsibility of an adoptive parent to maintain an adopted child is newly laid down in the NCC (Sec. 181(1)), and an adopted child must make arrangements

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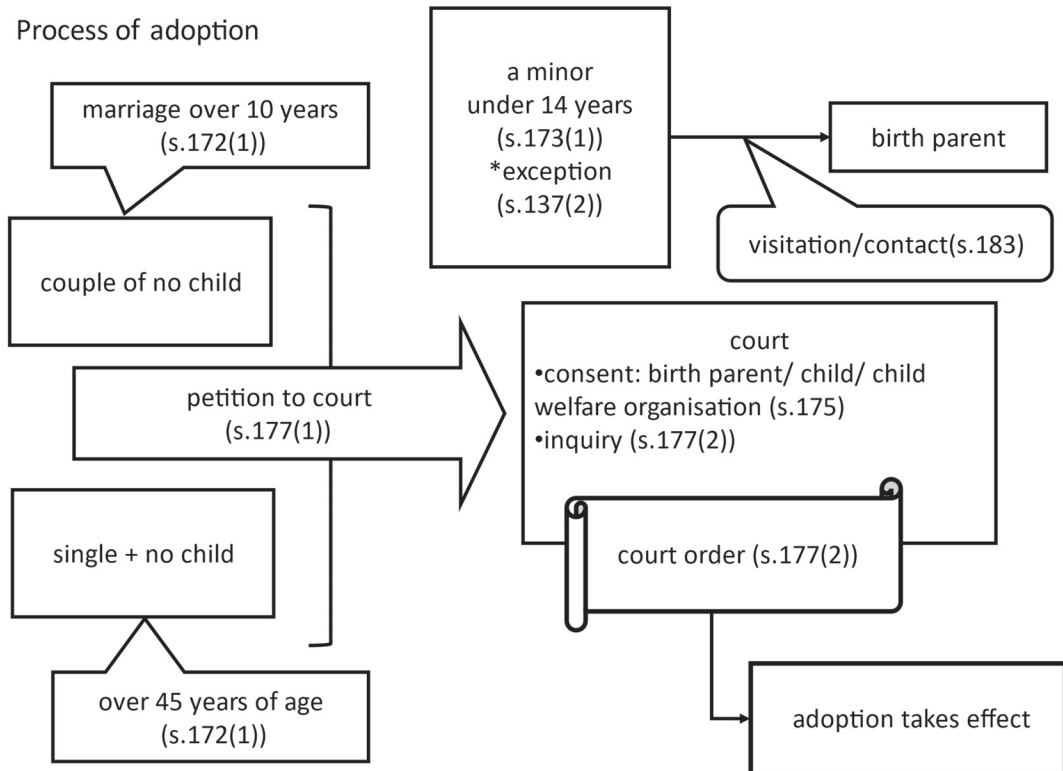
48 It was said that the age difference of 25 years shall be interpreted to exist between an adopted child and a younger adoptive parent (cf. Sec. 172 of the Bill of Civil Code, Civil Procedure Code and Report, 2010).

for the maintenance, health care and care of the adoptive person and protect, look after and properly manage the property of the adoptive parent (Sec. 182(a) to (c)).

Section 183 stipulates that an adopted child can continue to contact his/her birth parents after adoption, which is different from adoption laws in many other countries where contact between an adopted child and his/her birth parent shall generally terminate after conclusion of adoption. This section shows that the adoption law apparently aims at protecting and promoting the welfare of an adopted child by maintaining a wider network of protection for the adopted child and that the strong relationship between a child and his/her birth parents exists.

As one of the characteristics of adoption law in Nepal, only a person who has no child is, as a rule, eligible to adopt a child (Sec. 171(1) of the NCC and No. 2 of Part III Chap. 15 (No. 2) of *MA* 1963) and re-adoption is not available (Sec. 173(1)(c) of the NCC and No. 2 B of Part III Chap. 5 of *MA* 1963). In general, this implies that the adoption system aims at protecting and promoting the benefit of adoptive parents and his/her family as well as the welfare of the adopted child.

**Chart 7**



## 10. Provisions Relating to Inter-country Adoption

### 1) Source

This chapter (Secs. 188-204) is newly enacted but carries over the basic rule of Chapter 15 (No. 12A and 12B) of Part III of *Muluki Ain*.

### 2) Contents

- 188. Inter-country adoption deemed to be accepted
- 189. Adoption not to be effected without obtaining permission
- 190. Best interests of minor to be ensured in granting permission for adoption
- 191. Child eligible to be given for adoption
- 192. Foreigner eligible for adopting son or daughter
- 193. Provision relating to Inter-country Adoption Board
- 194. Application to be filed for adoption
- 195. Provisions relating to selection committee
- 196. To make recommendation by selecting person effecting adoption and child
- 197. Permission to be granted for adoption
- 198. Special provision relating to selection of families for minors in need of special care
- 199. Special provision relating to permission to be granted for adoption
- 200. Details to be forwarded
- 201. Monitoring
- 202. Case may be filed
- 203. Provisions of the Act to be applicable
- 204. Statute of limitation

### 3) Summary (See table 2)

The main aim of regulating inter-country adoption is to protect and promote the welfare of a minor in need (Sec. 190(1)). In fact, it is sometimes observed that adoption is abused for hiding the purpose of kidnapping and trafficking a child for child labour or prostitution in foreign countries<sup>49</sup>. Once an adopted child has crossed the border from Nepal, some provisions of the *MA* 1963 were not effective for securing and protecting such a child. So, the new independent chapter was especially enacted in the NCC for controlling the outbound transfer of

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49 UNICEF View Documents, 'Trafficking of Children and Women in Nepal', (<https://un.info.np/Net/NeoDocs/View/5089>), UN Office on Drugs and Crime, 'Nepal takes a step forward against human trafficking preventing child trafficking after Nepal earthquake', (<https://www.unodc.org/unodc/en/human-trafficking/Webstories2020/nepal-takes-a-step-forward-against-human-trafficking.html>).



a minor residing in Nepal under the name of adoption, which stipulates the detailed conditions and procedure of inter-country adoption for protecting the safety of a child and for preventing ill-treatment of a child taken to a foreign country<sup>50</sup>.

Unlike the procedure for adoption between Nepalese mentioned in the previous chapter, inter-country adoption shall be concluded not by a judicial procedure but by an administrative procedure.

Under the new law, a non-Nepalese citizen can adopt a minor of Nepalese nationality or of non-Nepalese domiciled in Nepal by obtaining government permission (Sec. 189(1)).

A minor under 14 years of age who is an orphan or voluntarily accommodated to a welfare institution (children home) for at least six months can be a ‘would-be’ adopted child (Secs. 191, 203 and 173(1)(a)). A non-Nepalese citizen (or a married couple) shall be eligible to be an adoptive parent(s) when s/he meets the requirements laid down in Section 192 that are similar to those for ordinary adoption (Secs. 171-174). The adoptive parent(s) must belong to a country which is recognised by the Nepalese government as a suitable country for the purpose of adoption (Sec. 189(2)).

A non-Nepalese person intending to adopt a minor must obtain permission from the Nepalese government (Sec. 189(1)). (See chart 8.) Upon application, the government shall refer the case to the Inter-country Adoption Board, which shall form a selection committee examining the documents submitted by the applicants (Secs. 194(1) and 195). After a recommendation is made by the selection committee (Sec. 196), the Inter-country Adoption Board shall make a recommendation to the government (Sec. 197(1)), and the government shall finally grant permission for adoption and issue a certification of adoption after considering the best interests of the child (Secs. 197(2) and 190(1)). In addition, the government shall provide details of the adoption to the central agency of the adoptive parents’ country which is responsible for inter-country adoption (Sec. 197(7)). When certification is issued, adoption shall take effect and an adopted child and adoptive parents shall have rights and obligation (Secs. 203(1), 178(1), 181(1) and 182), provided that a birth parent or guardian can take back a minor before certification is issued (Sec. 197(5)).

In order to protect and secure the welfare of an adopted child, the Nepalese government can order the adoptive parent(s) to submit a report relating to the state of the adopted minor periodically (Sec. 200), and the Inter-country Adoption Board has the authority to remain vigilant to the situation of the adopted child and to visit him/her if necessary (Sec. 201(2)). If the government finds any harm relating to the welfare of the adopted child, it shall warn

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50 The inter-country adoption service is not available since no directives or other detail rules are not set out as of January 2024.

the government of the country where the adopted child lives by hearing the child's opinion, if available, and it shall be able to remove the name of the country from the list of the countries for adoption if necessary (Sec. 201(6)).

In the interest of an adopted child, an adopted child gaining the age of majority or the Nepalese government is entitled to file a case of annulling adoption if necessary (Sec. 202).

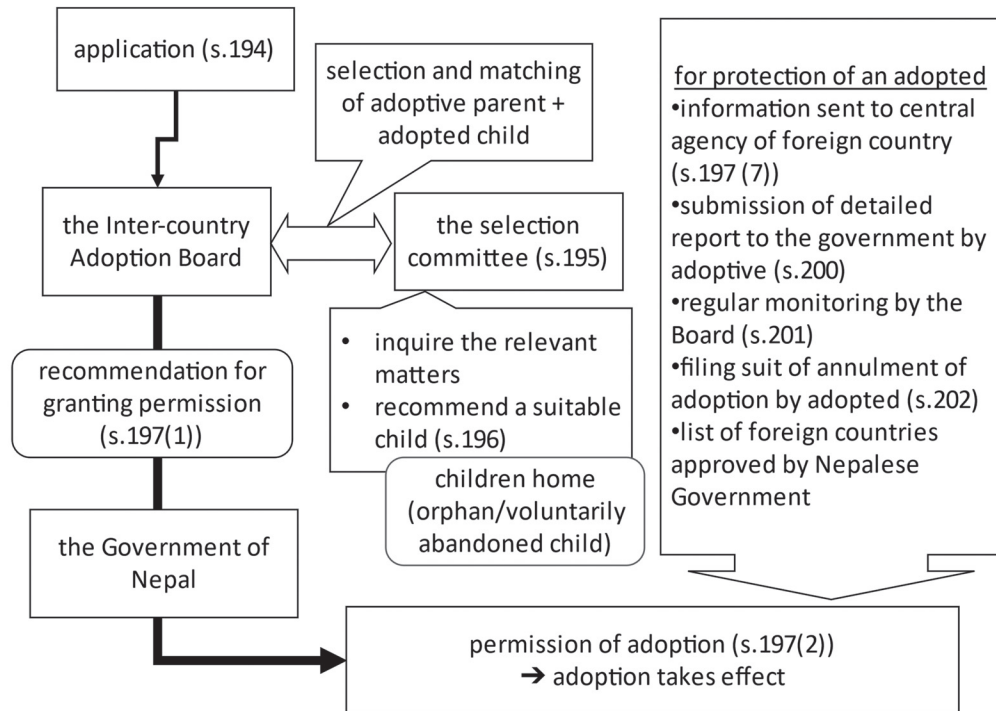
As for the inter-country adoption, more explanation may be necessary to justify some provisions. Firstly, Section 191 stipulates that minors to be adopted are limited to orphans or voluntarily abandoned children. It may be needed to explain the reasons why only those children shall be eligible to be adopted or why 'ordinary' children shall not. Secondly, an applicant for adopting shall be aged between 45 and 55, while no upper limit of age is set out for domestic adoption. If such an age requirement is necessary to protect the welfare of an adopted child, it could be said that the requirement shall be also necessary for a domestic adoption. Finally, monitoring an adopted child living in a foreign country (Sec. 201(1) and (2)) is crucial for protecting and maintaining the welfare of the adopted child, but it might be said that an additional scheme for the safeguards shall be needed for the purpose of achieving the purpose of the adoption law.

#### **4) Key Points**

There are several major differences in the requirements between domestic adoption and inter-country adoption. Firstly, the age requirement for adoptive parent(s) is between 45 and 55 in the case of inter-country adoption (Sec. 192(1)(c)) but only over 45 in ordinary adoption (Sec. 172(1)(c)(d)). Secondly, only a child in need (an orphan child and voluntarily abandoned child) is eligible to be adopted (Sec. 191). Thirdly, an adopted child is eligible to bring a case for annulment of adoption if the adoptive parents fail to look after him/her properly (Sec. 202). Fourthly, application for adoption shall be specially considered if an applicant intends to adopt a minor who needs physical and/or mental treatment (Sec. 198(1)), and if a foreign renowned citizen, such as head of state or head of government of a foreign country applies for adoption with specified documents (Sec. 199(1)). Fifthly, the government shall continue to remain vigilant and intervene, if necessary, even after adoption is completed (Sec. 201(2)). Finally, the adoption process shall be carried out by administration, and no person can challenge a decision by the government judicially.

**Chart 8**

**Process of Inter-country Adoption**



**Table 2**

	Adoption between Nepalese	Inter-country adoption*
An adopted**	<ul style="list-style-type: none"> <li>• under 14 years (Sec. 173)</li> <li>• Nepalese nationality</li> </ul>	<ul style="list-style-type: none"> <li>• under 14 years</li> <li>• Nepalese orphan/minor taken into a welfare institution (Secs. 203, 173)</li> <li>• Non-Nepalese child living in Nepal (Sec. 188)</li> </ul>

An adoptive***	<ul style="list-style-type: none"> <li>• married couple with no child born even up to ten years of the marriage</li> <li>• single person of 45 years or over</li> <li>• Nepalese nationality (Sec. 172)</li> </ul>	<ul style="list-style-type: none"> <li>• married couple with no child born even up to ten years of the marriage</li> <li>• single person between 45 and 55 years</li> <li>• Non-Nepalese nationality (Sec. 192)</li> </ul>
Age difference	• 25 years (Sec. 174)	• 25 years (Secs. 203 and 174)
Application	• court: order (Sec. 177)	• Inter-country Adoption Board: grant and certification (Sec. 194)
Dissolution of adoption	• application for voidable adoption to court (Sec. 185)	• application for annulment of adoption to court (Sec. 202)
Obligation of adoptive	• maintenance, caring and administration of property (Sec. 181)	<ul style="list-style-type: none"> <li>• maintenance, caring and administration of the property (Sec. 203)</li> <li>• submission of a regular report (Sec. 200)</li> </ul>
Obligation of adopted	• arrangement for maintenance, caring and administration of property (Sec. 182)	• no provision
Protective action after adoption approved	• no provision	<ul style="list-style-type: none"> <li>• submission of a regular report from adoptive parents (Sec. 200)</li> <li>• vigilance/visit to the adopted (Sec. 201)</li> </ul>
<p>*Only the countries considered suitable for adoption by the Nepal government are listed (Sec. 189) (No list available of January 2024).</p> <p>**Exception of age requirement (Secs. 173 and 192)</p> <p>***Special requirements applied to a particular person (Secs. 198 and 199)</p>		

## **11. Provisions Relating to Partition**

### **1) Source**

This chapter (Secs. 205-236) is mainly carrying over the provisions of Chapter 12 (No. 4A-4C) and 13 (No. 1-35) of Part III of *MA* 1963.

### **2) Contents**

- 205. To be deemed coparcener
- 206. Equal entitlement to partition share
- 207. Son and daughter born from couple whose matrimonial relationship is dissolved to obtain partition share
- 208. To obtain partition share from mother
- 209. To obtain partition share from part of father or husband
- 210. Latter wife or child to obtain partition share from part of husband or father
- 211. Right to obtain partition share
- 212. Separation may be effected at anytime
- 213. Husband or wife may separate by obtaining partition share
- 214. Widow may effect separation by taking her partition share
- 220. Relinquishment of partition share
- 216. Partition to be effected
- 217. Matters to be specified in deed of partition
- 218. Deed of partition to be registered
- 219. Prohibition of providing property without effecting partition
- 220. Lawsuit to be filed by setting out inventory of property
- 221. Matters to be set out in inventory
- 222. Partition to be effected by taking inventory
- 223. Partition to be effected on the basis of inventory received
- 224. Power to take inventory by breaking padlock
- 225. Partition to be effected when inventory produced
- 226. Prohibition of concealing or hiding property
- 227. Partition share to be reimbursed
- 228. Partition share not to be exchanged
- 229. Partition of pledged or mortgaged property
- 230. Power to withhold property or income until partition is effected

- 231. Partition to be so effected as to have provision of way or passage
- 232. Debtor not to be specified without consent of creditor
- 233. Compensation to be paid if lawsuit filed by person not entitled to partition
- 234. Partition share, money or expenditure may be awarded.
- 235. Statute of limitation
- 236. Partition deemed to be executed

### 3) Summary

The system of partition aims at protecting and securing the life of family members and achieving equality among them in terms of distribution of the family property. In this respect, the system of partition works as a measure for distributing family assets (the property in common) before the death of a person (sometimes after the death of a person), while the succession system is applied for division of the property obtained by a deceased person only after his/her death. (See chart 9.) In addition, the partition system plays a substitute role of division of matrimonial property (cf. Sec. 99(3)).

A coparcener who is entitled to claim his/her partition share shall be jointly liable to the debts in common (Sec. 216(2)). The property in common for partition is defined in Section 257(1) as consisting of inherited property and the property that is made by a family member individually or jointly except his/her private property (Sec. 256(1)). Transaction of the property in common shall be made under the conditions stipulated in Section 419 and 420<sup>51</sup>. Meanwhile, the joint property, not the property in common, of a coparcener not living in a joint family and private property shall belong to a family member individually (Sec. 258(1)). The debts in common cover a wide range of areas, including debts agreed to by the person acting as the head of a family, debts agreed to by all coparceners, debts borrowed by the coparceners, who have attained the age of majority and live in the undivided family and carry on household work, farming, trade or any other work in various places, debts incurred in such a transaction, or debts incurred in transaction carried on by the other persons, who have attained the age of majority and live in the undivided family, to which such persons have consented in writing (explanation of Sec. 216(2)).

A husband, wife, father, mother, son and daughter are regarded as coparcener (Sec. 205) and are eligible to claim his/her equal share to the property in common (Sec. 206(1))<sup>52</sup>. An

51 Section 419(1) states that no person shall, without obtaining written consent of the coparceners in common, transfer a property in common to another person, and Section 420 states that notwithstanding anything contained in Section 419, the person acting as the head of the family may, for the household purpose, sell the whole of the property in common, in the case of a movable property, and half of such a property, in the case of an immovable property, without the consent of the others.

52 Neither a wife of a de-facto marriage nor a child whose parents are in a de-facto marriage has the right

unborn baby whose mother is pregnant at the time of partition is also eligible to be a coparcener and his/her share shall be distributed equally to other coparceners if s/he is still born (Sec. 206(2) and (3)). (See paragraph 12.4.) The child is still eligible to partition even if his/her parents are not married, the marriage of the parents is considered annulled, or they dissolved their marriage (Sec. 207). A child whose father is unknown is only entitled to claim his/her partition to the property of his/her mother (Sec. 208(1))<sup>53</sup>. In addition, a child or wives of brothers living in an undivided family shall obtain partition share in the property in common only from the part of their father or husband (Sec. 209(1)), and a wife of the latter marriage has a limited share of her husband's share in the property in common (Sec. 210(2)).

A coparcener (father, mother, husband, wife, widow, child, including an unborn child) has an equal share as coparcener (Sec. 206(1) and (2)). Meanwhile, debts shall belong to each coparcener equally (Sec. 216 (2)), and the responsibility of payment of any debt of joint family shall not be imposed on a sole coparcener without the consent of the creditor (Sec. 232(1)).

A coparcener can claim his/her partition share at any time on the bases of mutual agreement among the coparceners (Sec. 212(1)), and in the case of husband and wife, s/he may claim his/her partition share if they fail to make arrangements for the maintenance and medical treatment of family members (Sec. 211(2)), if s/he is expelled from the house without any legitimate ground or if s/he has suffered domestic violence (Sec. 213(1)).(See chart 10.)

A coparcener may claim his/her partition share if the husband, father, mother or person acting as the head of the family considers such partition appropriate for that coparcener who intends to live apart from the family (Sec. 212(2)). A widow is entitled to obtain her partition share at any time and to hold it until her remarriage (Sec. 214(1)).

For a valid partition, a written deed of partition must be executed among the coparceners according to the requirements and be registered (Secs. 216(1), 217, 218(1) and 464(1)(e)).

If a coparcener intends to claim his/her share of partition, s/he is eligible to file a lawsuit for separating his/her share from the property in common (Sec. 220(1))<sup>54</sup>. For achieving fair results of partition among the coparceners, s/he must satisfy the conditions, such as submitting an inventory of property, and a coparcener who has concealed any property for partition under his/her name shall lose his/her right to obtain the property (Sec. 226(2))<sup>55</sup>.

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to claim partition share to her husband or father after his death (Sec. 208(2)). As for a de-facto marriage, the situation of 'a wife kept without making public' is not clear, but it may mean that a woman and a man accept each other as wife and husband but they do not hold any ceremony, formal or any other act (Sec. 67) and do not register their marriage (Sec. 76(1)).

53 A child whose parents are in a de-facto marriage has not the right to claim partition share to his/her father after the death of the father (Sec. 208(2)).

54 A lawsuit may be brought if the coparceners fail to reach an agreement (Cf. Sec. 212(1)).

55 In this case, it could be interpreted that the coparcener loses his or her rights to the concealed property, but not to partition share.

A coparcener may relinquish his/her partition share by a deed with consent of his/her spouse and a child of the age of majority, but the entitlement of a minor coparcener to partition share may not be relinquished (Sec. 215(1) and (2)).

Due to the complexity of the partition system based on its long history and reflecting social demands, there are several issues to be discussed with respect to partition.

Firstly, Section 209(3) states, ‘if a person has more than one wife, they shall obtain their respective partition share only from the part of the husband’, and a question may arise as to how to distribute the share of a married son to his wives and children in such a situation as bigamy (see Sec. 210), and further explanation shall be necessary since the Civil Code does not accept a union of more than one spouse as valid marriage (Sec. 70(1)(c)). In addition, Section 209(1) stipulates that a son and daughter child or wives of brothers living in an undivided family shall obtain partition share only from the part of their father or husband respectively, so it needs to make clear by interpretation whether ‘wives of brothers’ is a wife of a living brother or a wife of deceased brother, and ‘brothers’ is a husband’s brother or a father’s brother.

Secondly, all coparceners have equal partition share, but not a spouse of a child. In the case of a wife, she is only eligible to claim her partition share at the time of getting separated, divorced or widowed (Secs. 213(1), 99(1), 102 and 214(1)). Suppose that a wife does domestic chores every day, works with her husband and parents-in-law, and makes a contribution to the acquisition of the property in common for partition<sup>56</sup>, she is not a coparcener and has no right to claim partition share. Is there any interpretation for treating her fairly in such a situation? For a widower, no provision is stipulated in the NCC.

In addition, according to Section 257, there may be two types of the property in common: the property in common of family (Sec. 257(1)) and the property in common of marriage (Sec. 257(2)). In a case where a husband and wife live jointly with his parents in the same household, if the wife receives income from a part-time job, the income shall go to the property in common of marriage (Sec. 257(2)). In this case, if the husband obtains property by working jointly with parents (or other coparceners), which does that property constitute, the property in common of family (Sec. 257(1)) or the property in common of marriage (Sec. 257(2))? In addition to two types of the property in common, there may be the third type of property in common set out in Section 257(3) stating that any property earned by the parents for the purpose of partition between the parents and their children shall also be deemed to be the property in common (so-called family property). Accordingly, it could be said that there are three types of property in common in the NCC. The terms of ‘the property in common’ are observed in many provisions, but it is not clear which property in common it means in each provision and what connection among the property in common exists.

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56 While domestic chores are regarded as ‘shadow work’, it could be said that she substantially makes a contribution to the acquisition of the property in common by such an indirect way.



Thirdly, for dividing the property in common for partition, it is necessary to decide which property of family members shall be the property in common (Sec. 257(1)) or private property (Sec. 256(1)). Though there are those two provisions, it may not be easy to sort the property of family members into those two categories since the property belonging to family members is often acquired through a complicated process. For instance, if a family member acquired the property and registered it by his/her name with a substantial and great contribution made by other family members, it could be interpreted that the other family members may have a latent share in such property.

Fourthly, there are some provisions that are not consistent with the principle of gender equality. (See Sec.17.) For instance, a wife shall lose the right to claim her partition share to the property in common which is jointly built by the wife and her husband if she gets remarried before effecting partition (Sec. 99(1) and (5)), but this rule shall only apply to a divorced wife but not to the husband. It is unfair if a wife shall lose her partition share on the occasion of remarriage and accordingly a husband can keep hold of the whole property in common as his own after divorce. Meanwhile, a wife is entitled to claim her partition share from her parents as a daughter (Sec. 205), and she may obtain her share from her husband's parent as a wife (Sec. 99(4)), but no such provision exists for a husband.

Finally, the legal protection of a creditor against the debts in common is unclear. Before the division of the property in common, it could be interpreted that a creditor could enforce his/her claims against the whole property in common. However, after the property has been divided equally among all coparceners (Sec. 216(2)), it could be understood that the claim is also divided and the creditor must enforce his/her claim against each coparcener – debtor of the debts in common. In this respect, the question may arise as to what action needs to be taken to further protect the creditor.

#### **4) Key Points**

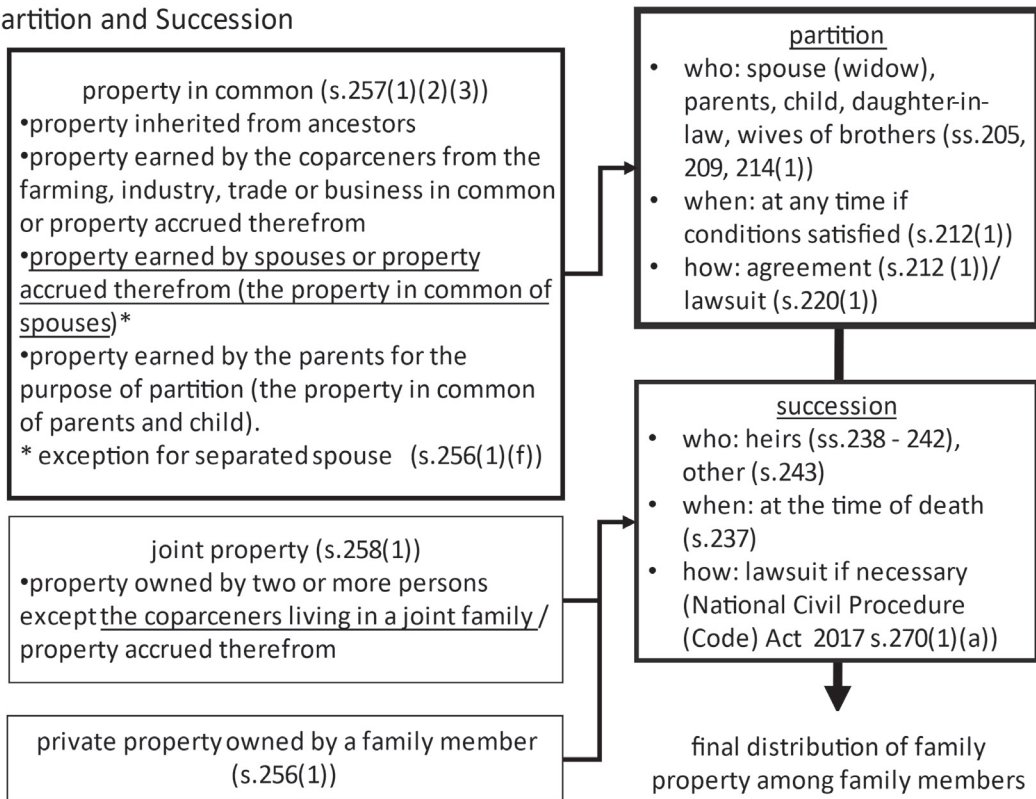
One significant change in the partition scheme is the right to partition of a married daughter. In *MA* 1963, a married daughter was not entitled to claim her share of partition (No. 1A of Chap. 13 of Part III of *MA* 1963). However, this rule is abolished and consequently discrimination against a married daughter is deleted from the NCC (Sec. 205). Since a married woman often faces financial and social difficulties in the current society, the new partition system could contribute to protecting and improving her financial situation by distributing her partition share during and at the time of terminating the marriage (particularly divorce) if her husband and father-in-law have enough assets for partition.

The partition system works for dividing and allocating the family property (the property in common) to all coparceners generally on an equal basis (Sec. 206(1)).

Meanwhile, the succession system aims at distributing private property that belonged to the head of a family and other family member at the time of his/her death<sup>57</sup>. It can be said that the partition and succession system jointly play roles of distributing property owned by a family member to other family members before and after the time of death of a family member.

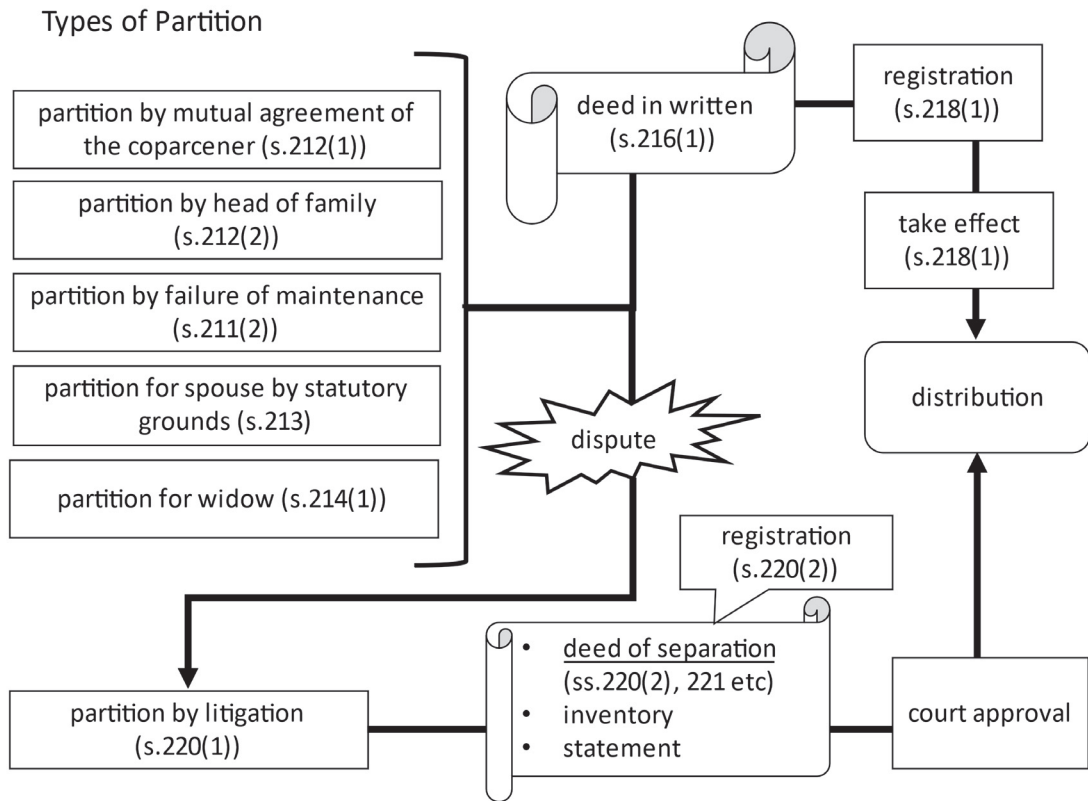
Chart 9

### Partition and Succession



57 As for the connection of partition and succession, it does not seem to be clear which procedure shall be taken if the head of a family dies before executing partition to coparceners.

**Chart 10**



## 12. Provisions Relating to Succession

### 1) Source

This chapter (Secs. 237-250) is carrying over some provisions of Chapter 16 (No. 1-20) of part III of *Muluki Ain*<sup>58</sup>.

### 2) Contents

- 237. Succession deemed to be opened
- 238. Heir entitled to succession
- 239. Order of preference of heirs for succession
- 240. Distant heir entitled to succession
- 241. Maintaining and caretaking heir entitled to succession
- 242. Separated heir entitled to succession

<sup>58</sup> No. 5 of Chap. 13 and No. 5 of Chap. 14 of Part III were the provisions on property of a deceased person.

- 243. Maintaining and caretaking person entitled to succession
- 244. Not to be obliged to accept succession
- 245. Disqualified for succession
- 246. Obligations and rights of person upon whom succession is devolved
- 247. Creditor may recover debt
- 248. Local Level to receive property under succession
- 249. Succession to property of foreigner who died in Nepal
- 250. Statute of limitation

### 3) Summary

At the time of death of a person, only intestate succession (statutory succession) is available in the NCC since, as mentioned earlier, the testamentary system was not implemented due to strong opposition in the process of the legislation, (See para 1.1.). Meanwhile, Section 406(4) stipulates that 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 s/he has executed a testamentary donation or testamentary gift. The term of testamentary<sup>59</sup> is used in this section, but could be interpreted to be *donatio mortis causa* (Sec. 406(3) and (4))<sup>60</sup>.

The scheme of the statutory succession aims at working for achieving and maintaining stability and security of finances among family members of a deceased person like the scheme of partition. (See para 11.3.)

When a person dies<sup>61</sup>, his/her heir shall take over all rights and obligations (liabilities) of the deceased person (explanation of Section 237 and see Section 246 (1)), but the heir shall not be obliged to make any payments to the creditors of a deceased in excess of the value of his/her succeeded property (Sec. 247 Proviso). However, a third party who was not obliged to but performed the funeral and obsequies acts of a deceased or conducted medical treatment of a deceased is entitled to claim reimbursement from the heir. (See Secs. 246(2) and 655.)

Who shall be an heir and what preference order of the heirs shall be applied are laid down (Secs. 238 and 239), and the fact of cohabitating, maintaining and caring for a deceased shall be mainly considered in deciding the preference order of heirs (Secs. 240-242). (See chart 13.) A junior heir shall become the heir if no senior heir exists due to a particular reason, such as the

<sup>59</sup> In addition, the term of testamentary is used in Sections 316, 414, 424, and 429.

<sup>60</sup> The term ‘gift’ shall be generally interpreted as a contract by agreement between the giver (a maker of a donation or gift) and the recipient. On the other hand, ‘testamentary gift’ does not require the consent of the recipient because it shall take effect through the unilateral act of the testator. In this respect, ‘a testamentary donation or testamentary gift’ referred to in Section 406(4) may not be ‘the gift’ which is generally interpreted.

<sup>61</sup> There is no mention about whether brain death shall be interpreted as death of a person.

death of a senior heir, surrender of succession by him/her and disqualification as an heir (Secs. 239(2) and (4), 244(3) and 245). Usually, a surviving spouse who has lived with a deceased firstly comes as a senior heir and a child shall be an heir if a spouse of the deceased (usually mother of the junior heir) does not exist (Secs. 238 and 239(1)). If a junior heir maintained and took care of the deceased instead of a senior heir, s/he is also eligible to claim a share of succession (Secs. 241 and 242(1)). A third party is entitled to claim a share of succession if s/he looked after the deceased instead of heirs (Sec. 243). If a person (including his/her heir) intentionally claimed the life of the deceased or a person maliciously intended to obtain property of the deceased, s/he shall be disqualified as an heir of the deceased person (Sec. 245).

The property and other items for succession shall be the private property belonging to a deceased, wages, and other rights (Secs. 256(1), 646(2), 455(2) and 528), (See chart 13.)<sup>62</sup> In the case of a trust, an eldest son, daughter-in-law or daughter may succeed the office of a trustee (Sec. 329(1)), and then the heirs (or guardian) or descendants may succeed the office after the death of the trustee (Sec. 329(2)). Each heir shall have an equal share to the property of the deceased (Sec. 239(3)), and in logical consequence, s/he may be equally liable to the creditors of the deceased.

An heir is entitled to claim his/her share to succession, and s/he may surrender succession by written document which shall be submitted to a local court (Sec. 244(1)). By surrender of succession, the heir shall be free from any rights and obligations (liabilities) except the obligation to conduct obsequies of the deceased (Sec. 244(4)).

If no heir is found or any heir declines to accept a succession, the property of a deceased shall be handed over to a local authority after liquidating the debts of the deceased and reimbursing the expenses incurred for obsequies (Sec. 248(1)).

As for succession of a non-Nepalese person, a similar rule to that for a Nepalese person shall be applied through some intervention by the Federal Ministry of Home Affairs. (See Sec. 249.) From the perspective of achieving fair distribution among heirs and a third party, there may be some questions.

Firstly, a third party who looked after a deceased instead of heirs is entitled to claim to succession (Sec. 243), but the Section 654 Proviso stipulates that if s/he maintains such a person by way of compassion or gratification or with intention to do so gratuitously, s/he shall not be entitled to claim such an amount. In this connection, does it happen that a third party shall legally gain nothing if s/he voluntarily took care of the deceased while a third party shall be eligible to claim to succession if s/he took care of and maintained a deceased with the expectation of a reward?

Secondly, shall a third party be equally liable to the creditors of the deceased if s/he claims a share of succession? For instance, Section 243 states that notwithstanding anything

62 Cf. If a person dies s before effecting partition, his wife or his or her child shall obtain the partition share to which that person was entitled (Sec. 209(2)).

contained elsewhere in this Chapter, if another person has maintained (*shyahar samhar*) and taken care of the deceased because the heir has not done so, the person who has so maintained (*shyahar samhar*) and taken care of the person shall be entitled to such succession. If a third party has maintained and taken care of a deceased since the heirs did nothing for the deceased, s/he shall be entitled to such succession by Section 243. In such a case, is the third party liable to the creditors of the deceased as the heir? In other words, is s/he entitled to such succession as an heir or a person specially taking care of the deceased?

Thirdly, a junior heir or a third party shall be entitled to a claim to succession if s/he took care of and maintained a deceased instead of a senior heir (Secs. 240-243). At the same time, the senior heir may be still eligible to a claim to succession since s/he is not disqualified as an heir by Section 245<sup>63</sup>. This may raise a question of whether a senior heir failing to look after a deceased shall be equally entitled to a claim to succession, such as a junior heir or a third party (See Sec. 239(3).)

Fourthly, it is not clear if ‘succession by representation’ is available in the NCC. For instance, Mr. A has two children - Mr. B and Ms. C. Mr. B married a woman (Mrs. B) and they have their child (b). In the case of Mr. A’s death, heirs shall be Mr. B and Ms. C. If Mr. B had already died before the death of Mr. A, heirs of Mr. A will be Ms. C and Mrs. B (a widowed daughter-in-law living in the undivided family) according to Section 239(1)(b). If Mr. A dies after the death of Mr. B and Mrs. B, who shall be the heir to succession of Mr. A, only Ms. C or Ms. C and b?<sup>64</sup> Meanwhile, in the case of partition, a measure similar to ‘succession by representation’ is set out in Section 209(2) stating that if the husband, father or mother dies before effecting partition, his wife or his or her child shall obtain the partition share to which the husband, father or mother is entitled.

Fifthly, while heirs shall equally be entitled to the succession (Sec. 239(3)), there is no provision on how to divide the property of a deceased and how to deal with a dispute among heirs relating to division of the property.

Finally, as mentioned in the case of partition, a question may arise as to how to and to what extent to demarcate the property of a deceased.

#### 4) Key Points

According to Number 2 of Chapter 16 (On Inheritance) of Part III of *MA* 1963, a married daughter was merely eligible to inherit the ancestral property (which seems to be equivalent to the property in common in the NCC) as an heir holding a junior rank in the order of priority.

63 It is not stated in Section 245 that an heir who fails to look after a deceased shall be disqualified from the succession of the deceased.

64 Section 239(2) stipulates that so long as the person who is in the first order of preference referred to in Sub-section (1) at the time when succession to one’s property is open is serving the person in the subsequent order of preference shall not be entitled to succession.

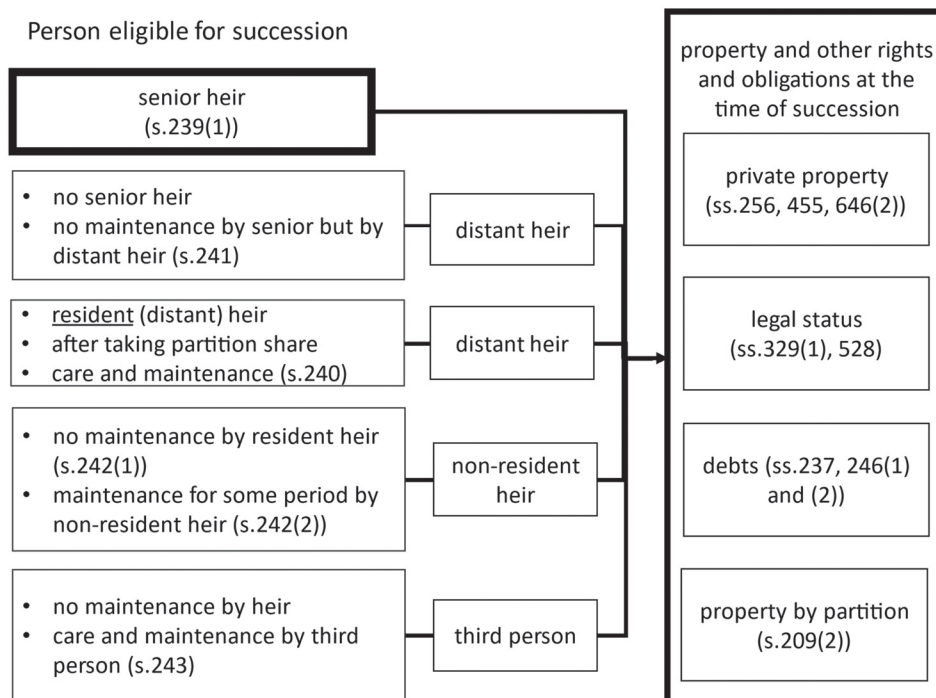
However, she can enjoy the equality of the right to inherit the property of a deceased (Sec. 239(1)(b) and (3)).

In the process of succession, the fact of whether a person (heir) has taken care of and supported a deceased is regarded as crucial for dividing and allocating the property of the deceased (Secs. 240, 241 and 242). For instance, an heir in a junior rank in the order of priority shall be entitled to succession if an heir in a senior rank has not maintained and taken care of a deceased, but a junior heir has done so (Sec. 241). This kind of connection between maintenance of a family member and division of family property can be observed in the case of partition (See Secs.211(2) and 213(1)(a).)

A widow can live apart from the family of her deceased husband after taking property as her partition share of the property in common of the husband's side, and she can retain such property if they have no child. However, she is obliged to devolve such property to their child when she gets remarried if they have a child (Sec. 214(2)). This provision may reflect the principle of protecting vulnerable family members and the traditional rule of succeeding the family property by patrilineal line.

As for an unborn child, no provision relating to his/her right of succession exists in this chapter, while s/he is entitled to claim his/her portion in the case of partition (Sec. 206(2)), and s/he is also eligible to accept assets in the case of donation and gift (Sec. 408(c)).

**Chart 11**



# V Law of Property

Prof. Hiroshi Matsuo

## 1. Overview

### 1.1 The Structure of Part 4 and General Characteristics of the Property Law in Nepal

Part 4 of the NCC provides “Laws Relating to Property.” It includes 15 Chapters starting from General Provisions Relating to Property (Chap. 1) and ending with Provisions Relating to Transactions (Chap. 15) (see [Table V-1]). Most of those Chapters succeeded to corresponding chapters in the former *Muluki Ain* and other special laws, including the Land Law of 1964, as are shown in [Table V-1]. It also includes some new Chapters on Provisions Relating to Ownership and Possession (Chap. 2), Provisions Relating to Usufruct (Chap. 7), Provisions Relating to Servitude (Chap. 8), and Provisions Relating to House Rent (Chap. 9).

Table V-1

Civil Code 2017	Previous Provisions
Part 4 Law Relating to Property	
Chap. 1 General Provisions Relating to Property	← <i>Muluki Ain</i> , Part III, Several Chapters
Chap. 2 Provisions Relating to Ownership and Possession	← (Lands Act, 1964)
Chap. 3 Provisions Relating to Use of Property	← <i>Muluki Ain</i> , Part III, Several Chapters
Chap. 4 Provisions Relating to Cultivation, Possession and Registration of Land	← <i>Muluki Ain</i> , Part III, Chap. 8
Chap. 5 Provisions Relating to Government, Public and Community Property	← <i>Muluki Ain</i> , Part III, Several Chapters
Chap. 6 Provisions Relating to Trusts	← <i>Muluki Ain</i> , Part III, Chap. 7



<u>Chap. 7 Provisions Relating to Usufruct</u>	New
<u>Chap. 8 Provisions Relating to Servitudes</u>	New
<u>Chap. 9 Provisions Relating to House Rent</u>	← (Lands Act, 1964)
Chap. 10 Provisions Relating to Gift and Donation	← <i>Muluki Ain</i> , Part III, Chap., 19
Chap.11 Provisions Relating to Transfer and Acquisition of Property	← Lands Act, 1964
Chap. 12 Provisions Relating to Mortgage of Immovable Property	← <i>Muluki Ain</i> , Part III, Chaps. 2 and 17
Chap. 13 Provisions Relating to Pre-emption of Immovable Property	← <i>Muluki Ain</i> , Part III, Several Chapters
Chap. 14 Provisions Relating to Registration of Deeds	← <i>Muluki Ain</i> , Part III, Chap. 21
Chap. 15 Provisions Relating to Transactions	← <i>Muluki Ain</i> , Part III, Chap. 17

When we compare the structure of Part 4 on the Law Relating to Property with that of the former laws, the following features are recognized.

### **(1) New rules**

As new rules, it is noteworthy that the NCC clarifies the difference between the right of ownership and the right of possession. It also adopts the provisions on the right of usufruct and the right of service, which were not provided by the old *Muluki Ain*.

### **(2) Incorporation of contract-related rules**

The NCC incorporated some types of transactions into Part 4 on the Law Relating to Property, which are usually provided as a type of contract in the civil codes of the civil law countries. For example, (a) the house rent is included in Part 4, while the lease contract in general is stipulated in Part 5 Provisions Relating to Contracts and Other Liabilities; (b) donations and gifts are also included in Part 4 on property law, not in Part 5 on contract law; and (c) transactions (such as loan for consumption) are included in the Property Law.

### **(3) Incorporation of provisions related to property law into the law of obligation**

The NCC creates the new chapter on unjust enrichment (Part 5, Chapter 16). However, it includes the provision on the acquisition of lost property (Sec. 699), which may be included in Part 4 on the acquisition of property (Part 4, Chapter 11).

Part 4 characteristically includes provisions on Trusts (Chapter 6). In other jurisdictions, trust may be provided by special law as a special type and transformation of property right.

## **1.2 The Role of Property Law in the Civil Code**

Property law is an indispensable part of the civil code because it provides the basic rules of property as a fundamental basis of the life of people. No one can survive without food, clothing, housing on land, and other goods and valuable services which support the life of the people. The use of those properties is regulated by recognizing the appropriate types of property rights for the concerned parties to property. The civil code provides the protection of those property rights and the transformation of them.

According to its content, Part 4 stipulates (i) the concept of property on which property rights can be established, (ii) various types of property rights and their effect, and (iii) transfer and acquisition of property rights.

## **2. General Provisions on Property**

### **2.1 The Concept of Property**

According to the NCC, “property” has a broad meaning and shall include cash, goods, action or work, which can be transacted by way of sale, donation and gift, exchange, and other dispositions. In this context, the term “goods” shall mean physical property. A property shall be deemed to be either movable property or immovable property irrespective of its physical or non-physical, tangible or intangible form.

Immovable property includes land, buildings, appurtenances to land and buildings, minerals in the ground (still embedded), stones, natural water, groundwater, buildings and other structures permanently floating in rivers, ponds and lakes, and trees and their fruits.

Movable property includes not only movable things in general, but also securities, such as bonds, shares, notes, checks, intellectual property, encumbered rights, goodwill, sales rights, and other things other than real property. The concept of movable property is unique in that it is conceived of as including non-material or intangible property.

The classification of property according to the subject of ownership or the form of ownership is also distinctive. Property shall be classified into seven types according to the form of ownership: (1) private property, (2) property in common, (3) joint property, (4) community property, (5) public property, (6) government property, and (7) trust property.

- (1) Private property is defined by the cause of acquisition (e.g., acquired by one’s own knowledge, skill or effort), and as its effect, the right of exclusive disposition is recognized.
- (2) Property in common is property that is shared by family members. Hereditary property, common property by family members, and property obtained from cultivation or

trading of common property by family members are regarded as family community property.

It is also unique in that, unless otherwise provided by law, all property acquired by a spouse or property derived from it is also considered to be family community property by the husband and wife. This suggests that the concept of community among family members, including the husband and wife, is deeply rooted.

- (3) Joint property is property owned by more than one person other than the members of the undivided family. Each co-owner has an interest, which is clarified by a deed, but in the absence of a deed, the title to the co-owner's interest is deemed to be equal.

The consent of the previous co-owners is required to make changes to the joint property.

The maintenance and management of common property should also require the consent of all parties, but if the consent of all parties cannot be obtained, the decision should be made by a majority (head count), and if the consent of a majority cannot be obtained, the holder of the largest interest should have the right to make the decision. On the other hand, expenses incurred for the maintenance and management of the co-ownership are borne by the co-owners in proportion to their interests. If one co-owner A also bears the share of another co-owner B, B is obligated to reimburse him within one year, and if he fails to do so, A has the right to purchase B's share at market value.

However, if any co-owner is unable to do so, one or more other co-owners may sue or be sued on behalf of all co-owners.

The co-owners may at any time demand partition of the common property.

- (4) Community property, (5) public property, (6) government property, and (7) trust property are discussed below.

## **2.2 General Provisions Relating to Property**

### **1) Source**

Part 4, Chapter 1, from Section 251 to Section 265 provides for the general concepts and rules on the law of property.

### **2) Contents**

251. Deemed to be property
252. Property deemed to be in movable or immovable form
253. Property deemed to be immovable
254. Property deemed to be movable

- 255. Classification of property according to ownership
- 256. Property deemed to be private property
- 257. Property deemed to be property in common
- 258. Property deemed to be joint property
- 259. Trees, plants or goods on a boundary to be deemed joint property
- 260. Management, protection and maintenance of joint property
- 261. Prohibition of alteration in joint property without consent
- 262. Legal action or defense may be made by any owner of joint property
- 263. Separation of one's share from joint property
- 264. Provisions relating to community, public, government and trust properties
- 265. Statute of limitation

### **3) Summary**

Part 4, Chapter 1 provides the general rules of the concept of property and property rights. After Section 251 and Section 252 generally define property, Section 253 stipulates immovable property and Section 254 provides for movable property.

The concept of "property" shall include not only any cash and goods (physical property in this Act except otherwise provided), but also "work" or "action" shall also be regarded as "property" (Sec. 251). It means that the concept of property refers not only to corporeal things (tangible things or physical things), but also to incorporeal things (intangible or non-physical things).

Property shall be either movable or immovable form irrespective of its physical or non-physical, tangible or intangible form (Sec. 252). Immovable property shall include (a) a building or land or structure fixed thereto, (b) any goods attached to a building or land permanently, (c) a mine, stone or mineral embedded in land, (d) natural water, surface water and underground water, (e) a building or other structure so made permanently that it can float over a river, lake or pond, (f) a standing tree, plant or fruit tree or fruit or flower growing on such a tree, plant or fruit tree or crops in the land, or (g) a movable property attached to an immovable property (Sec. 253).

Movable property can be regarded as properties other than immovable property (Sec. 254 (h)). It shall include (a) cash or goods that can be transacted as cash or foreign currency, (b) gold, silver, jewelry, *Ratna*, gold or silver ornament or precious stone, (c) other goods that can be moved from one place to another, (d) a bond, security, promissory note, bill of exchange, letter of credit or other negotiable instrument or a benefit derived therefrom, (e) intellectual property, (f) a right in security, (g) a trade goodwill or franchise (Sec. 254 (a)

to (g)). Thus "movable" property in the law of Nepal extensively covers not only corporeal things but also incorporeal things such as intellectual property, a right in security, a trade goodwill, franchise, etc.

Section 255 classifies the property in accordance with the ownership which can be established on the property. It is one of the salient features of the NCC that it recognizes various types of property rights which can be owned by plural persons such as (a) private property, (b) property in common, (c) joint property, (d) community property, (e) public property, (f) government property, and (g) trust property. Among them, private property is common to the civil code in other jurisdictions. Joint property is also common, for it is a type of property which is co-owned privately by plural private persons. Community property, public property and government property are regarded as types of property that are owned by a public body. Trust property is owned in the name of a trustee, but the proprietary interest is held by a beneficiary. Some rights to the trust property shall be kept by a trustor. Thus, the right of ownership is uniquely divided in the hands of a trustee, a beneficiary and a trustor. It is also common to other jurisdictions. However, property in common which is held by coparceners is one of the characteristic types of property which is based on the traditional property law in Nepal.

#### **4) Key Points**

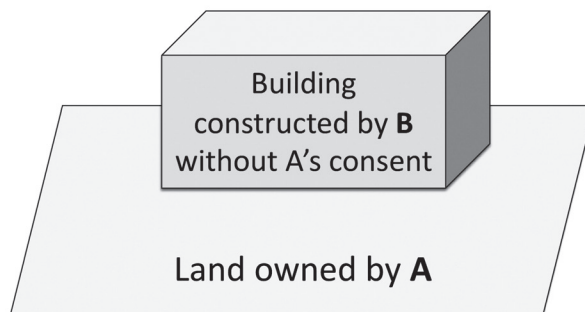
##### **4.1) Relationship between land and building**

Land and building constructed on that land are both immovable. However, the relation between land and building is treated differently by the civil code in different jurisdictions depending on the traditional treatment of land and building.

For instance, if the building was constructed by B without A's consent and any other measures to acquire the title to possess the land on which the building was constructed, who is the owner of the building?

There are different principles to be applied to this problem. On the one hand, according to the Roman law, land and building on that land are treated as an integrated one property. Consequently, if B builds any building or structure on A's land without any title, the building or structure shall be merged into the land (*Superficies solo cedit*). On the other hand, according to the Civil Code of Japan, land and building are treated as separate properties, so that the building constructed by B on the land owned by A is B's property even though B did not acquire any consent of A or any other title to use the land. How about the treatment of this topic in the NCC?

## Who is the owner of the building?



### Building on the land as a separate property from that land

In the NCC, the principle of land and building as separate property seems to be adopted. For example, according to Section 279, no person shall build a house on land without obtaining the written consent of the owner of that land (Sec. 279 (1)). However, if any person builds a house on land without obtaining written consent of the owner of that land, the landowner may, if he or she so desires, purchase the house on payment of the price that is less by up to 25% of the market price of that house (Sec. 279 (2)). This provision presupposes that the house constructed on the land without obtaining any consent of the owner is owned by the person who built the house.

Section 279 continues that if the landowner does not purchase such house pursuant to Section 279 (2) as above, the house-owner may, if the owner so consents, purchase the land on payment of the price that is higher by up to 25% of the market price of the land where the house is located (Sec. 279 (3)). Further, if both parties do not agree to purchase and sell the house or land pursuant to Section 279 (2) and (3), 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 (Sec. 279 (4)). Finally, if the house is not demolished within the period referred to in Section 279 (4) above, such a house shall belong to the landowner (Sec. 279 (5)).

This principle of land and building (or house) as separate property aims to keep the value of the building (or house) once constructed by the builder even without obtaining a title from the landowner where possible from the viewpoint of keeping the interest of social economy.

### 4.2) Private property and property in common

The NCC defines the “private” property by the cause of acquisition. Section 256 provides that any of the following properties owned by any person or properties accrued therefrom shall be deemed to be a private property of such a person:

- (a) property earned by way of his or her knowledge, skills or effort;
- (b) property acquired by way of donation, bequeathal, or succession,  
I property acquired by way of a lottery or gift;
- (d) property acquired by way of remuneration, gratuity, pension, medical expense, provident fund, insurance or other social security;
- (e) property acquired by way of intellectual property or royalty;
- (f) property acquired in any manner whatsoever while living apart by separating bread and board in accordance with law or while managing one's accommodation at one's cost despite not so living apart;
- (g) property earned or acquired by a woman prior to marriage or acquired from her parental side at the time of marriage or accrued therefrom;
- (h) property so granted to a woman by the husband or with consent of all coparceners of the husband side that she will have exclusive right in it or movable or immovable property received from the relatives or friends of the husband side and property accrued therefrom;
- (i) property which, according to law, is considered to be the exclusive private property of a person.

These causes of property acquisition will explain why the property shall belong to the acquirer.<sup>65</sup>

The effect of private property is that any person shall be entitled to exclusively deal with that property, subject to the NCC (Sec. 256 (2)).

In contrast to the private property, property in common is owned by the coparceners (Sec. 257). It is acquired by the following causes (Sec. 257):

- (a) property inherited from ancestors;
- (b) property owned by the coparceners except private property;
- (c) property earned by the coparceners from farming, industry, trade or business in common or property accrued therefrom.

In addition, any property earned by the husband or wife or property accrued therefrom shall be deemed to be property in common of the husband or wife (Sec. 257 (2)), and any property earned by the parents for the purpose of partition between the parents and their children shall also be deemed to be property in common (Sec. 257 (3)).

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<sup>65</sup> However, Sec. 256 (1) may not exclusively provide the acquisition causes of private property. Item (g) and (h) mention only for a woman.

Property in common owned by coparceners is the object of collective ownership. However, it is different from community property, public property and government property, because property in common is collectively owned by the family members.

### 4.3) Joint property

In contrast to property in common, joint property is substantially a private property owned by plural persons called co-owners. Thus, the NCC provides that any property owned by “two or more persons except the coparceners living in a joint family or property accrued therefrom” shall be deemed to be a joint property (Sec. 258 (1)). Trees, plants or goods lying on the boundary of two or more owners of adjoining lands shall be deemed to be the joint property of all co-owners (Sec. 259). Co-owners of joint property hold a share, which can be decided by an agreement between the co-owners and set forth in a deed. However, if they fail to make the deed, their shares shall be deemed to be equal (Sec. 258 (2)).

Co-owners have to manage, protect and maintain the joint property on the basis of the agreement between them (Sec. 260 (1)). It implies that the agreement between co-owners is the fundamental basis of the management of joint property. However, if they fail to reach a unanimous agreement, the management, protection and maintenance of the joint property shall be made according to the decision of the majority of members (Sec. 260 (2)). Interestingly, the decision to manage the joint property shall be decided by the majority of members, not by the majority of shares.<sup>66</sup> But if they cannot agree by the majority of members, the management, protection and maintenance of the joint property shall be decided by the largest share in that property (Sec. 260 (3) Main text). However, if the owners have an equal share, all owners shall have to conduct the management, protection and maintenance of such property on an equal basis (Sec. 260 (3) Proviso). It is necessary to clarify what “to conduct management, protection and maintenance of such property on an equal basis” means.<sup>67</sup>

Any expenses incurred in the management, protection and maintenance of the joint property shall be borne by all co-owners in proportion to their respective right or share (Sec. 260 (4)). They have to pay those expenses to the co-owner who had made the expenditure within one year (Sec. 260 (5)). If any co-owner fails to pay the expenses in proportion to his/her share, the co-owner who had made the expenditure shall be entitled to purchase the share of that failing co-owner at the prevailing price by deducting the expenses to be paid in proportion to his/her share (Sec. 260 (6)).

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66 From the viewpoint of comparative law, there are other solutions if co-owners cannot reach an agreement. For instance, the management of joint property shall be determined by the consent of the majority of shares, not the majority of members according to Sec. 252 (1) JCC. The protection and maintenance of joint property can be carried out by each co-owner regardless of the amount of the share according to Sec. 252 (5) JCC.

67 See Sec. 252 (5) JCC as explained in the previous footnote.



Beyond management, protection and maintenance, any alteration in a joint property or any change in its form may not be made without the consent of all the co-owners of the joint property (Sec. 261).

A joint property may be sold and transferred with the consent of all co-owners (Sec. 418 (1)). However, even if some co-owners do not agree to transfer the joint property, any co-owner may transfer his/her portion in that joint property (Sec. 418 (2)). But, if it is technically impossible to separate his/her portion in that joint property, and another co-owner intends to acquire that portion, this co-owner shall be entitled to obtain it at the price mutually agreed upon (Sec. 418 (3)). If more than one co-owner intends to acquire that portion, the co-owner who agrees to pay the highest price shall be entitled to obtain it (Sec. 418 (4)). If the other co-owners do not intend to acquire that portion and it is impossible technically to separate that joint property, the whole of the joint property shall be sold, and the price shall be divided between the co-owners according to the share in that joint property (Sec. 418 (5)).

#### **4.4) Community property**

Any land held by a community for its use, any structure built on such land, and other property owned by it shall be deemed to be the community property (Sec. 301).

The legal nature of community property is unique and distinct both from private property and public property. It is the advantage of the NCC to recognize community property and give it legal status. The NCC gives provision on community property in Chapter 5 of Part 4 together with those on government property and public property.<sup>68</sup>

### **3. Ownership and Possession**

#### **3.1 The Distinction between Ownership and Possession**

The NCC introduced a conceptual distinction between ownership and possession. There was no corresponding chapter in the old *Muluki Ain* on the distinction between ownership and possession. Section 266 and Section 267 provides for ownership or the right of owner, while Section 268 and Section 271 provides for the possessory right or the right of possessor.

#### **3.2 Provisions on Ownership and Possession**

##### **1) Source**

Part 4, Chapter 2, from Section 266 to Section 275

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<sup>68</sup> See 6 infra.

## 2) Contents

- 266. Ownership to be deemed
- 287. Right of owner
- 268. Possessory right to be deemed
- 269. When possessory right can be acquired
- 270. Person competent to acquire possessory right
- 271. Rights of possessor
- 272. Circumstances when possessory right is extinguished
- 273. Adverse possessory right to be deemed
- 274. Compensation to be paid
- 275. Statute of limitation

## 3) Summary

The owner of a property shall have the right to use, sell or otherwise transfer the title to, encumber, take the fruits from, destroy or dispose of the property (Sec. 267). On the other hand, a person who holds a property lawfully with the intention to possess it shall have the possessory right over that property (Art. 268). A person who is not the owner may acquire the possessory right with the consent of the possessor or by the provisions of law (Sec. 269 (1) (b), (c)). The possessory right shall not be deemed to have been lawfully acquired unless it was acquired in good faith, peacefully, and openly (Sec. 269 (2)). The possessory right may also be acquired by an agent (Sec. 270 (1)).

A possessor, i.e., a person who has the possessory right, shall not be interrupted in his/her possession except by law or contract (Sec. 271 (1) (a)). He/she may also take advantage of the benefits arising from the object (Sec. 271 (1)(b))<sup>69</sup>. Furthermore, a *bona fide* possessor of a property may demand reimbursement from the owner for the expenses incurred in maintaining and managing the property (Sec. 271 (2)), and may retain the property until the expenses are reimbursed (Sec. 271 (3)). These provisions show the effect of possessory right, which is distinguished from the right of ownership.

Another important effect of the possessory right is recognized for a person who acquires the adverse possession. If a person has possessed a property owned by anyone else for more than three years in the case of movable property and thirty years in the case of land as if the property is owned by him/herself, the possessor shall be deemed to have adverse possessory

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69 However, a person who acquires the possession of a property forcibly, with *mala fide* intention or secretly, must return the property and the benefit derived from the possession to the person who had been deprived of the right of possession and must compensate for any damage caused by his/her negligence (Sec. 274 (1)).

right over that property. (Sec. 237 (1)). The person who has acquired the adverse possessory right may obtain ownership over that property in his/her name (Sec. 237 (2)). However, the right of adverse possession is not established for government property, public property, community property, and trust land (Sec. 273 (1) Proviso (1)). If there is a contract between the possessor and owner of the property or any special law provides otherwise, they take precedence (Sec. 273 (1) Proviso (2)). In addition, if the property is possessed without the knowledge of its owner, secretly or forcibly, the right of adverse possession shall not be recognized (Sec. 273 (3)).

#### **4) Key Points**

##### **4.1) Right of owner (Ownership)**

The NCC provides concretely the rights of the owner which must be subject to laws (Sec. 288): (a) to use the property, (b) to sell or otherwise transfer the title to the property to any other person, (c) to mortgage or pledge the property in any manner, (d) to deal in the property (e) to take benefits of the property in any manner whatsoever, (f) to make any kind of physical structure, wall or fence or delimit boundary, in his or her land or change the form of any property or otherwise protect it, (g) to use his or her land or part below its surface or goods therein or sky above its surface, (h) to destroy or dispose of property in any manner, and (i) to institute a legal action in any manner in relation to the acquisition or security of the property.

Section 288 shows that ownership is a most comprehensive right over the property under the restriction to be provided by law.

##### **4.2) Possessory right**

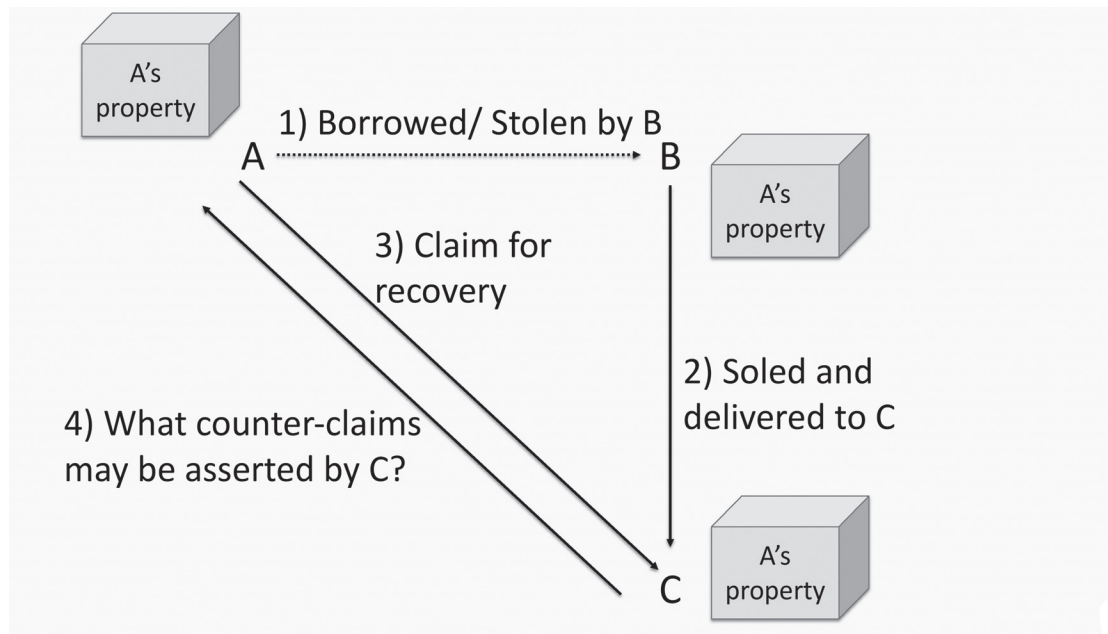
The NCC recognizes the possessory right if a person holds a property “lawfully” with the intention to possess the property (Sec. 268). The term “lawfully” shall mean that the possessory right is acquired in good faith, peacefully and openly (Sec. 269 (2)). The possessory right can be acquired (a) by holding the property in the capacity of its owner, (b) by acquiring the property owned by another person, in accordance with law, or (c) by obtaining consent to have possessory right (Sec. 269 (1)).

The effects of the possessory right are: (i) to possess the property uninterruptedly, (ii) to claim reimbursement of expenses from the owner for the period it was possessed in good faith (*bona fide*) (Sec. 271), and (iii) to obtain ownership by the three-year (for movables) or thirty-year (for immovables) adverse possession (Sec. 273).

##### **4.3) Protection of ownership (the right of an owner) and the possessory right of a *bona fide* possessor**

Ownership (the right of owner) of a property is protected by law. Sec. 421 (1) provides that no person shall transfer a property to another person when someone else has ownership. If

a person makes a deed to transfer a property of which someone else has ownership and delivers it to the transferee, such transaction shall be void (Sec. 421 (2)). The owner of the property can claim against the transferee of that property to return it to the owner (*rei vindicatio*) (Sec. 421 (3)).<sup>70</sup> If the property was a lost or stolen property, the owner of such property may claim it, with evidence showing his/her ownership, within three years after the date on which the property was lost or stolen (Sec. 421 (4)). In this case, the transferee (the possessor) must return it to the owner. But the *bona fide* possessor (the possessor who did not know that the property did not belong to the transferor) can claim to collect the amount of expenses incurred in its preservation or maintenance (Sec. 421 (5)). In addition, if the *bona fide* transferee has acquired the stolen or lost property by way of purchase at a public market or auction or bidding made publicly by anybody, the transferee shall not be bound to return the property to the owner unless and until he or she obtains the real value of the property and the fees or amount paid by him/her in the acquisition of the property (Sec. 421 (6)).

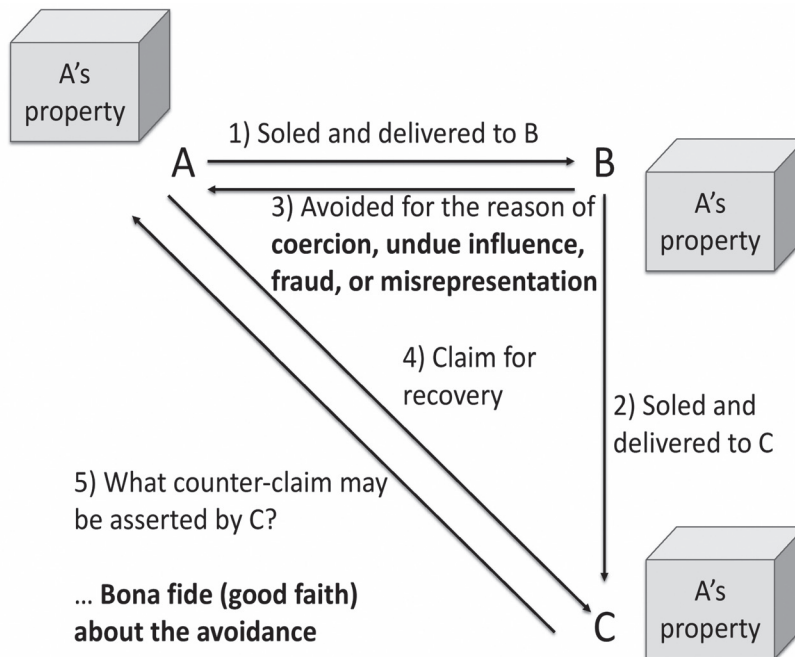


#### 4.4) Protection of ownership (the right of an owner) and a *bona fide* third party of an avoided contract

If any contract is avoided for the reason of coercion, undue influence, fraud or misrepresentation based on Section 518 (1) and (2), both parties can claim the restoration of the property once transferred into the position that would have been had the contract not been concluded (Sec. 518 (3)). For instance, if A sold his/her property to B and delivered it to B, but

<sup>70</sup> However, the transferee may make a counterclaim that the limitation period of the claim shall be six months from the date of knowledge (Sec. 434).

A avoided the contract for the reason of B's fraud, A can claim against B to return the property. However, Section 518 (3) provides that the legal right or interest of a *bona fide* third party shall not be prejudiced merely by the reason of the avoidance. For example, if A sold his/her property to B and delivered it to B, and B sold it to C and delivered it to C. Then A avoided the contract for the reason of B's fraud. A will claim against C to return the property based on ownership of the property. However, C can make a counterclaim that C did not know the contract between A and B was concluded by B's fraud so that C's legal interest of a *bona fide* third party cannot be prejudiced.



## 4. Use of Property

### 4.1 The Necessity of General Provisions on the Use of Property

The NCC stipulates some general provisions on the use of property. There were some corresponding provisions in the old *Muluki Ain* in Part III, though there was no independent chapter on the use of property.

An owner of a property has the right to use the property (Sec. 288 (a)). But no one should infringe on another person's property when he/she use his/her own property. This principle becomes serious when the landowner uses his/her land, because the use of land may easily influence the neighbor's land. Chapter 3 of Part 4 provides certain rules on the use of land between the neighbors.

In addition, there are provisions on the coordination of land ownership between neighbors in Chapter 4 (Secs. 288-295).

## **4.2 Provisions on the Use of Property Affecting Neighbors**

### **1) Source**

Part 4, Chapter 3, from Section 276 to Section 286.

### **2) Contents**

- 276. Prohibition of use, temperance or acquisition o' other's property
- 277. Property to be inviolable
- 278. Safety measures to be adopted
- 279. Prohibition of building a house o' other's land without consent
- 280. To leave land with a house built on it by putting a window or door towards the n'ighbor's land
- 281. Prohibition of channeling water from a house or roof
- 282. Prohibition of installing a safety tank adjoining a n'ighbor's land
- 283. To leave land while digging a well or *kuwa*
- 284. Prohibition of planting trees or plants causing impact
- 285. Compensation to be recovered
- 286. Statute of limitation

### **3) Summary**

The NCC provides some detailed rules on the use of land between the neighbors. When a person does any work on his/her house or land, he/she must adopt safety measures in order to avoid any loss or damage or impact on the neighbor's house or land (Sec. 278 Main text). However, except where a business transaction is carried on by the neighbor, matters such as gas, smells, smoke or noise of general nature emitted or produced from the use of his/her house or land shall not be deemed to have caused loss or damage or impact to the neighbor's house or land (Sec. 278 Proviso). This provision aims to coordinate the use of land between the neighbors.

When a person builds a house on his/her land, he/she must be careful not to infringe on the neighbor's land and house. No building may be constructed on another person's land without the written consent of the landowner (Sec. 279).<sup>71</sup> If the building has a window or a door facing towards the neighbor's land, a certain distance must be kept from the boundary by following the standards specified by the concerned body (Sec. 280).

<sup>71</sup> For more details, see 4.1) *infra*.

No person shall channel the water of his/her house or roof to other's house or land or a public road (Sec. 281). No person shall construct a safety tank by adjoining it to the neighbor's land (Sec. 282 (1)). If a person needs to construct a safety tank on his/her land, he/she must keep a certain distance from the boundary by following the standards specified by the concerned body, except the neighbor's consent is obtained (Sec. 282 (2)). When a person digs a well or a small *kuwa* on his/her land, he/she must keep the distance of at least one meter from the neighbor's land (Sec. 283).

No person shall plant a tree or plants in such a way as to cause impact on other's house, land or property (Sec. 284 (1)).<sup>72</sup>

If any damage is caused to any person from any act or action taken by any person under Chapter 3, the aggrieved person shall be entitled to recover reasonable compensation from the person who has taken such act (Sec. 285). However, he/she can make a lawsuit within six months after the date of knowledge of the commission of such act or action (Sec. 286).

#### **4) Key Points**

##### **4.1) Prohibition of building a house on another person's land without any consent**

No person can build a house on land without obtaining the consent of the landowner, because it infringes on ownership of the land. The written consent of the landowner is required for the construction of the building (Sec. 279 (1)). If a person builds a house on land without obtaining written consent of the landowner, the landowner is entitled to purchase the house on payment of the price that is less by up to 25% of the market price (Sec. 279 (2)). If the landowner does not wish to purchase the house, the house owner may be able to purchase the land, if the owner so consents, on payment of the price that is higher by up to 25% of the market price of the land on which the house is located (Sec. 279 (3)). If both parties do not agree to purchase and sell the house or land, the person who has built the house must demolish the house and take away his/her materials within a period of three months from the date on which the house was built (Sec. 279 (4)). If the house is not demolished within this period, the house shall belong to the landowner (Sec. 279 (5)). These rules seem to aim to maintain the value of the building once constructed on the land without obtaining written consent of the landowner.

##### **4.2) Prohibition of planting trees or plants affecting another person's property**

No person can plant a tree or plants in such a way as to cause any adverse impact on another person's house, land or property (Sec. 284 (1)). If a tree or any other plant planted by a person on his/her land causes any impact by expanding to another person's house, land or property, the person who has planted the tree or plant must cut the branches or roots of the tree or plant so as not to cause any loss or damage to the other person's house, land or property (Sec.

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<sup>72</sup> For more details, see 4.2) *infra*.

284 (2)). If the person who has planted the tree or plant fails to cut off the branches or roots, the affected person is entitled by the provision of law to cut off the branches or roots of the tree or plant for him/herself (Sec. 284 (3)). This is a practical solution for a conflict of this kind.

## **5. Cultivation, Use and Registration of Land**

### **5.1 General Features of the Provisions on Cultivation, Possession and Registration of Land**

Following the previous chapter on the general rules for the use of land, Chapter 4 of Part 4 provides for special rules on the use of land, especially for the use of water on land, because a lot of conflicts may occur concerning the use of water for the purpose of cultivation of the land. In addition, this chapter gives a provision of the registration of land.

Provisions of this chapter were adopted from Chapter 8, Part III of the old *Muluki Ain*.

### **5.2 Provisions on Cultivation, Possession and Registration of Land**

#### **1) Source**

Part 4, Chapter 4, from Section 287 to Section 298.

#### **2) Contents**

- 287. Prohibition of use of other's land
- 288. Requirement to allow land to be used for a ditch
- 289. Prohibition of using all water of a river or stream
- 290. Prohibition of making a new ditch affecting an irrigated field
- 291. Use and allocation of ditch water
- 292. Prohibition of alteration in a ditch without consent
- 293. One who does not make labor or expenses in making a ditch is not allowed to use water
- 294. Construction of ditch or use of water with mutual consent
- 295. Cultivation of land adjacent to riverbank
- 296. Prohibition of registration
- 297. Transmission and registration and deregistration to be effected
- 298. Statute of limitation

#### **3) Summary**

If landowner A needs to construct a ditch for the purpose of cultivating his/her land, he/she may seek the consent of B, the owner of the land on which the ditch is to be constructed (Sec. 288 (1)). In this case, A must provide a substitute land, the amount of the prevailing



price of the land to be used for the construction of the ditch or reasonable compensation for B's damage (Sec. 288 (2)). This provision aims to coordinate the land ownership in order to maximize the utility of the land. So, if the ditch is to be constructed on public or government land, any substitution, payment of the market value of the land or compensation for damages shall not be required (Sec. 288 (3)) because the land shall be used free of charge. In addition, no person can construct a new ditch on land irrigated by a ditch which is already made and in operation in a manner to lessen significantly the volume of water on that land (Sec. 290). In addition, there are detailed provisions on the use of a ditch (Secs. 291- 294).<sup>73</sup>

As for the use of water flow, no owner of land can use the all the water of the river or stream which originates or flows from the land in such a manner as to prevent the landowner downstream from using the water or as to endanger the life of aquatic animals in the river or stream or as to adversely affect the ecological balance (Sec. 289).

The owner of land adjacent to a river may, if the river changes its course, acquire the land resulting from the change of the river and cultivate it (Sec. 295).

With regard to the registration of land, it is carefully provided that the land owned by a person cannot be registered in another person's name (Sec. 296). If the owner of the land dies or ownership of the land is transferred to another person, the person concerned must apply for transfer of registration within 35 days, and if 35 days have elapsed, the Land Revenue Office shall register on behalf of the concerned person and he/she must pay Rs. 100 (Sec. 297).

#### **4) Key Points**

##### **4.1) Use of ditch and allocation of ditch water**

The use of a ditch and allocation of the ditch water shall be determined by mutual agreement between the concerned landowners who use the ditch (Sec. 294). If there is no agreement, the use of the ditch and allocation of the ditch water shall be determined by the provisions of law in consideration of the contribution by the concerned landowners and the customary rules as will be explained below.

A person who has spent labor or money in the construction of a ditch shall have the first priority to the ditch water for the cultivation of land (Sec. 291 (1)). However, in a place where people have been using the water according to the agreed allocation between them from time immemorial, all people are entitled to use the ditch water (Sec. 291 (2)).

If any ditch is constructed only in the land of a person and other persons have also been using the ditch, the owner of land cannot alter the ditch without the consent of the other persons (Sec. 292).

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<sup>73</sup> For the details, see 4.1) *infra*.

If a ditch is newly constructed or repaired, all persons who use the water of the ditch need to make necessary labor or expenses in proportion to their land (Sec. 293 (1)), and a person who does not make labor or expenses shall not be entitled to use the water of the ditch (Sec. 293 (2)).

#### **4.2) Transmission and registration and deregistration of land**

If a person needs to change the registered name of a land on the death of its registration holder or to have registration and deregistration of a land to which the person has a right in any manner, the concerned person shall submit an application to the Land Revenue Office and obtain transmission and registration and deregistration of the matter within thirty-five days from the occurrence of the changes mentioned above (Sec. 297).

If a person submits an application for transmission and registration and deregistration of the matter after the expiry of the time-limit of thirty-five days as explained above, the Land Revenue Office shall execute the transmission and registration of the land in the applicant's name by collecting the fee of one hundred rupees irrespective of the length of time after the expiration date (Sec. 297 (2)).

## **6. Government, Public and Community Properties**

### **6.1 General Features of Government, Public and Community Properties**

After the provisions on private property (Chapter 2 to Chapter 4), Chapter 5 of Part 4 of the NCC stipulates some general provisions on the government, public and community properties. There were some corresponding provisions in the old *Muluki Ain* in Part III, though there was no independent chapter on the government, public and community properties.

Chapter 5 provides the definition of the government, public and community property, and their management, land registration, and protection. It also provides certain prohibitions of possession and cultivation without necessary permission, and building structure on those properties.

### **6.2 Provisions on Government, Public and Community Properties**

#### **1) Source**

Part 4, Chapter 5, from Section 299 to Section 313.

#### **2) Contents**

299. Property deemed to be government property

300. Property deemed to be public property

301. Property deemed to be community property
302. Details to be updated
303. Land ownership registration certificate to be provided
304. Obligation to protect government, public or community properties
305. Prohibition of registration of government, public or community properties in individual's name
306. Prohibition of possession or cultivation of government, public or community land
307. Prohibition of building structure
308. Power to transfer government property
309. Conversion of community property into public property
310. Rewarding a complainant
311. Action to be taken
312. Governmental attorney empowered to file or make a case, petition or appeal
313. Statute of limitation

### **3) Summary**

Chapter 5 of Part 4 defines the government property, public property and community property (Secs. 299, 300 and 301). The Land Revenue Office must prepare the details of the government and public property situated within its district and update them (Sec. 302). The certificate of land ownership registration shall be issued in the name of a government body or public organization for the government and public land, and in the name of a community for the community land (Sec. 303). Each government body, public organization and community has a responsibility to protect its own property (Sec. 304). Government, public and community property cannot be allowed to be registered in an individual's name (Sec. 305 (1)). If it is registered in an individual's name, it is ipso facto void (Sec. 305 (2)).

Government, public and community land cannot be possessed and cultivated by any other person without the respective permission of the Government of Nepal, concerned public organization or community (Sec. 306). No person can build any structure on government, public or community land without the approval of the concerned government body, organization or community (Sec. 307).

Anyone can make a complaint with the concerned body on the matters of registration, or causing registration, of a government, public or community property, or possession, use or cultivation of a government, public or community land or construction work done on that land, that are in contravention of the provisions in Chapter 5 (Sec. 310 (1)). If the complaint is held to be true, the concerned body shall provide the complainant with a reward in a sum which shall

be a half of the fine imposed on the wrongdoer pursuant to Chapter 5 (Sec. 310 (2)).<sup>74</sup>

## **4) Key Points**

### **4.1) Government property**

Government properties are those which are owned and managed subject to the Government of Nepal. They shall include the following properties (Sec. 299): (a) government houses, buildings or lands; (b) roads, paths or railways; (c) forests, or trees or trees, bushes in forests; (d) rivers, rivulets, streams, lakes, ponds and banks thereof; (e) canals, ditches or uncultivated, barren lands; (f) mines or minerals; (g) Himalaya, mountains, rocks, sandy lands, public gardens; (h) any property other than a public, community, trust property or anyone's private property.

The Government of Nepal may transfer any government property to another (government) body or organization with the permission of the owner body or organization (Sec. 308). As a precondition for this, it should be noted that government property is also owned by each government body or organization such as each ministry and that each government body or organization is considered to have legal personality.

If any government land is held in the name of a government body or public organization, the Land Revenue Office shall prepare the land ownership registration certificate of the land in the name of that body or organization and provide it to such body or organization (Sec. 303 (1)).

### **4.2) Public property**

Properties which are used for the public purpose shall be deemed to be public properties (Sec. 300 (1)). The ownership of public property shall vest in the public body or the Government of Nepal (Sec. 300 (2)). Public properties include (Sec. 308 (1)): (a) houses, lands, sewerage or roads having been used since ancient times; (b) wells, water conduits, shores, ponds and banks thereof; (c) exits for chattels, pasture lands, *kharka*, graveyards, *chihan*, *samadhithal*, *kabristan* and lands where these are located; (d) inns, *pauwas*, *dewals*, religious meditation sites, memorials, *temples*, *shrines*, *chaitya*, *monasteries*, *stupas*, *churches*, *chowk*, *dawali*, *chautari* or lands where these are located; (e) lands where fairs, markets and public entertainment or sports sites are located; (f) private property provided by any person for public purposes; (g) such other property as prescribed to be public property by the Government of Nepal by a notification in the Nepal Gazette.

### **4.3) Community property**

Any land held by a community for its use, any structure built on such land or other property owned by the community shall be deemed to be community property (Sec. 301).

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<sup>74</sup> See Sec. 305 (5) and Sec. 306 (4).

If any land is available to a community in accordance with law, the Land Revenue Office shall prepare the land ownership registration certificate of the land “in the name of that community” and provide it to that community (Sec. 303 (2)). This provision shows that each community has the legal personality to own and register the land in each community’s name. It is the great advantage of the NCC to recognize the legal personality of a community and its community property, and to register the community property in the name of each community.

If a community which holds a community property does not use it, the community may, with the consent of all heads of households in the community, apply to the Land Revenue Office to have the community property incorporated into public property by following the prescribed procedure (Sec. 309 (1)): the community must submit an application bearing the signature or thumb impression of each of the main persons of all families of that community, setting out that it is not necessary to use the property as a community property for its purpose, to the concerned Land Revenue Office, and the concerned Land Revenue Officer may make necessary inquiry into the matter and convert the property into public property. The concerned Land Revenue Officer shall make necessary entries in the records maintained in his/her office and give information thereof to the concerned district level administrative office and Local Level (Sec. 309 (2)).

## **7. Trust Relations**

### **7.1 General Features of Trust**

Chapter 6, Part 4 of the NCC provides for trust relations. It succeeds the provisions of Chapter 7, Part III of the old *Muluki Ain* with some necessary revisions.

### **7.2 Provisions on Trust**

#### **1) Source**

Part 4, Chapter 6, from Section 314 to Section 351.

#### **2) Contents**

- 314. Trust deemed to be established
- 315. Trust may be public or private
- 316. Application to be made for establishment of trust
- 317. Details to be set out in a memorandum of incorporation
- 318. Trust to be registered
- 319. Power to refuse registration of trust

320. Transfer of property for incorporation of trust
321. Dissolution of trust on failure of transfer of property
322. Operation and management of trust property according to the memorandum of incorporation
323. Duty to operate and manage trust property properly
324. Trustee to be appointed
325. Disqualification of trustee
326. Number of Trustees
327. Body corporate eligible to be trustee
328. Provisions relating to vacancy in office of trustee
329. Specification of roll of succession of trustee
330. Requirement to perform obligation of trustee in special circumstance
331. Requirement to operate trust by consensus
332. Carrying out object of trust
333. Maintaining records of trust property
334. Protection of trust property
335. Prohibition of possession of trust property to prejudice benefit of beneficiary
336. Duty to prevent loss to trust property
337. Maintaining accounts of trust
338. Breach of trust
339. Deed of trust property to remain with trustee
340. Entitlement to reimbursement from trust property
341. Other powers, duties and liabilities deemed to be vested with trustee
342. Acts not to be committed by trustee
343. Give direction to transfer trust property
344. Power to relinquish benefit of trust property
345. Duty to maintain ownership of trust property
346. Alteration to the object of trust
347. Trust property not to be counted
348. Consequence of avoidance of trust
349. Appeal may be made
350. Not affecting other trust
351. Statute of limitation

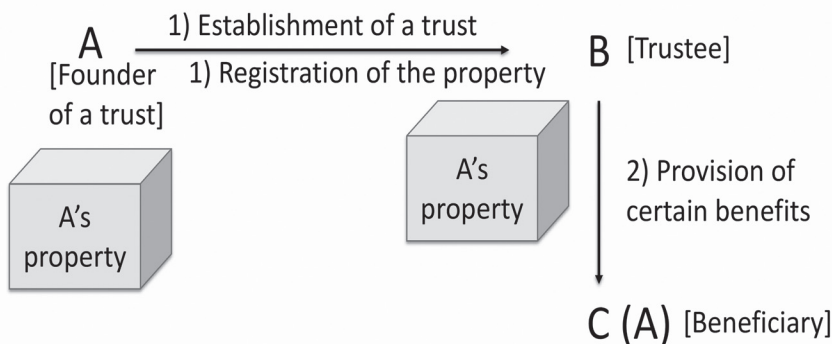
### 3) Summary

A trust is set up so that property (rights) owned by one person A (the founder of a trust, a trustor), may be managed and operated as necessary by another person B (a trustee), for the recipient of benefit C (a beneficiary) (Sec. 314). As mentioned above, a trust existed under the old *Muluki Ain*.

Not only individuals, but also organizations, the general public, corporations, and other associations are included as beneficiaries as long as they receive benefits from the trust property (Sec. 314 Explanation).

There are two types of trusts: public trusts and private trusts (Sec. 315 (1)). Public trusts are intended to contribute to the promotion of public interest, such as the establishment, operation and use of funds for infrastructure and development projects for economic development (Sec. 315 (2)). On the other hand, a trust that is intended to provide benefits, convenience, facilities, etc. to a specific individual or group is considered to be a private trust (Sec. 315 (3)). If a trust is established to achieve both public and private purposes, it is deemed to be a public trust (Sec. 315 (4)).

There are important differences between public and private trusts in several respects. For example, in the case of a private trust, unless otherwise provided in the instrument of a trust, a single beneficiary who has the requisite capacity to enter into the contract, or several beneficiaries who all become competent and all agree, may direct the trustee to transfer the trust property. In the case of a private trust, the beneficiaries may direct the trustee to transfer the trust property when the beneficiaries have the necessary capacity, or when all of the beneficiaries become competent and all of them agree, and the trustee must transfer the ownership of the trust property accordingly (Sec. 343). In addition, in the case of a private trust, the beneficiaries may renounce all or part of the benefits when they have acquired the necessary capacity to enter into the contract, but the trust is deemed to be terminated when all the beneficiaries have renounced all the benefits (Sec. 344).



## **4) Key Points**

### **4.1) Establishment of trust**

A trust is created by submitting to the registrar a written application containing the prescribed particulars, such as details of the contents of the trust property and its value, details of the beneficiaries, the nature of the beneficiary, and the conditions and time limits thereof. At that time, the applicant is also required to submit the trust act document, the name, photograph and consent deed of the trustee, a copy of the document proving the identity of the trustee, and a receipt to the effect that the registration fee for the trust has been paid (Sec. 316 (1) and (2)). Of these, the trust act document must contain the name and address of the trustee, the subject matter and nature of the trust property, the name, address and occupation of the trustee, details of the beneficiaries, how the trust property is to be used, details of the trustee's duties and when he or she is to receive remuneration, the expiration date and other termination events of the trust and their consequences, and the method of operation, management and audit of the trust (Sec. 316 (1) and (2), Sec. 317).

A trust can also be created by a will in accordance with prescribed procedures (Sec. 316 (3)).

A foreign person or a foreign corporation may also establish a trust. In such a case, at least one of the trustees must have permanent residence in Nepal (Sec. 316 (4)).

When an application for registration of a trust is filed, the registrar will ask the necessary questions about the purpose of the trust and the details of the trust property, and if he/she finds it reasonable, he/she will register the trust and issue a certificate of registration of the trust within 35 days of the filing of the application. A trust is established by registration (Sec. 318 (1) and (2)). However, a private trust can operate without registration (Sec. 318 (3)). On the other hand, the registrar may refuse to register the trust if the application is incomplete, the name of the trust is the same as or similar to that of a trust already registered, or the purpose of the trust is inappropriate in the public interest, illegal, or vague and not feasible (Sec. 319).

### **4.2) Management of trust property**

When a trust is established, the trustor must transfer the trust property to the trustee within three months (Sec. 320 (1)). If the trust property is not transferred within this period, the trust is deemed to be terminated and the registration is no longer effective (Sec. 321).

The trustee is appointed by the trustor, unless otherwise provided in the trust act document. If the trustee is not designated in the trust act document or is not appointed by the trustor and cannot be determined, the trustor himself is deemed to be the trustee (Sec. 324 (2) and (3)). The minimum number of trustees is one and the maximum is seven (Sec. 326). A legal person can also be a trustee (Sec. 327).



There are various restrictions on the powers of trustees. For example, a trustee may not sell or encumber all or part of the real estate in trust without the prior consent of the competent registrar, unless otherwise provided in the trust instrument (Sec. 322). In addition, income acquired from trust property that is not immediately needed to achieve the purpose of the trust may be used for investment to achieve the purpose of the trust, unless otherwise provided in the trust act document. In such cases, at least 25% of the funds must be used for the purchase of Nepalese government bonds, unless otherwise provided in the trust act documents. The maximum deposit in a commercial bank's time deposit account must be limited to 25%. Further, deposits in time deposit accounts of development banks are restricted to a maximum of 10%, purchases of ordinary shares of commercial banks to a maximum of 5%, deposits in time deposit accounts of loan companies to a maximum of 10%, and purchases of ordinary shares of public limited companies to a maximum of 5% (Sec. 323 (4)).

If a trustee breaches the performance of his duty and causes loss to the beneficiaries, he shall make good the loss. If there is more than one trustee who breaches a duty, they are jointly and severally liable (not that multiple trustees are immediately jointly and severally liable) (Sec. 338 (3) and (4)).

In the event of the absence of a trustee (see Sec. 328), if the trust act document does not contain a list of successors to the trustee, the eldest son, daughter-in-law or daughter succeeds to the position of trustee upon the death of the trustee, in that order. If this person is not a competent person, his or her guardian shall perform the duties of trustee on his or her behalf (Sec. 329).

The trust property is not considered as the trustee's property for taxation purposes (Sec. 347) but is effectively treated as the beneficiary's property (Sec. 345).

With respect to the trust property, for example, if the trustee commits embezzlement, fraud, etc., and the beneficiaries pursue the liability, the beneficiaries' rights are not subject to the statute of limitations (Sec. 351). In such a way, the heavy responsibility of the trustee is maintained.

## **8. Usufruct**

### **8.1 General Features of Usufruct**

Chapter 7, Part 4 of the NCC is newly introduced to regulate the right of usufruct. There was no corresponding chapter and provisions in the old *Muluki Ain*. The usufruct is a right to use a thing which is owned by another person and enjoy fruits from the thing as if he/she were the owner of the thing (Sec. 355 (1)). It means that the usufructuary may also lease or encumber the object of usufruct (Sec. 358).

## **8.2 Provisions on Usufruct**

### **1) Source**

Part 4, Chapter 7, from Section 352 to Section 367 provides for usufruct.

### **2) Contents**

- 352. Usufruct deemed to be constituted
- 353. Usufruct to be effective
- 354. Deed to be executed
- 355. Entitlement of usufructuary to enjoy property as if it belonged to him or her
- 356. Property which usufructuary cannot enjoy
- 357. Prohibition of alteration in structure of property without consent
- 358. Power to rent, lease or mortgage property under provision of usufruct
- 359. Duty to maintain and care for property under the provision of usufruct
- 360. Prohibition of causing damage to property obtained under the provision of usufruct
- 361. Usufructuary to bear tax or fee
- 362. Information of claim or interference by anyone to be given to owner
- 363. Validity period of the provision of usufruct
- 364. Usufruct may be canceled
- 365. Power to return property by usufructuary
- 366. Usufruct deemed to be extinguished
- 367. Statute of limitation

### **3) Summary**

The NCC has created a chapter on usufruct. This is the introduction of a new system that did not exist in the previous law. The right of usufruct aims to provide a more stable and longer use of the property by making profit from it. It will be interesting to see what kind of demand there is for usufruct in Nepalese society and how it will be used and spread when the Civil Code is enforced and this system is introduced in the future.

When a person gives free a property in which he or she has the 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 constituted (Sec. 352 (1)). Newly adopted in Part 4, Chapter 8 (Secs. 352-367). Usufruct established in immovable Property should be registered (Sec. 464 (1) (i)).

## **4) Key Points**

### **4.1) Establishment of usufruct**

A usufruct is established by contract, whereby the owner of a piece of property, A, allows another person, B, to obtain the fruits, benefits, income, or profits from the property (Secs. 352 and 353).

If a usufruct is created on real estate, a deed must be prepared and registered (Sec. 354 (1)). When a usufruct is created on family property, the consent of the family members must be obtained (Sec. 354 (2)).

### **4.2) Effects of usufruct**

The usufructuary B may use the object of usufruct and enjoy the fruits and other benefits as if he/she were the owner. However, depending on the nature of the object, or without the prior consent of the owner, the usufructuary may not use the object in a way that alters or damages itself (Sec. 357).

The usufructuary may also lease or encumber the object of usufruct. For this purpose, a deed must be prepared and registered. However, if the rent does not exceed Rs. 1,000 per month, no deed is required to be executed (Sec. 358). In addition, the usufructuary must notify the owner of any lease or encumbrance. This also means that it is only necessary to notify the owner and it is not necessary to obtain his/her consent. This shows the strength of the usufruct. Furthermore, no lease or encumbrance can be made that will last beyond the term of validity of the usufruct (Sec. 358 (1)). In addition, the deed of lease or encumbrance must indicate that the subject property is the property subject to the usufruct (Sec. 358 (2)). Any lease or creation of security contrary to this is invalid (Sec. 358 (3)).

The holder of a usufruct has the same duty of care as the owner (Sec. 359 (1)). The usufructuary must also bear the costs necessary for the maintenance of the property (Sec. 359 (3)). The property tax on the object of usufruct shall be paid by the owner, but the annual tax on the income must be paid by the usufructuary (Sec. 361).

Furthermore, the usufructuary must ensure that the subject property is not lost or damaged. In the event of loss or damage, the usufructuary is liable for compensation, except in the case of natural disasters (Sec. 360). If a third party asserts a right to the subject property or infringes it, the owner must be notified within 15 days of the assertion or infringement (Sec. 362).

If the usufructuary causes damage to the object of usufruct or does not use it as agreed, the owner of the object may rescind the creation of the usufruct (Sec. 364).

On the other hand, if the usufructuary no longer needs the usufruct, the usufructuary may waive the usufruct and return the property to the owner by notifying the owner at least 45 days in advance (Sec. 365).

#### **4.3) Termination of usufruct**

The duration of the usufruct may be determined by contract. But in the absence of such a provision of the contract, the usufruct shall terminate upon the death of the usufructuary if the usufructuary is a natural person, or upon the expiration of 49 years after the usufruct has come into effect, whichever comes first (Sec. 363 (2)(a)). If the usufructuary is a legal entity, the usufruct shall terminate upon the earlier of the dissolution of the legal entity or the expiration of 29 years after the usufruct came into effect (Sec. 363 (2) (b)). The usufruct of a legal entity shall also end if the legal entity is terminated, becomes insolvent, or its registration was revoked, by which the liquidation process shall start.<sup>75</sup>

If there are more than one usufructuaries, the property in usufruct shall devolve on the owner in proportion to the share of the usufructuary who died or dissolved, except as otherwise stipulated in the contract (Sec. 363 (3)).

## **9. Servitudes**

### **9.1 General Features of Servitude**

Chapter 8, Part 4 of the NCC is newly introduced to regulate the servitude. There was no corresponding chapter and provisions in the old *Muluki Ain*.

### **9.2 Provisions of Servitude**

#### **1) Source**

Part 4, Chapter 8, from Section 368 to Section 382 provides for servitudes.

#### **2) Contents**

- 368. Servitude to be deemed
- 369. Use of provision of servitude to be allowed
- 370. Servitude not to be adversely affected by transfer of immovable property
- 371. To allow enjoyment or use
- 372. Use of neighbor's house or land at time of disaster
- 373. Acquisition of servitude of passage
- 374. Prohibition of transfer of house or land without provision of passage or exit

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<sup>75</sup> However, Explanation to 363 (2) (b) provides “For the purposes of this Section, the term ‘dissolution’ includes the termination, liquidation, revocation of registration or insolvency of a legal person”.

- 375. Power to extend basic services
- 376. Power to use river or stream or river or stream bank
- 377. Power to use exit road
- 378. Prohibition of preventing natural flow of water
- 379. Power to use stream, river or pond water
- 380. Requirement to allow passage or exit for farming
- 381. Compensation to be paid
- 382. Statute of limitation

### 3) Summary

The concept of servitude did not exist in the old *Muluki Ain*. It is introduced for the first time by the Civil Code. The owner of a property may use another person's immovable property (a servient property) so as to increase the value of that property. However, a system that is substantially equivalent to servitude is partly provided in the current law on *sandhi sarpan*. The easement that the draft Civil Code intends to introduce is the right of the owner of real estate to use all or part of another's real estate for the purpose of increasing the benefit of the real estate. A servitude may be created by contract or recognized by custom or law of the locality where the property is located (Sec. 368). The right of use remains unaffected by the transfer or division of the serviced real estate (Sec. 370 (1) and (2)).

The rights of servitude provided for in Part 4, Chapter 8 include so-called statutory rights of servitude. It is the right to use another person's land or building in order to save victims in case of emergency (Sec. 372). For some landowners, if access to a public road is blocked by a natural disaster, the right of passage over another person's land to a public road is recognized in a reasonable place and to a reasonable extent (Sec. 373). When the division or transfer of land results in land that does not lead to a public road, a pathway must be secured in advance (Sec. 374 (1)).

In addition, if it is necessary to provide basic services, such as sewerage, water supply, electric lines, gas pipes, or telephone lines on the land of one person, that person has the right to use the land of another person and to install these facilities. In such a case, the owner of the essential property shall be obliged to pay reasonable compensation to the owner of the serviced property (Sec. 375).

There are other provisions on rights of passage (Secs. 377 and 380, which allow passage by livestock as well as by humans), and provisions on the use of water (Secs. 376 and 377).

## 4) Key Points

### 4.1) The concept of servitude

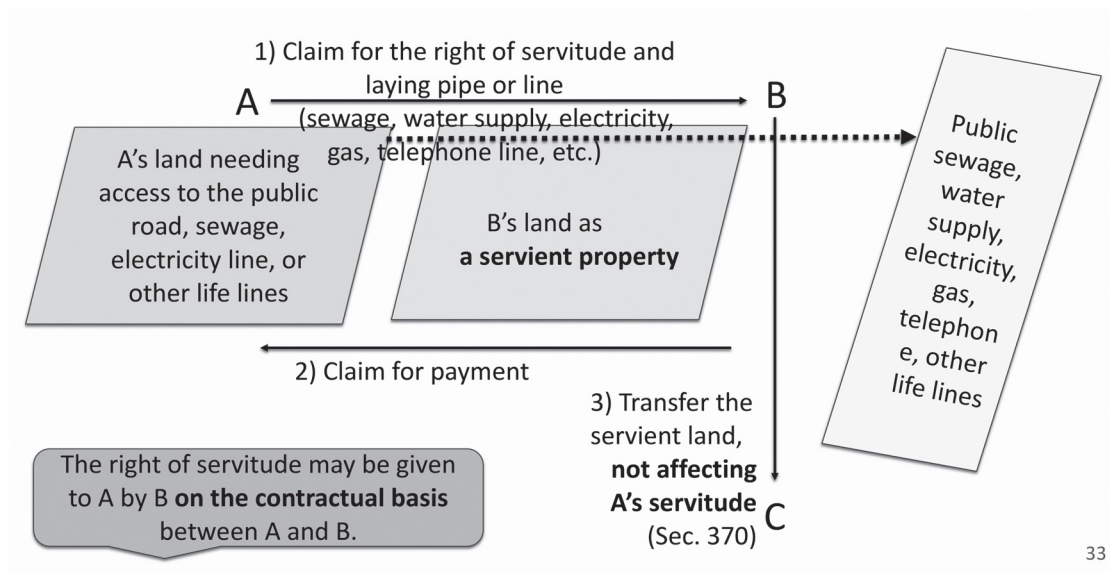
The owner of a property may use another person's immovable property (a servient property) so as to increase the value of that property (Cf. Sec. 288)

The provisions on servitude are newly adopted in Part 4, Chapter 8 (Secs. 368-382). Servitude should be registered.

### 4.2) Example

If it is not possible to provide basic services, such as sewerage, water supply, electricity, gas and telephone service to the house of a person through his or her own land or public, government or community land, the person shall be entitled to lay a pipe or line in the neighbor's land in such manner as not to cause any loss or damage to the owner of such land (Sec. 375).

Reasonable compensation shall be paid to the owner of the servient immovable property (Sec. 381).



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## **10. House Rent**

### **10.1 General Features of House Rent**

Provisions of house rent were not provided in the *Muluki Ain*.

The NCC incorporates provisions on the house rent into Part 4 Law Relating to Property (in its Chapter 9). There is another chapter on provisions relating to the lease contract in Part 5, Provisions Relating to Contracts and Other Liabilities (in its Chapter 12). The reason for the existence of the independent chapter on the house rent from the chapter on the lease in general implies the importance of the rights of tenants and house owners as property rights.

### **10.2 Provisions on House Rent**

#### **1) Source**

Part4, Chapter 9, from Section 383 to Section 405 provides for house rent.

#### **2) Contents**

- 383. House deemed to be rented
- 384. Prohibition of renting an unsafe house
- 385. Period of house rent
- 386. Agreement to be concluded while renting
- 387. Details of house to be provided
- 388. Preparation of description of goods or chattels
- 389. Obligations of house owner
- 390. Obligations of tenant
- 391. Mode and procedure of payment of rent
- 392. Obligation to pay tax and other charges
- 393. Insurance of house to be procured
- 394. Repair and maintenance of house rented
- 395. Subletting house rented to other person
- 396. Prohibition of altering structure without consent
- 397. Prohibition of using house contrary to agreement
- 398. Alteration to agreement
- 399. Power to inspect
- 400. Leaving rented house
- 401. Power to evict tenant

- 402. House rent agreement deemed to be terminated
- 403. Duty to hand over goods or chattels in good condition
- 404. Power to vacate house
- 405. Statute of limitation

### **3) Summary**

Chapter 9 provides for the formation of house rent, the rights and duties of the house owner and the tenant, and other effects of house rent, the termination of house rent, and restoration of a rented house and other properties. Provisions of house rent shall apply not only to the rent of an independent house, but also to a unit or a room of the house (Sec. 383 Explanation).

### **4) Key Points**

#### **4.1) Formation of House Rent**

In order to rent a house, the owner has to agree with a tenant in writing on matters specified in Section 386 (1). The agreement must be signed by at least two witnesses of each side and a copy of the agreement shall be retained by the house owner and the tenant. The tenant's photograph must be affixed to the agreement (Sec. 386 (3)). The agreement in writing may be registered, and if it is once registered, the alteration in the house rent agreement may be made by the mutual consent of the other party by submitting an application to alter the registered agreement to the concerned body (registration office) (Sec. 398).

However, if the monthly rent does not exceed Rs. 100,000, the agreement between the house owner and tenant does not need to be made in writing (Sec. 386 (2)).

#### **4.2) Duration of House Rent**

The duration of house rent shall be fixed by the agreement. But, it cannot exceed more than five years (Sec. 385 (1) Main text), though it can be renewed as many times as the house owner and the tenant agree (Sec. 385 (2)). However, if the house is rented for a commercial purpose, it shall be fixed by the agreement (Sec. 385 (1) Proviso).

#### **4.3) Rights and duties of the house owner**

The owner of a house to be rented out to a tenant shall have duties to protect the tenant. The house owner cannot rent out a house if the house is not safe for human habitation from health and security perspectives (Sec. 384 (1)), and, if the house is for non-residential purposes, such as a warehouse, livestock farming, storage, cold storage, etc., he/she must specify the quality of standards of the house to be provided for the tenant in the house rent agreement (Sec. 384 (2)). At the time of agreement, the house owner must disclose any weakness or fault which exists in the structure of the house to the tenant (Sec. 387).



The main obligation of the house owner is to allow the tenant to use the house in accordance with the agreement (Sec. 389 (a)). Subsequently, he/she must arrange for water and electricity supply, sewerage and sanitation in the rented house except as otherwise provided for in the agreement (Sec. 389 (b)) and to prevent the tenant from insecurity, harassment or unrest from other persons dwelling in that house (Sec. 389 (c)).

Except as otherwise stipulated in the agreement, the house owner has an obligation to pay the tax and other charges to be levied by law in relation to the house rented out (Sec. 392 (1)).

However, it shall be the tenant's obligation to repair and maintain the house except as otherwise provided in the agreement (Sec. 394 (1)).<sup>76</sup> Relating to this obligation of the tenant, the house owner may inspect the rented house at any time by an advance notice to the tenant (Sec. 399 (1)).

The house owner shall have the right to evict the tenant for certain reasons as provided in Sec. 401 (1) even before the expiration of the duration period. It includes the case of the house owner needing the house for himself or herself (Sec. 401 (1) (c)). In this case, the house owner must give a notice in writing to the tenant in advance of at least 35 days (Sec. 401 (2)), and the house owner is not entitled to rent out such a house to another person until three months have passed without he/she having used it for his/herself (Sec. 401 (3)). If the house-owner intends to rent out the house to another person within three months without having used it for his/herself and the previous tenant desires to rent the house, he/she shall get priority (Sec. 401 (4)).

#### **4.4) Rights and duties of the tenant**

The major obligation of the tenant is to pay the rent to the house owner for the period specified in the agreement (Sec. 390 (a)). If the agreement does not provide for any mode and procedure of the payment, the tenant must pay the rent to the house owner within seven days after the end of each month (Sec. 391 (2)).

In addition, the tenant has obligations to maintain sanitation in, take care of, protect and safeguard the rented house properly and reasonably, "as if it were his or her own" (Sec. 390 (b))<sup>77</sup>, not to commit any act such as causing unrest, harassment or insecurity to the other dwellers in the house or neighbors (Sec. 390 (c)), and to abide by provisions in the agreement (Sec. 390 (d)).

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76 It is different from the corresponding provisions in other civil codes such as Sec. 606 (1) Main text JCC, which provides that it shall be the lessor's duty to repair the leased object to be used in accordance with the leasing contract.

77 It is a different way of specifying the care standard to be paid by the tenant from the corresponding provisions in other civil codes such as Sec. 400 JCC, which provides that the tenant who has a duty to return the rented property to the owner must take custody of the property "with due care of a prudent manager," which shall be regarded higher than "care identical to that he/she exercises for his/her own property" (for instance, Sec. 657 JCC for the duty of care to be paid by the gratuitous depositary).

The tenant has an obligation to repair and maintain the rented house except as otherwise provided in the agreement (Sec. 394 (1)). If the agreement provides that the house owner has an obligation to repair and maintain the rented house and it becomes necessary to carry out any repair or maintenance of the house, the tenant must give a notice in writing to the house owner within a reasonable time (Sec. 394 (2)). If the house owner fails to repair or maintain the rented house in spite of the notice given by the tenant, the tenant can repair or maintain the house (Sec. 394 (3)). In this case, the tenant must give the written information of the estimated cost to the house owner fifteen days in advance (Sec. 394 (5)). The tenant may deduct the amount of expense for the repair or maintenance from the rent to be paid to the house owner (Sec. 394 (4)).

The tenant must not demolish, remove or disorder any structure of, or add any structure to, the rented house or otherwise alter it without the house owner's consent in writing, except as otherwise provided in the agreement (Sec. 396 (1)).

The tenant cannot use the rented house for any purpose other than that for which he/she has rented it without prior consent of the house owner (Sec. 397).

The tenant who rents a house for industrial or business purpose, which means the operation of any industry or carrying on a business or trade by having a departmental store or one or more than one shop, must procure insurance for the house for its security (Sec. 393 (1)). If the tenant fails to procure insurance for the house and the house is damaged by any causes which cannot be attributable to the tenant, such as a disaster, unrest, riot or fire, the tenant must be liable for the damage (Sec. 393 (2)).

The tenant can leave the rented house prior to the expiration of the duration period, if the tenant no longer needs the house (Sec. 400 (1) (b)). In this case, the tenant must give a notice in writing to the house owner at least 35 days in advance except as otherwise provided in the agreement (Sec. 400 (2)). If the tenant leaves the house without giving a notice in advance, the house owner can deduct the rent for that period from the rent which was paid in advance or recover the same amount from the tenant (Sec. 400 (3)).

#### **4.5) Subletting the rented house to another person**

The tenant may sublet the whole or any portion of the rented house to another person, if the house owner agrees to it (Sec. 395 (1)). In this case, the tenant must give information in writing of the name and address of the sub-tenant to the house owner within 15 days after subletting (Sec. 395 (2)).

The sub-tenant must abide by all such terms and provisions as required to be abided by the tenant according to provisions in Chapter 9 (Sec. 395 (4)). If the sub-tenant fails to act in accordance with those terms, the tenant and the house owner can evict the sub-tenant from the house at any time (Secs. 395 (5) and 401 (1) (h)).

## 4.6) Termination of the House Rent

The house rent agreement shall be terminated if the tenant leaves the house as provided by Section 400, if the house owner exercised the right to evict the tenant from the house pursuant to Section 401, if the house owner and the tenant canceled the agreement by mutual consent, or if the duration period of house rent has expired (Sec. 402).

At the termination of the house rent, the tenant must count the goods or chattels in his/her custody, clean or color the house, if required, and hand over the same in good condition to the house owner (Sec. 403 (1)). However, the tenant shall not be bound to reimburse for any goods or chattels which depreciate or ruin in the course of daily use or to pay the price for such goods or chattels (Sec. 403 (3)).

If the tenant disappears without paying the rent for three months or more without notice and the tenant is not found despite a public notice or correspondence sent to his or her address, or the tenant or his/her successor or the agent does not appear, the house owner shall submit an application to vacate the house to the concerned ward office of the Local Level (Sec. 404 (1)). In this case, the concerned ward office must make a public notice requiring the tenant to appear within 15 days (Sec. 404 (2)). If the tenant does not appear within this period, the concerned ward office can open and vacate the rented house and must keep the goods in its own or other's custody (Sec. 404 (4)). If the tenant returns or sends his/her agent within six months, the concerned ward office can collect the expenses for keeping the goods from him/her in exchange of returning them to him/her (Sec. 404 (5)).

However, if the concerned ward office of the Local Level does not take any action even within one month of the application submitted by the house owner, the house owner can submit an application to the concerned ward office and the nearby police office, and execute a deed and open the house if witnessed by a police employee and at least two local persons, and hand over the custody of the tenant's goods to the police (Sec. 404 (6)).

## 11. Donations and Gifts

### 11.1 General Features of Donations and Gifts

Chapter 10 , Part 4 of the NCC provides for donations and gifts. It follows Chapter 19, Part III of the *Muluki Ain*. It implies that donations and gifts have played an important role in society. It is a characteristic of the NCC that it incorporates the chapter on provisions for donations and gifts in Part 4 Law Relating Property, rather than in Part 5 Provisions Relating to Contracts and Other Obligations.<sup>78</sup>

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<sup>78</sup> In other civil codes, donations and gifts seem to be provided as a type of contract. For instance, Sec. 549 to Sec. 554 JCC on the contract of gift.

## **11.2 Provisions on Donations and Gift**

### **1) Source**

Part 4, Chapter 10, from Section 406 to Section 412 provides for donations and gifts.

### **2) Contents**

- 406. Donation or gift deemed to be effected
- 407. Property may be donated by pronouncement
- 408. Voidance of donation or gift
- 409. Donation or gift to be voidable
- 410. Power to amend or revoke deed of gift with testament
- 411. Not to obtain property under deed of gift with testament
- 412. Statute of limitation

### **3) Summary**

It is a characteristic of the NCC that it defines donation and gift separately. A donation can be recognized when a person grants free of cost a property in which the person has right and ownership to another person “for any religious, social, public or community purpose” (Sec. 406 (1)). It implies that it cannot be made to an heir (cf. Draft NCC Sec. 424(1)). A gift shall be recognized when a person grants free of cost a property in which the person has right and ownership to another person “as a reward, prize or tip 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” (Sec. 406 (2)). It can be made to the giver’s heirs.

A donation and a gift may become effective immediately or after a certain period or after the death of a donor or a giver (Sec. 406 (3)). If a donation or a gift becomes effective only after the death of the donor or the giver, he/she shall be regarded as having executed a testamentary donation or a testamentary gift (Sec. 406 (3)).

Chapter 10 provides the definition, the validity of a donation and a gift, and the amendment and revocation of the testamentary gift.

### **4) Key points**

#### **4.1) Formation of donations and gifts**

Anyone who has a legal competency can make a donation and a gift of a property which he/she owns to another person. However, the donation and the gift must be made by executing a deed except for any movable property or cash amounting up to Rs. 100,000 (Sec. 414 (4) (a)).

As for a donation, a person may donate a certain amount of property for any specific purpose by making a pronouncement in writing or publicly in a public function organized for that purpose (Sec. 407 Main text). In this case, however, no lawsuit may be made even if the donor does not transfer the property as he/she pronounced to donate (Sec. 407 Proviso).

#### **4.2) Voidness of donations and gifts**

A donation and a gift shall be void if the person who is entitled to the donation or gift does not accept the donated or gifted property (Sec. 408 (a)). It means that the acceptance of the donee or receiver is necessary for the donation or gift to be valid, even though the donation or gift is not a contract in the NCC.

If a testamentary donation or gift is made, and a donee or receiver dies (or is dissolved in the case of a legal person) before the donor or giver dies, the donation or gift shall be void (Sec. 408 (b)).

A donation or gift can be made for an unborn baby. However, if the baby is not born alive, then the donation or gift shall be void (Sec. 408 (c)).

If the donated or gifted property is destroyed and extinguished before the donation or gift becomes effective, it shall be void (Sec. 408 (d)).

In addition, no guardian or curator may donate or gift any property belonging to the person under his/her guardianship or curatorship to any person (Sec. 423). In this case, the donation or gift can be interpreted to be void for the purpose of this provision because the donor or giver cannot make the donation or gift valid as a case of sale.<sup>79</sup>

#### **4.3) Avoidance of donations and gifts**

A donation or gift can be avoided in the following cases (Sec. 409):

- (a) if the donor or giver does not have ownership of the donated or gifted property;
- (b) if the donor or giver does not obtain the necessary consent of another person in accordance with law;
- (c) if the donor or giver is an incompetent or quasi-competent person; and
- (d) if the donation or gift is made without fulfilling the legal requirements.

It should be noted that the donation or gift of another person's property shall not be ipso facto void (as is provided by Section 408) but shall be avoidable. The donee or receiver may claim against the donor or giver to acquire ownership from the owner and transfer the property. In this case, it should be made clear who has the right to avoid the donation or gift.

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<sup>79</sup> According to Sec. 415, a guardian or curator may sell and transfer a property of a person under his/her guardianship or curatorship for the interests and protection of the person (Sec. 415 (1)). However, no immovable property can be sold without permission of the court (Sec. 415 (2)).

#### **4.4) Amendment and revocation of testamentary gift**

As for the testamentary gift (not for the testamentary donation), the giver may amend the terms of, or revoke, the deed of testamentary gift at any time by making an application in person before the concerned authority and executing a separate deed to amend or revoke the previous deed (Sec. 410 (1), (2)). If the earlier deed of testamentary gift has been executed before it was amended or revoked by the giver, it shall be valid (Sec. 410 (4), (5)).

If the receiver of a testamentary gift is convicted for having committed any criminal offense against the giver before the deed of testamentary gift becomes effective, the receiver shall not be entitled to obtain the property by that deed (Sec. 411). It means that the giver may revoke the testamentary gift or his/her successors may refuse the execution of the testamentary gift against the receiver who has been convicted for having committed a criminal offense against the receiver.

#### **4.5) Remedy for the donee and the receiver**

If a person who may be entitled to a donation or who is entitled to a donation or gift is aggrieved from being unable to use the property for any reason under Chapter 11 of Part 4, such as the case of the donation or gift of another person's property, a stolen property or a property which had already been transferred to another person, the donee or receiver shall be entitled to receive reasonable compensation from the donor or giver (Sec. 424 (4)). However, if the donee or receiver knew that the property was another person's property or a stolen property, or it was already transferred to another person shall not be entitled to the reasonable compensation to recover the loss and damage as referred to in Section 424 (1), (3) and (4) (Sec. 424 (5)). It shows that a donee or receiver who acts in bad faith cannot be protected by law.

## **12. Transfer and Acquisition of Property Rights**

### **12.1 General Features of Transfer and Acquisition of Property Rights**

The NCC stipulates general rules on the transfer and acquisition of property rights in Chapter 11 of Part 4, before the chapters on mortgage and pre-emption of immovable property and registration of deeds. It clarifies the requirements and the process of transfer and acquisition of property rights to be caused by donation, gift, sale or exchange.

### **12.2 Provisions on Transfer and Acquisition of Property Rights**

#### **1) Source**

Part 4, Chapter 11, from Section 413 to Section 434 provides for transfer and acquisition of property. It followed provisions of the Lands Act 1964 concerned with the transfer and acquisition of land.

## **2) Contents**

- 413. Property deemed to be transferred
- 414. Property may be transferred
- 415. Power of guardian or curator to sell property
- 416. Ownership devolving on transferee of property
- 417. Power to transfer private property
- 418. Joint property may be sold by way of sale
- 419. Prohibition of transferring property in common without obtaining consent
- 420. Property in common may be sold for household purpose
- 421. Prohibition of transferring other's property
- 422. Prohibition of transferring property in duplication
- 423. Donation or gift incapable of being effected by guardian or curator
- 424. Entitlement to amount or compensation in event of deprivation of enjoyment of property
- 425. Right in property may be transferred by attorney
- 426. Procedure to be followed by body corporate while purchasing or transferring property
- 427. Property may be purchased or obtained by other person on one's behalf
- 428. Property may be purchased or obtained in the name of incompetent or quasi-competent person
- 429. Registration and deregistration of property right which is transferred in testament
- 430. No claim shall be recognized for the purchaser due to the damage, destruction or low quality of the purchased property
- 431. Property may be exchanged
- 432. Restriction on transfer of immovable property to foreigner
- 433. Foreigner to transfer partition share or inheritance, if any obtained
- 434. Statute of limitation

## **3) Summary**

Chapter 11 defines the concept of transfer of property, stipulates the principle of private property transfer, and provides requirements for the transfer and acquisition of property rights in movable property and immovable property by way of sale, donation, gift or exchange. It includes cases of the transfer and acquisition of property owned by the incompetent person, joint ownership, property in common, another person's property, a lost or stolen property, and a property which has been already transferred to another person. It also provides for the transfer and acquisition of immovable property by a foreigner.

## 4) Key Points

### 4.1) The concept and principle of private property transfer

If a person sells, donates, gifts, exchanges or otherwise transfers a property in which he/she has ownership to another person, the property shall be deemed to have been transferred to that person (Secs. 413 and 431). The owner can transfer his/her private property without anyone else's consent (Sec. 417). It means that private property can be transferred only by the intention of the owner to be expressed to that effect. This is the principle of voluntarism for the transfer of ownership and other property rights. As a result, the transfer of property can take place immediately in accordance with the intention of the owner or at the death of the owner in accordance with the testamentary deed (Secs. 414 (3) and 416 (2)). The transfer and acquisition of property rights is conceived as the extinction of ownership in the transferor from the date of transfer and the creation of ownership in the transferee (Sec. 416 (1)).

However, the transfer of immovable property and cash amounting to more than Rs. 100,000 by way of a donation or gift must be made by a deed to be executed in accordance with the provisions of law (Sec. 414 (4)). If a person transfers his/her property right to another person with testamentary effect, the deed must be registered, and a person who acquires the property must submit an application accompanied by the death registration certificate to the concerned office within six months after the date of the transferor's death (Sec. 429 (1)).

In addition, in order to determine the priority in case of the transfer of property in duplication, the deed of transferring immovable property registered at an earlier date or the delivery of movable property acquired at an earlier date shall be necessary (Sec. 422 (2)).

One important issue to be discussed for the future development of the NCC is the protection of a purchaser of property, because Section 430 provides a limited protection of the purchaser based on the principle of "Caveat emptor" (the purchaser should be careful about defects of a property purchased).<sup>80</sup>

As for the purchaser of movable property as defined "goods" by Section 545 Explanation, remedies for the "unsatisfactory quality" (Sec. 541 (1), (4)) provided by Section 552 (2) (to deliver other goods or to improve the quality of the goods) and Section 561 (c) (compensation for damages) in Part 5 may be applicable. However, there are no contractual remedies provided for the purchaser of immovable property in Part 5.

In order to achieve the balanced protection of the purchaser of immovable property and movable property, the relationship between the provisions of the agreement to sell property in Part 4 and those of the sales contract in Part 5 should be discussed (see 4.7 infra).

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80 Sec. 430 provides: "A person who has once purchased a property from another person shall not be entitled to make a claim that such property is damaged, destroyed or of low quality. Provided that if the seller has sold the property by misrepresentation or with deviation from the particulars set forth in the deed, the purchaser shall be entitled to compensation for the same".



#### **4.2) Requirements for transfer of property in general**

In order to transfer ownership of property or other property rights to another person or other persons, the expression of intention by the owner or right-holder to that effect must be necessary (see 4.1 above). In addition, the transferor must be competent at the time of the transfer (Sec. 414 (1), (2)). Further, the transfer of immovable property and cash amounting to more than Rs. 100,000 by way of a donation or gift must be made by a deed to be executed in accordance with the provisions of law (Sec. 414 (4)).

If a guardian or curator sells and transfers an immovable property of the person under his/her guardianship or curatorship for the interests and protection of that person, he/she needs to acquire permission of the court (Sec. 415 (1), (2)).

#### **4.3) Requirements for transfer of joint property and property in common**

A joint property can be sold and transferred with the consent of all of its owners (Sec. 418 (1)). Any co-owner may transfer the property of his/her portion to another person, even though the other co-owners do not agree to transfer the joint property (Sec. 418 (2)). In this case, if it is technically impossible to separate the portion of the transferring co-owner from the joint property, and another co-owner intends to acquire that portion, the acquiring co-owner shall be entitled to obtain it at the price mutually agreed (Sec. 418 (3)). If two or more co-owners intend to acquire the portion of the joint property, the co-owner who agrees to pay the highest price shall be entitled to obtain such property (Sec. 418 (4)).

A property in common cannot be transferred to another person without obtaining written consent of all the coparceners in common (Sec. 419 (1)). If a coparcener of the property in common transfers a property in common without obtaining the consent of all the other coparceners, the transfer of title only to the portion of the transferring coparcener shall be valid (Sec. 419 (3)). The concerned coparcener shall be entitled to get back the property transferred in excess of such right or portion (Sec. 419 (3)).

However, the head of the family may, for the household purpose, sell whole of the property in common in the case of a movable property, and the half of that property in common in the case of an immovable property, without the consent of the other coparceners (Sec. 420).

#### **4.4) Prohibition of transferring another person's property**

The NCC provides that no person shall transfer a property which belongs to another person (Sec. 421 (1)). If a person makes a deed to transfer a property owned by another person, the deed “shall be void” (Sec. 421 (2)).

In this case, the owner of the property can claim against the transferee to return the property (Sec. 421 (3)). However, if a person acquired a movable property which did not belong to the transferor by way of purchase believing (in good faith) without negligence that

the property had belonged to the transferor, paid the purchase money and took possession of it, the protection of the transferee should be considered.<sup>81</sup>

The NCC provides that 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 the property to the owner unless and until he/she obtains the real value of that property and the fees or amount, if any, paid by him/her in the acquisition of that property (Sec. 421 (6)). This is a special rule to Sec. 421 (5) which provides that the owner of the stolen or lost property can claim the transferee of the property within three years after the date on which the property was stolen or lost (Sec. 421 (4)). This is limited protection of the transferee who did not know that the property was stolen or lost.

But the problem remains for the case where the transferee bought a property which was not stolen or lost but the transferor borrowed from the owner. If the transferee did not know that the transferor sold the property which he/she borrowed from its owner, the good faith transferee deserves stronger protection than the transferee of the stolen or lost property.

#### **4.5) Prohibition of transferring property in duplication**

The NCC prohibits the transfer of property in duplication by providing that no person shall re-transfer to another person a property which he/she has already transferred to some other person (Sec. 422 (1)). If a person A transferred a property to B and C in duplication, 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 acquired (took possession of) the property earlier shall be valid (Sec. 422 (2)).<sup>82</sup>

This priority rule to decide the owner in the duplicated transactions is clear. However, a problem may still remain when the second purchaser who registered first knew that the property had been sold to the first purchaser. For instance, A agreed with B that A will sell a piece of land owned by A to B at a certain price, but A also agreed with C to sell the same land and made a deed to that effect and registered it. C knew that A had already agreed with B to sell it to B.

From the viewpoint of the comparative law, certain remedies may be given to B. For instance, (a) in the French Civil Code (FCC), Section 1198 (2) explicitly provides that “where two successive purchasers of rights in the same immovable property derive their rights from the same person, the one who was the first to publish his or her title of acquisition in authentic form in the real estate register shall be preferred, even if his or her right is subsequent, provided that he or she is in good faith”. So if C was aware that there is an early sales contract on the

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81 For instance, Sec. 2279 (1) of the FCC, Sec. 932 (1) of the GCC and Sec. 192 of the JCC protect the good faith acquirer by recognizing him/her as the owner by the force of law (good-faith acquisition).

82 See also Section 472 which provides that in the event of approval and registration of more than one deed in relation to the same matter, the deed approved and registered on the earlier date shall be valid.

same property between A and B, B can claim his/her priority against C by proving that C registered the authenticated title in bad faith, i.e., C was aware that B has already purchased the immovable property from A.

(b) For the German Civil Code (GCC), judicial precedents held that if C was in bad faith and it was regarded as an intentional violation against good morals, it shall be held that C's acquisition was a tortious action and B can claim for the recovery of the immovable property from C by applying Section 826 of the GCC (compensation for damage inflicted intentionally in a manner against good morals) and Section 249 (1) of the GCC (compensation for damage by restoring the original position).

(c) For the Japanese Civil Code (JCC), judicial precedents held that if C was "maliciously in bad faith" in such a way that C intended to harm B or to earn unreasonable benefit from B without reasonable ground, C's action must be held against the principle of good faith as provided by Section 1 (2) of the JCC, and B can claim for the recovery of the immovable property and the registration of transfer of the property from C to B.

For the application of Section 422 (2) of the NCC, the comparative law perspective mentioned above may be useful. For instance, if C's acquisition of the land by executing the deed and registration is regarded as a wrongful act against B, B may claim for the transfer of ownership and registration from C to be, because C must be liable for B's damage and bear consequence as compensation as provided by Section 8 (1), (2) and (3), which is one of the principles of the NCC.

#### **4.6) Restriction on transfer of immovable property to foreigner**

The NCC restricts the transfer of an immovable property to a foreigner by providing that no person can transfer any immovable property to a foreigner without obtaining prior permission of the Government of Nepal (Sec. 432 (1)). A deed which was made to transfer the immovable property to the foreigner without government permission shall be void, and the property shall devolve on the Government of Nepal (Sec. 432 (2)).

Even if a foreigner obtained a partition share in or succeeded to any immovable property in Nepal, the property shall not be eligible to be transferred to him/her or registered in his/her name nor shall he/she be entitled to enjoy the income of the immovable property unless the Government of Nepal permits it (Sec. 433 (1)). The foreigner must claim the return of the price paid to the transferor as an unsecured creditor (Sec. 433 (2)).

A foreigner who obtained a partition share in or succeeded to the immovable property can transfer the property share to a citizen of Nepal, and the concerned office shall issue a provisional landownership registration certificate valid for the day of transfer of the share (Sec. 433 (2)). If the foreigner failed to transfer the partition share or the succession share obtained

in his/her name to a citizen of Nepal, the Government of Nepal shall have a right in that immovable property at any time in the case of the partition share, and within three years in the case of succession (Sec. 433 (3)).

#### **4.7) Remedies for the purchaser of defective property**

Section 430 provides that a person who has once purchased a property from another person shall not be entitled to make a claim that the property is damaged, destroyed or of low quality (Sec. 430 Main text). This provision seems to be the principle of “Caveat emptor”, that is, the purchaser should be careful about the possible defect of property to be purchased. There are two exceptions: (i) if the seller has sold the property by misrepresentation, or (ii) if the seller sold the property with deviation from the particulars set forth in the deed, the purchaser shall be entitled to compensation for that defect (Sec. 430 Proviso).

However, this provision based on the principle of “Caveat emptor” will affect the efficient transactions of property in the globalized market, because if the purchaser must be more careful about the quality and possible defects of the property to be purchased, the cost of inspection of the property and other transaction costs will be increased.

There are contractual remedies available for the purchaser of movable property which is defined as “goods” by Section 545 Explanation. In the contract of sale of goods, except as otherwise provided for in the contract, the goods sold or to be sold shall be deemed to be of “satisfactory quality” (Sec. 551 (1)). But what does “the quality” mean? If it is not specified in the contract, the goods shall be “of the quality according to the prevalent standards (Sec. 551 (4)).

Then what are the remedies for the unsatisfactory quality of purchased goods? Three remedies are provided: the purchaser can claim the seller to deliver other goods, to improve the quality of the goods (Sec. 552 (2), and to make compensation for damages (Sec. 561 (c)).

These provisions stipulated in Chapter 6 of Part 5 shall be applied to the contract of sale of “goods” which means the movable property (Sec. 545 Explanation). But why Section 545 Explanation defined “goods” as the movable property? The reason seems to be that Section 545 Explanation succeeds to Section 40 (1) Explanation of the Contract Act, 2000. However, when the provisions of contract of sale were included into the Civil Code as the basic and comprehensive private law, there might be the alternative to create the provisions of contract of sale to be applied not only to movable property, but also immovable property as long as the nature of each provision is common to both movable property and immovable property.

As for the quality of the property purchased and the remedies for the unsatisfactory quality, the provisions of sale of goods can be applied to sale of immovable property *mutatis mutandis*, or those provisions can be analogically applied to the sale of immovable property.

This is the teleological interpretation of the provision by considering the purpose of the relevant provision of law.

In addition, from the viewpoint of systemic and consistent interpretation of the provision of law, the provisions on the contract of sale of immovable property must exist in Part 5 as the cause of obligations of the seller to transfer ownership and to deliver the property and those of the purchaser to pay purchase money. In Part 4, the provisions on the transfer of ownership in Chapter 11 shall apply both to immovable property and movable property.

## **13. Mortgage to Be Established in Immovable Property**

### **13.1 General Features of Mortgage on Immovable Property**

The mortgage to be established on an immovable property has already existed in the *Muluki Ain*, Part III, Chapters 2 and 17. There are two types of mortgage on the immovable property. The first type is a mortgage with possession, in which possession is transferred to the creditor at the time of establishment. The second type is a mortgage without possession, in which the creditor has the right to take possession of the immovable property in the event of default by the debtor. In the mortgage with possession, the mortgagee must take possession immediately after registration of the deed, while in the mortgage without possession, the mortgagee must take possession of the immovable property within two years after default. The creditor of the mortgage with possession may not collect interest, while the creditor of the mortgage without possession may collect interest. The mortgage with possession may not be held in possession for more than 10 years unless otherwise provided in the deed. After 10 years, the creditor's claim becomes an unsecured claim even if the mortgaged property is not returned. The duration of the mortgage without possession may not exceed five years, and after the commencement of possession, it may not exceed 10 years. After that, the right of creditor shall become an unsecured claim even though the creditor continues to possess the immovable property. In both types of mortgage, the mortgaged property must be of such a nature that the creditor can make a profit from it. This is related to the method of enforcement of mortgages. The mortgage cannot be established on the immovable property on which the settlor has no title.

In order to establish the mortgage on the immovable property, a deed must be prepared and registered. The mortgaged immovable property may be sub-mortgaged in whole or in part, or only the fruits may be mortgaged. However, the same property may not be mortgaged in duplicate.

In either the mortgage with possession or the mortgage without possession, once the creditor has taken possession of the mortgaged property, the mortgagee is entitled to collect the fruits from the property and use them to repay the debt. At the same time, the mortgagee who

took possession of the property is obligated to manage and protect the property with the same reasonable care as the owner. In addition, except for land taxes, taxes on the proceeds are borne by the mortgagee. If the mortgagee causes any damage to the mortgaged property, he/she is liable for compensation for the damage.

## **13.2 Provisions on Mortgage**

### **1) Source**

Part 4, Chapter 12, from Section 435 to Section 453 provides for mortgage. It succeeded some provisions from the *Muluki Ain*, Part III, Chapter 2 and 17.

### **2) Contents**

- 435. Property deemed to be mortgaged
- 436. Deed to be executed
- 437. Mortgaged property to be possessed and enjoyed
- 438. Possessory right in mortgaged property to be deemed transferred
- 439. Entitlement to possess as if it belonged to oneself
- 440. Duty to take reasonable care of mortgaged property
- 441. Interest, charge or fee not to be collected
- 442. Period for possession and enjoyment of property in mortgage with possession
- 443. Maximum period of mortgage without possession
- 444. Redemption of mortgaged property at any time
- 445. Property in mortgage may be remortgaged
- 446. Fruits or benefits of property may be mortgaged
- 447. Mortgaging by third party on behalf of debtor
- 448. Property in mortgage to be indivisible
- 449. Creditor to be liable for loss and damage to property in mortgage
- 450. Not to create trouble on property in mortgage
- 451. Mortgage not to be made to foreigner
- 452. Not to be mortgaged or transferred in duplication
- 453. Statute of limitation

### **3) Summary**

Chapter 12 of Part 4, provides the definition, kinds and establishment of mortgage, rights and duties of the mortgagee and mortgagor, re-mortgage, restriction of establishing mortgage

for a foreigner, prohibition of mortgage in duplication, and other matters related to the effects of mortgage.

#### **4) Key Points**

##### **4.1) Definition, kinds and establishment of mortgage**

If a debtor or a third party gives the whole or any portion of an immovable property which the debtor or the third party owns to a creditor in consideration for a loan which the debtor borrows from the creditor, entitling the creditor to possess that property with effect from the date of execution of the deed or after a certain period from the expiration of repayment, that property shall be deemed to have been given in mortgage (Secs. 435 (1) and 447 (1)).

In order to mortgage an immovable property, a deed must be executed by a competent mortgagor (Sec. 435 (1), (2)).

If the deed provides that the creditor is entitled to possess the mortgaged property with immediate effect at the time of lending or after a certain period, it is deemed to be a mortgage with possession (*Bhogbandaki*) (Sec. 435 (2)).

If the deed provides that the creditor is entitled to possess the property in the event of the debtor's default on repayment of the loan within the deadline set by the creditor and the debtor for repayment, it is deemed to be a mortgage without possession (*Drishtibandhaki*) (Sec. 435 (2)).

A property to be mortgaged shall be capable of being enjoyed by the mortgagee (Sec. 435 (3)) because the creditor should be able to take any benefit from the mortgaged property if the debtor cannot repay his/her debt (see Sec. 437).

A mortgagor must be a person who presently owns the property to be mortgaged (Sec. 435 (4)).

The immovable property cannot be mortgaged for a foreign creditor other than a person having obtained the non-resident Nepali citizenship unless the mortgagor obtains the prior approval of the Government of Nepal (Sec. 451).

##### **4.2) Mortgage with possession (*Bhogbandaki*)**

The creditor (mortgagee) can possess the mortgaged property from the date of execution of the deed or from a particular date, if any, specified in the deed (Sec. 437 (1)). Except as otherwise provided in the deed of mortgage, a mortgagee of mortgage with possession cannot possess and enjoy the mortgaged property for a period exceeding 10 years (Sec. 442 (1)). If the property in mortgage with possession is not redeemed within 10 years, the deed of mortgage shall be equivalent to an unsecured bond (Sec. 442 (2)).



After the creditor (mortgagee) acquires possession in the mortgaged property, the possessory right shall be transferred from the mortgagor to the creditor (mortgagee) (Sec. 438). The creditor (mortgagee) can enjoy the mortgaged property and fruit, benefit and facility to be drawn from the property as if it were his/her “own property” (Sec. 439 (1)). At the same time, the creditor (mortgagee) must take reasonable care and protection of the property as if it were his/her own (Sec. 440 (1)). The creditor must pay the tax or charge for the possession and enjoyment of the mortgaged property, except for the land tax (Sec. 440 (2)).

In addition, the creditor (mortgagee) of mortgage with possession cannot collect any kind of interest, charge or fee in consideration of the loan from the debtor (Sec. 441 (1)).

#### **4.3) Mortgage without possession (*Drishtibankhaki*)**

The duration period of the mortgage without possession cannot exceed five years (Sec. 443 (1)). The period is shorter than the mortgage with possession. After the expiry of this period, the creditor (mortgagee) can possess the mortgaged property for a period not exceeding 10 years (Sec. 443 (3)). If the property in mortgage without possession is not redeemed within 10 years after the possession by the creditor, the deed shall become equivalent to an unsecured bond (Sec. 443 (4)).

The creditor (mortgagee) of the mortgage without possession can also begin to possess the property in mortgage within two years from the expiration date for the repayment of loan by the debtor (Sec. 437 (1)).

After the creditor (mortgagee) acquires possession of the mortgaged property, the possessory right shall be transferred from the mortgagor to the creditor (mortgagee) (Sec. 438), and the creditor (mortgagee) can enjoy the mortgaged property and fruit, benefit and facility to be drawn from the property as if it were his/her “own property” (Sec. 439 (1)). At the same time, the creditor (mortgagee) must take reasonable care and protection of the property “as if it were his/her own” (Sec. 440 (1)). The creditor must pay the tax or charges for the possession and enjoyment of the mortgaged property, except for the land tax (Sec. 440 (2)).

In addition, after the creditor has acquired possession in the property of mortgage without possession, the creditor shall not collect any kind of interest, charge or fee in consideration for such loan (Sec. 441 (2)).

#### **4.4) Remortgage and mortgage on fruit from mortgaged property**

The creditor (mortgagee) can remortgage the property or a part of the property to another person in consideration for an amount of loan which is equal to, or lesser than, the amount specified in the deed of the original mortgage (Sec. 445 (1)).



The period of possession and enjoyment of the re-mortgage cannot exceed the period of possession and enjoyment under the original mortgage (Sec. 445 (2)).

If the debtor of the original mortgage intends to redeem the re-mortgaged property which he/she owns, the debtor can redeem it by paying the amount of debt directly from the re-mortgagee if the amount of debt of the re-mortgage is equal to the original amount of debt and through the original mortgagee if the amount of debt is less than the original amount of debt (Sec. 445 (3)). If the creditor becomes unentitled to possess the re-mortgaged property, the deed of re-mortgage shall be equivalent to an unsecured bond (Sec. 445 (5)).

Instead of re-mortgaging the whole property in mortgage, the creditor (mortgagee) can remortgage only the fruits, benefit or facility of the mortgaged property, such as the crops, products, trees, bamboo trees, reaped or to be reaped fruits, vegetables, flowers or any other kinds of products to be yielded from a cultivable land in mortgage (Sec. 446).

#### **4.5) Prohibition of mortgaging in duplication**

The NCC provides that a property once mortgaged cannot be mortgaged again in duplication to other persons (Sec. 452 (1)). If a person A mortgages a property in duplication to B and C, the deed registered at an earlier date shall be valid and the subsequent deed shall *ipso facto* be void (Sec. 452 (2)). A person who executed a deed in duplication shall be liable to punishment with a fine as provided by law (Sec. 452 (5)).

This prohibition of mortgaging in duplication is due to the transfer of possessory right from the mortgagor to the creditor (mortgagee) in both mortgage with possession and mortgage without possession (Secs. 437 and 438). The creditor (mortgagee) shall enjoy the mortgaged property and fruit, benefit and facility drawn from the property to secure repayment of debt (Sec. 439).

There are exceptions to the prohibition of mortgaging in duplication.

(i) When the deeds on the same immovable property are executed in duplication, if the first deed provides for the mortgage and the second deed provides for the transfer of title, then the transferee by the second deed shall be entitled to establish the title by making repayment of loan for the creditor of the mortgage in accordance with the first deed of mortgage (Sec. 452 (4)).

(ii) When the deeds of mortgage are executed in duplication, if possessory right shall be established within two years from the date of the first deed which provides for mortgage with possession (*Bhogbhandhaki*) and the second deed provides for mortgage without possessory right (*Drishtibandhaki*) within two years from the date of entitlement to the possessory right (Sec. 452 (6)). These mortgages can be compatible.

However, if the value of the mortgaged property significantly exceeds the amount of debt to be secured by that mortgaged property, there may be room to develop the mortgaging in duplication more generally to make full use of the value of that property by making clear the priority between the deeds of mortgage. But, it depends on the need from financial practices.

## **14. Pre-emption of Immovable Property**

### **14.1 General Features of Pre-emption of Immovable Property**

Nepal maintains the traditional system of community property and family property. Closely related to this system is the pre-emption system which gives the opportunity to a person who has a certain close relationship, such as a neighborhood relationship to the immovable property to buy it with priority when the owner of the property transfers it to another person. This feature of the NCC cannot be overlooked from the viewpoint of keeping a community in which the immovable property exists. The pre-emption by the neighbor may control a stranger to enter into the community, while it may restrict the smooth transactions. The former objective will be traded-off the latter.

The system of pre-emption (*hak safa*) has already existed in *Muluki Ain* and has been used in practice. The relevant rules have been fragmented in Chapters 8, 17, 19, 21 of Part III, *Muluki Ain*. The NCC attempts to compile them into one chapter and provides for them comprehensively.

When the owner of an immovable property intends to transfer it to another person, the person who has a certain close relationship with the immovable property can acquire it in priority according to the prescribed procedure.

One such person with the right of pre-emption is the heir who owns the immovable property adjacent to the property which was sold by the owner to a person other than his/her heir in question. The heir may acquire the property in priority by providing the buyer with the price paid by the buyer and the cost of preparing the deed. If there are two or more heirs, the next-of-kin heir to the seller shall have priority. If there are two or more next-of-kin heirs, all of them may purchase the property in equal proportions. If the next-of-kin heirs do not exercise their right of pre-emption, it shall be transferred to the heirs of the next rank. If there is no neighboring heir, or if such an heir does not exercise the right of pre-emption, the lessee of the immovable property, if any, has the right of pre-emption.

In addition, when a part of a building is sold, the person who owns the other part of the building has the right of pre-emption. However, the right of pre-emption does not apply when a condominium is sold.

If the person who has the right of pre-emption wishes to exercise it, the procedure shall be carried out at the competent Land Revenue Office. When a petition for exercising

the right of pre-emption is filed, the competent Land Revenue Office shall summon the buyer who first purchased the property to appear within seven days, excluding the time required for transportation.

The right of pre-emption must be exercised within 35 days from the time the right holder becomes aware of the transfer of the relevant property and within six months from the time the transfer is registered. This time limit is considered to be an attempt to reconcile the safety of immovable property transactions with the protection of the interests of the right of pre-emption.

## **14.2 Provisions on Pre-emption of Immovable Property**

### **1) Source**

Part 4, Chapter 13, from Section 454 to Section 462 provides for pre-emption of immovable property. They rearranged the fragmented provisions in Chapters 8, 17, 19, 21, Part III, *Muluki Ain*.

### **2) Contents**

- 454. Pre-emption deemed to be made
- 455. Entitlement of heir to pre-emption
- 456. Pre-emption by tenant
- 457. Pre-emption of sold house
- 458. Pre-emption of house donated or gifted
- 459. Where pre-emption is not permitted
- 460. Procedures for making pre-emption
- 461. To update records upon pre-emption
- 462. Statute of limitation

### **3) Summary**

Chapter 13 provides the definition, right-holders, objects and procedure of pre-emption.

### **4) Key Points**

#### **4.1) What is pre-emption?**

When a person transfers an immovable property which he/she owns to another person, a third party who is a neighbor of the immovable property and has been given the right of pre-emption may redeem it in accordance with the provisions of law (Sec. 454).

However, a house or a part of it which was built under the provision of joint housing (condominium) shall not be subject to pre-emption (Section 459).

#### 4.2) Who has the right of pre-emption?

- (i) If a person sells his/her immovable property, the heir who neighbors the property sold can pre-empt it upon payment of the amount paid by the buyer of it and the fees for preparing a deed to the buyer (Sec. 455 (1)). If there is more than one heir who intends to make pre-emption, the nearest heir, if such heirs are also more than one, the heir who is the most immediate neighbor, and, if even such heirs are more than one, all the heirs can pre-empt such property in equal proportion (Sec. 455 (2)).

However, if the nearest heir does not pre-empt the property, the other heir who is the nearest in the order of preference may pre-empt it (Sec. 455 (3)).

- (ii) If there is no heir who neighbors the property or even if there is an heir, he/she does not intend to make pre-emption and if there is a tenant in accordance with law in that property, the tenant can pre-empt such property (Sec. 456).
- (iii) If there are different owners of the different parts of the same house and the owner of a part sells his/her part to another person, the owner of another part can pre-empt that part by paying the amount paid by the buyer and the fee expensed for the registration of the deed to the buyer (Sec. 457 (1)). In this case, (a) if the owner of the other part is the heir of the seller, this heir, or if there is more than one heir, the nearest heir; (b) if the owner of the other part is a person other than the heir, the owner who neighbors or the owner of the part adjoining that part (Sec. 457 (2)).
- (iv) If a person donates or gifts a part of a house or the land occupied by the house or appurtenant to the house and the donee or receiver has transferred the right in the house or land to another person, the donor or his or her heir residing in the same place can pre-empt the part of house or the land occupied by the house or appurtenant to the house (Sec. 458 (1)).

If a person receives a donation or gift of a part of the same house or the land occupied by the house or appurtenant to the house from a donor and the donor donates or gifts the remaining part of the house or land to another person, the former donee or receiver or his/her heir can pre-empt the remaining part of the house or land (Sec. 458 (2)).

In these cases, a price indicated in the instrument of donation or gift, if any, and, if it is not indicated, an amount equal to the prevailing market price and the fees expensed for the registration of the deed must be paid to the acquirer (Sec. 458 (3)).

If there is more than one heir who intends to make pre-emption according to Sec. 458 (1) and (2), the nearest heir, or, if there is more than one nearest heir, the most aggrieved heir can make pre-emption (Sec. 454 (4)).

### 4.3) Procedure of pre-emption

A person who wishes to make pre-emption of an immovable property must submit a petition to the office which made the registration of the relevant deed along with a deposit of an amount equal to the price of the property to be pre-empted, if any, indicated in the deed registered for the transfer of the property or an amount equal to the prevailing market price if such price is not indicated in the deed, and the fees charged in the approval of registration of the deed (Sec. 460 (1)).

If the office receives the petition, the office which approved the registration of the deed must inform the petitioner as such and send a process of summon to the person (such as a buyer) who is obliged to allow preemption to appear in the office within seven days excluding the time required for the journey (Sec. 460 (2)).

If the person obliged to allow preemption appears and consents to preemption within seven days as mentioned above, the office must effect preemption by paying to him/her the deposited amount (Sec. 460 (3)).

If the person obliged to allow preemption does not appear and does not give consent to preemption within seven days as provided above (Sec. 460 (2)), but it appears from the received petition that pre-emption should be effected, the office must make the decision to effect pre-emption (Sec. 460 (4)).

If the person obliged to allow pre-emption does not appear within seven days as provided above (Sec. 460 (2)), and, after the expiration of that time limit, if it appears from the received petition, registered deed and records of the office that pre-emption should be effected, the office shall make decision to effect pre-emption and give an execution slip to the person entitled to pre-emption to enjoy the property to be pre-empted, and send a notice to the person obliged to allow preemption to receive the amount of money as deposited pursuant to Section 460 (1) (Sec. 460 (5)).

Conversely, if it appears that pre-emption should not be made, the office must make the decision that it would not effect pre-emption and give information accordingly to the petitioner (Sec. 460 (4)). In this case, 2.5% of the amount of deposited money shall be deducted (Sec. 460 (8)).

If the person who is obliged to allow pre-emption appears within the time limit but expresses his/her disagreement with the market price of the property, the office must fix the market price of the property and effect pre-emption by having the amount equal to that market price to be paid to the person who is obliged to allow pre-emption (Sec. 460 (6)).

However, the office must inform that the either person may make a lawsuit in the court within thirty-five days in the following two cases: first, if either party does not agree to the

market price of the property which is subject to pre-emption; second, if the person who is obliged to allow pre-emption appears within the time limit and shows a reason why pre-emption should not be made, and it is necessary to decide upon examination of evidence on the matter (Sec. 460 (6)).

If the lawsuit has been filed within the time-limit of thirty days, action shall be taken pursuant to a decision of the court; if the lawsuit was not filed within that time-limit, the decision of the office (Sec. 460 (7)).

If the person who has petitioned for pre-emption does not subsequently intend to make pre-emption, or he/she fails to appear at the appointed dates, the office shall punish him/her with a fine of 3% of the amount of deposit money, and the remaining amount must be returned to him/her (Sec. 460 (9)).

## **15. Registration of Immovable Property Transactions**

### **15.1 General Features of Registration of Immovable Property Transactions**

The NCC provides for cases in which a deed of title needs to be prepared and registered, such as the transfer of immovable property. These provisions were succeeded from Chapter 21, Part III, *Muluki Ain* with some necessary amendments.

A deed must be registered at the competent Land Revenue Office. Otherwise, it cannot be legally recognized as a deed. A deed must be prepared and registered in the following cases: (1) transfer of immovable property, (2) establishment of mortgage, (3) donation or gift of immovable property by testament, (4) exchange of immovable property, (5) partition or partition share relinquishment of family property, (6) establishment of trust, (7) partition of household, (8) house rent for more than Rs. 10,000 per month, (9) establishment of usufruct on immovable property, (10) other deeds required to be registered under the NCC and other laws.

However, it should be noted that in addition to those deeds which are legally required to be registered, the parties to the contract can prepare a deed at their discretion and request the competent office to register them. In order to prepare and register the deed, the prescribed fee has to be paid.

If several deeds with conflicting content are registered, the first one shall be considered valid.

For immovable property transactions in Nepal, in addition to the contract of sale and purchase, a deed of transfer of land is prepared and registered. The deed of transfer of land is made on large size Nepalese paper and contains a simple description of the land, the size of the land area, the name of the land, the name of the neighboring right holder (right of first purchase), the name of the family members in the case of joint family property, and the signatures and fingerprints of the transferor and transferee.

After the necessary examination, the deed of transfer is stamped with the official seal of the Land Revenue Office, compiled into a book by land number (this is the registration of land transfer in Nepal), and kept in the Land Revenue Office. This is the main body of the land register. In addition, there is no separate register for buildings.

In addition to the land register, the Land Revenue Office also keeps a book with photographs of each owner's name. In this book, the property owned by the owner and the transaction records of it are described. It is truly a book of human organization. The property information listed in the book is linked to the land registry.

In addition to the Land Revenue Office, there is a land surveying office that manages maps, where a map of the land within the jurisdictional area is prepared, and each parcel of land is numbered. This information is linked to the information in the land register so that the identity of the land can be easily confirmed.

## **15.2 Provisions on Registration of Immovable Property Transactions**

### **1) Source**

Part 4, Chapter 14, from Section 463 to Section 473 provides for registration of immovable property transactions. It succeeded concerned provisions in Chapter 21 (Registration of Deeds), Part III, of the *Muluki Ain*, the Lands Act, 1964, etc.

### **2) Contents**

- 463. Deed deemed to be registered
- 464. Deeds to be registered
- 465. Other deeds may be registered
- 466. Deed may be registered by commission
- 467. Deed may be approved and registered with office in other district
- 468. Fee chargeable for registration of deed
- 469. Obligation to pay fees
- 470. Provision relating to payment of amount
- 471. Transmission and registration and de-registration to be made
- 472. Deed registered at earlier date to be valid
- 473. Statute of limitation

### **3) Summary**

Chapter 14 of Part 4, provides the meaning of a deed, occasions in which the deed is created and registered, how the deed is created and registered, and effects of the deed.

## **4) Key Points**

### **4.1) The meaning of a deed**

A deed is an authenticated document which records and recognizes a certain fact under the public authority in order to avoid and solve the conflicts. If a deed is created and submitted by a person to the concerned office<sup>83</sup> for approval by that office, such a deed shall be deemed to be registered (Sec. 463).

If a person fails to have registered a deed required to be registered by Section 464 (1) (see 4.2 below), it cannot be legally recognized as the deed (Sec. 464 (2)).

### **4.2) When the deed is created and registered**

In the following cases, a deed must be created and registered in the concerned office (Sec. 464).

- (a) A deed transferring the right in an immovable property;
- (b) A deed of mortgage with possession, mortgage without possession and re-mortgage;
- (c) A deed on donation and gift of immovable property by testament;
- (d) A deed on exchange of immovable property (cf. Sec. 431 (2));
- (e) A deed on partition or relinquishment of partition share of property in common;
- (f) A deed on separation of board and bread or unification of board and bread;
- (g) A deed on establishment of a trust;
- (h) A deed on house renting with a monthly rent of more than Rs. 500,000;
- (i) A deed on usufruct in an immovable property;
- (j) Other deeds required to be registered pursuant to the NCC and other laws.

In addition to the cases above, a person can create and have registered a deed if he/she intends to do so (Sec. 465 (1)). In this case, the person needs to make an application for the approval of registration of the deed. The concerned office must register the deed by confirming that it fulfills the legal requirements, including the payment of the fees (Sec. 465 (2)).

### **4.3) How the deed is created, approved and registered**

If a person makes an application to the concerned office for the approval of registration of a deed and it appears that the deed can be registered by that office, the chief of the office or other employees deputed by him/her must, on deposit of the fees chargeable for the registration,

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83 “The concerned office” shall mean an office as may be designated by the Government of Nepal, by a notification in the Nepal Gazette. It includes the concerned Land Revenue Office until the office is so designated (Sec. 463 Explanation).



visit the location indicated by the applicant within five days and register the deed by confirming that it fulfills the legal requirements (Sec. 466 (1)).

If the parties to a deed intend to get the deed approved and registered in a district other than the district in which either of them resides or the property is situated, they shall make an application, setting out the matter, to the concerned office of that district (Sec. 467 (1)). In this case, the office must make necessary inquiry into the matter and approve and register the deed by confirming that it fulfills the legal requirements (Sec. 467 (2)). If a deed of immovable property is approved and registered in a district other than the district in which either party resides or the property is situated, the office shall send a copy of the registered deed to the relevant office of the concerned district (Sec. 467 (3)).

The fee specified by law must be charged for the approval and registration of a deed (Sec. 468 (1)). Except as provided otherwise, the fee shall be charged according to the amount set forth in the deed dealing with transaction of money (Sec. 468 (2) Main text). However, if the price of the immovable property referred to in the deed is less than the minimum price specified by the Government of Nepal, the fee shall be charged according to the price specified by the Government of Nepal (Sec. 468 (2) Proviso).

In order to register a deed in another district, an additional fee of 10% shall be charged on top of the normal fee (Sec. 468 (3)).

The following party shall pay fees for the registration of the deed (Sec. 469).

- (a) In the case of a deed transferring a property or relating to mortgage, the transferee or mortgagee;
- (b) In the case of a deed on partition or relinquishment of partition share, separation of board and bread or unification of board and bread, all coparceners in equal portion;
- (c) In the case of a deed on exchange of property, both parties to the deed;
- (d) In the case of a deed of testamentary gift, the giver (testator);
- (e) In the case of a deed on house renting, the house owner;
- (f) In the case of a memorandum of establishment of trust, founder of a trust;
- (g) In the case of any other deed, both parties to the deed;

In registering the deed of (e) above, the fee shall be determined considering the amount of rent of the first month (Sec. 469 (2)).

#### **4.4) Effects of the deed**

If more than one deed in relation to the same matter has been created, approved and registered, the deed approved and registered on the earlier date shall be valid (Sec. 472). The registration date of the deed determines the priority between the incompatible deeds.

## 16. Transactions

### 16.1 General Features of Transactions

The NCC incorporates provisions on the transactions (transactions of loan for consumption) into Part 4 Law Relating to Property in its last chapter, Chapter 15. They can be traced back to Chapter 17, Part III of the *Muluki Ain*. A typical example of transactions is when one party receives a certain amount of money or other things from the other party, the recipient is supposed to return the same thing in type, quality and quantity. This is equivalent to a loan for consumption transaction in the civil codes of civil law countries.

But transactions must be done by preparing and registering a deed. The deed must contain the names, ages, and addresses of the parties to the transaction, and their spouses, if married, their parents and grandparents, the reason for the transaction, the amount of the transaction, the price and nature of the goods, the amount borrowed (if the transaction falls under that category), the interest rate (if the interest is agreed), and the details of any substitute property to be returned to the creditor in the event of default of the borrower; if the borrower defaults on the obligation, the creditor is to receive a return of the substitute property, if any, the details of the substitute property, the place and date of registration of the deed, and other matters necessary for the nature of the transaction.

Thus, transactions, which are used for loans for consumption, etc. are considered to be incorporated in the property chapter in that they are conducted by creating and registering a deed, just as immovable property transactions are.

If the deed does not contain a promise of interest, the creditor may not demand payment of interest from the debtor.

### 16.2 Provisions on Transactions

#### 1) Source

Part 4, Chapter 15, from Section 474 to Section 492 provides for transactions, which succeeded the provisions of Chapter 17, Part III, in *Muluki Ain*.

#### 2) Contents

- 474. Transaction deemed to be made
- 475. Loan deemed to be borrowed
- 476. Transaction not to be carried on without executing deed
- 477. Matters to be set out in the deed
- 478. Entitlement of creditor to interest from debtor

- 479. Creditor not allowed to collect interest from debtor
- 480. Compound interest not to be collected
- 481. Interest in excess of principal not to be collected
- 482. Procedures to be fulfilled in paying and collecting principal and interest
- 483. Interest accruable as of the date of recovery of amount
- 484. Period of deed executed in household
- 485. Transaction carried on with incompetent or quasi-competent person not to be recognized
- 486. Recovery of amount not available from property in common
- 487. Exchange of movable property not allowed without consent
- 488. Recovery of amount if transaction appears to have been carried on
- 489. Procedure to be followed if deed executed on household is lost or destroyed owing to force majeure event
- 490. Return of goods transacted in the event of imperfection
- 491. Return of goods in original condition
- 492. Statute of limitation

### **3) Summary**

Chapter 15 of Part 4, provides the concept of transactions, formation of transactions by way of a deed, rights and duties of creditor and debtor, and other effects of transactions, including the right to collect interest, etc.

### **4) Key Points**

#### **4.1) The concept of transactions**

The NCC recognizes the transaction if there is give-and-take of any amount (including the price of goods) or goods between two or more persons subject to any condition (Sec. 474 (1)), and the receiver of that amount or goods must return “the same” to the giver of amount or goods (Sec. 474 (2)). In the transaction, the transfer of ownership of the amount or goods shall occur between the parties.

For instance, if a person (A) has an obligation to pay any amount or goods to another person (B), the obligation shall be deemed to be “a loan” borrowed by that person (A), and he/she shall return the amount or goods to the other party (B) (Sec. 475).

#### **4.2) Formation of transactions**

A transaction must be carried on by executing a deed in accordance with law (Sec. 476). It means that in order to make a transaction, the formality of executing the deed is necessary.

The deed in this context is a document which “substantiates a transaction including a cheque, bill, voucher and receipt” (Sec. 476 Explanation).

The following matters must be set out in the deed according to the nature of the transaction (Sec. 477):

- (a) Name, surname, age and address of each person involved in the transaction, and name of his or her father, mother, grand-father and grand-mother (in the case of a married person, the name of his or her husband or wife, as the case may be, shall also be included);
- (b) Reason for transaction;
- (c) Volume of transaction;
- (d) In the case of a transaction of any good, price of such good;
- (e) In the case of an exchange of any goods by way of borrowing, loan or otherwise, the matter to that effect;
- (f) Details of the goods, if any, exchanged;
- (g) Date for repayment of the transacted amount;
- (h) Rate of interest, if any, payable on the transaction;
- (i) Matter that the creditor may recover the amount involved in the transaction from the borrower’s assets in the event of failure to repay such amount within the specified time or to fulfill the other conditions set forth in the deed;
- (j) Place of the deed executed;
- (k) Date of the deed executed;
- (l) Such other matters as required to be set out according to the nature of the transaction.

#### **4.3) Effects of transactions (1): Return of the goods**

A person who obtained or borrowed any goods owned by another person on the basis of a transaction must, after the completion of the purpose of the transaction, return the goods of “the same in kind, quantity and quality” as he/she has acquired or borrowed to the owner (Sec. 491 (1)). If the goods obtained or borrowed are lost, broken, destroyed, out of order or otherwise damaged, except as otherwise provided for in the deed, the person who obtained or borrowed the goods must return “similar other goods” to the owner or pay to the owner “an amount equivalent to the prevailing market price of the goods” if similar other goods are not available (Sec. 491 (2)). Except as otherwise stipulated in the deed, the goods, similar other goods or the equivalent amount of the goods must be returned or paid to the owner within 15 days after the completion of the purpose of the transaction (Sec. 491 (3)). If the person who obtained or borrowed the goods fails to return the goods

or pay the equivalent amount within the period mentioned above, the aggrieved party can recover the amount of the goods and a reasonable compensation for the loss caused to him/her (Sec. 491 (4)).

#### **4.4) Effects of transactions (2): Collection and payment of interest**

If a deed on a transaction provides for the payment of interest, the creditor may collect the interest from the debtor as set forth in the deed (Sec. 478 (1)). The amount of interest which the creditor is entitled to collect from the debtor cannot exceed 10% of the principal per annum (Sec. 478 (2)). If the deed does not stipulate the rate of interest but only the payment of interest, the creditor may collect interest from the debtor at the rate of 10% of the principal per annum (Sec. 478 (3)). Conversely, if the deed on the transaction does not stipulate the payment of interest, the creditor cannot collect interest from the debtor (Sec. 479). Even if the creditor can collect the interest as stipulated in the deed, he/she cannot collect compound interest from the debtor (Sec. 480 (1)). If the creditor collects compound interest from the debtor, the interest shall be deducted from the principal and refunded if the principal has already been repaid (Sec. 480 (2)). Further, the creditor cannot collect interest in excess of the principal (Sec. 481). These provisions protect the debtors of a transaction, typically consumers, from the imposition of too much interest payment.

As for the collection and payment of interest, certain procedures must be fulfilled (sec. 482):

- (a) If the debtor repays the whole of the principal and interest, the creditor shall sign and return the deed on the transaction to the debtor by tearing out the deed or indicating on a space or reverse side of the deed that the loan has been repaid;
- (b) If the deed cannot be found at the time of repayment of the principal and interest, the creditor shall give the debtor a receipt indicating the receipt of the particular amount on the particular date;
- (c) In repaying some amount out of the principal and interest, the creditor shall indicate on the reverse side of the deed how much he/she has received from the debtor on which date and get the debtor to sign the deed and issue a separate receipt of amount accordingly if the deed is not found immediately or it is not with the creditor for the time being.

#### **4.5) Limitation period**

The NCC provides that there shall be no statute of limitation for making a lawsuit in the matter of transaction carried on “to take rights to, misappropriate, cause loss to, or disorder, the property of an incompetent and quasi-competent person or in the matter of collection of compound interest or collection of interest in excess of 10% (Sec. 492 (1)).

This provision will contribute to the protection of the incompetent and quasi-competent persons and consumers.

As for other matters provided above, a person who is aggrieved from any act or action concerned with transactions can make a lawsuit within one year from the date of expiration of the period specified in the deed, and failing such a deed, or in other cases, from the date of accrual of the cause of action, except that a separate statute of limitation for making a lawsuit is provided by law (Sec. 491 (2)).

# VI Contract Law

Prof. Hiroyuki Kihara

## 1. General Overview

### 1.1 The Structure and Categories of Part 5

Most of the provisions on both contract law and tort law are included in Part 5 (Contract and Other Liabilities) of the Nepalese Civil Code (hereinafter ‘NCC’). Therefore, firstly, it will be useful to mention the structure and characteristics therein. There are 18 chapters in Part 5, and it may be possible to classify them into four categories.

Part 5, the Nepalese Civil Code	Related previous statutes
Category 1) General Provisions Chap. 1 General Provisions Relating to Obligations	New
Category 2) General Principles of Contract Law Chap. 2 Formation of Contracts Chap. 3 Validity of Contracts Chap. 4 Performance of Contracts Chap. 5 Breach of Contracts and Remedies	The Contract Act, 2000, Chap. 2 The Contract Act, 2000, Chap. 3 The Contract Act, 2000, Chaps. 10, 11 The Contract Act, 2000, Chap. 12
Category 3) Special Contracts Chap. 6 Contracts of Sale of Goods Chap. 7 Contracts of Guarantee Chap. 8 Contracts of Bailment Chap. 9 Contracts of Collateral or Deposit Chap. 10 Contracts of Agency Chap. 11 Contracts of Carriage of Goods Chap. 12 Contracts of Lease Chap. 13 Hire-purchase Contracts Chap. 14 Wages	The Contract Act, 2000, Chap. 7 The Contract Act, 2000, Chap. 4 The Contract Act, 2000, Chap. 5 The Contract Act, 2000, Chap. 6 The Contract Act, 2000, Chap. 8 The Contract Act, 2000, Chap. 9 New New The <i>Muluki Ain</i> , Part. III, Chap. 4
Category 4) Non-contractual Liabilities Chap. 15 Indirect or Quasi-Contracts Chap. 16 Unjust Enrichment Chap. 17 Torts Chap. 18 Liability for Defective Products	New New New New

Category 1 is the ‘provisions relating to obligations’ stated in Chapter 1, which is the general provisions for the following chapters in this Part.

Category 2 is ‘the general principles of contract law’ stated in Chapter 2 through Chapter 5, covering formation, validity, performance of contracts and breach of contracts and remedies.

Category 3 is ‘the special contracts’ stated in Chapter 6 through Chapter 14, covering various types of contract, such as contracts of sale of goods, guarantee, bailment, collateral or deposit, agency, carriage of goods, lease, hire-purchases, and wages.

Category 4 is called non-contractual liabilities and stated in Chapter 15 through Chapter 18, which governs Indirect or Quasi contracts, unjust enrichment, torts and product liability.

## **1.2 General Characteristics of Contract Law**

### **1) Historical Overview**

Prior to the enactment of the NCC in 2018, the main legal source in Nepal was the *Muluki Ain*, which was enacted in 1854. This Code was repeatedly revised several times. The latest revision was in 1963. It consists of five parts with a preamble, covering both civil and criminal procedures and both civil law and criminal law. However, there is no systematic structure therein, and there is also no clear borderline between substantial law and procedural law, and between civil law and criminal law as well. Regarding contract law, there were only a few related chapters, which regulate some specific contracts, such as financial transactions in Part 3. As to tort law, there were no related provisions in the *Muluki Ain*.

In the area of contract law, the Contract Act played the most important role in Nepal. First, the Contract Act enacted in 1966 only provided the general principles of contracts, and it did not deal with any special contracts. The Act was revised in 2000 and attempted to cover almost all areas of contract law. This Act was strongly influenced by the Contract Act, 1872 in India.

### **2) Respect for Existing Contract Law in Nepal**

First, the chapters in Part 5 related to contract law have a strong continuity with the previous legal system in Nepal. While one chapter, ‘Wages’, supersedes the content from the *Muluki Ain*, most of the other chapters supersede the content from the Contract Act, 2000.

Exceptionally, there are three new chapters in Part 5. One is ‘General provisions Relating to Obligations’ (Chapter 1), and the other two are ‘Contracts of Lease’ (Chapter 12) and ‘Hire-purchase Contract’ (Chapter 13). However, even the latter two chapters are also modeled after the related statutes in India. That is, the Hire-purchase Act, 1972 and Chapter 5 (Lease of Immovable Property) in the Transfer of Property Act, 1882.



Therefore, out of respect for the existing contract law in Nepal or to model the law after the Indian related laws which are familiar with many Nepali legal practitioners, this new contract law as a part of the Civil Code is prepared not to cause, or to avoid, confusion in future trade practices as a result of respecting and emphasizing the continuity with the existing law in this country.

### **3) The Influence of Common Law in Nepalese Contract Law**

There is a strong influence of Indian law in Nepalese contract law. The Contract Act, 1872 in India was an attempt at codifying common law in the area of contract law during the era of British India, and this Act was adopted in some of the former British colonies, such as Malaysia, Brunei, Bangladesh, Myanmar and Kenya. Nepal was not a colony of Britain, therefore not directly belonging to the common law system, but she attempted to adopt this Act from India voluntarily.

Therefore, Nepalese Contract Law has developed strongly under the influence of common law through an acceptance of Indian law and English law behind it. This historical fact is important for understanding and interpreting Nepalese contract law, which also applies to the provisions of contract law contained in the Nepal Civil Code. Even though the article number, heading, and composition changed, as to the interpretation of each provision, the Contract Act, 2000, Indian Contract Act, 1872, other related statutes, common law, and case law will continue to be referred to.

However, it should also be noted that there was no direct and comprehensive adoption of Indian Contract Act in Nepal. This means that even though the structures of the Contract Act of India and Nepal are similar, only partial and selective adoption was accomplished in Nepal. While under the influence of common law, it does not belong completely to the common law system. This is a characteristic of Nepalese contract law, which has not changed to this day.

### **4) Modernization of Contract Law**

One more point worth noting is that contract law in the NCC attempts to modernize some provisions on basis of the existing structure of contract law. Some of the latest and advanced contract law provisions from an international perspective are included in the new contract law with very careful consideration to ensure harmony with the legal system and legal practices in Nepal. One example is a *Favor Contractus*, which is the norm to maintain a contractual relationship as much as possible. Another example is to emphasize the safety of transactions and to enrich the provisions of protection of third parties.

## **1.3. General Provisions Relating to Obligations (Chap. 1)**

### **1) Source**

This chapter (Secs. 493-503) is newly established.

### **2) Contents**

- 493. Obligation to be created
- 494. Circumstances in which obligation is created
- 495. Obligation to be fulfilled
- 496. Obligation to be fulfilled within the prescribed time
- 497. Each person to fulfill obligation
- 498. Obligation may be divisible
- 499. Obligation to be fulfilled in good faith
- 500. Bearing of compensation for failure to fulfill obligation
- 501. Obligation contrary to law not to be fulfilled
- 502. Impossible obligation not to be fulfilled
- 503. Statute of limitation

### **3) Summary**

Provisions in this chapter shall be applied to all reasons which create obligations, such as contract, indirect or quasi-contract, unjust enrichment, tort, and quasi-tort (Sec. 494). There are eleven sections herein, and basic rules on obligations are stipulated.

General provisions applied on the basis of the discretion of the judge, such as good faith (Sec. 499), public order or public morality (Sec. 501) and impossibility (Sec. 502) may provide resolution criteria against unpredictable conflicts in future on the basis of the development of case law. Also, provisions for multiple debtors' relationships (Secs. 497 and 498) will play an important function in the future. These points are described in detail below.

Provisions relating to Statute of Limitation are provided in Chapter 5 of the Civil Procedure Code, and only the period of exercise of rights is stipulated in the last article of each chapter of the Civil Code. Under this chapter, any act or action 'may make a lawsuit within two years from the date of accrual of the cause of action' (Sec. 503).

### **4) Key Points**

#### **4.1) Good faith principle**

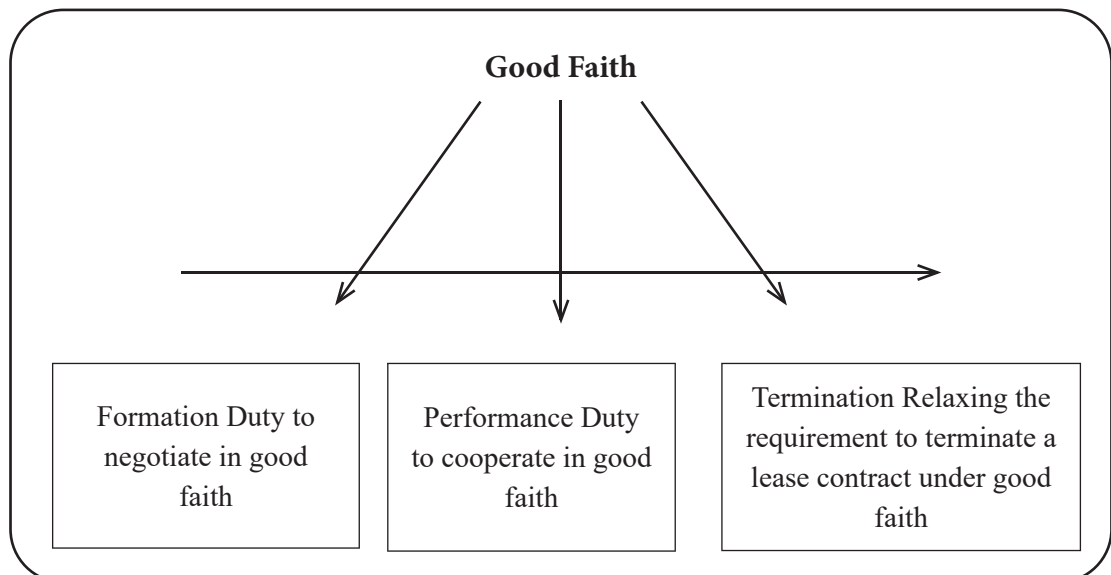
According to section 499, 'The person who is bound to fulfill the obligation created pursuant to Section 494 shall fulfill it in good faith.'

This is a general provision. It means that the application of good faith is subject to judicial discretion. Courts need to set the scope and criteria for applying good faith in each context. Because of this inherent nature of the general provision, there is the potential to create new rules of contracts or to modify existing rules of contracts stated in the provision on the grounds of applying good faith. For example, the Figure below shows the process of a contract from the stages of formation, performance, and termination.

At the stage of formation of a contract, it may be possible to impose the duty to negotiate in good faith on the parties. There is no provision for pre-contractual liability in the Civil Code, so this duty may create a new rule to govern the stage of negotiations by applying good faith.

As to the stage of performance, one party may assert a breach of contract on the other party owing to the slight shortage of payment or incorrect method of performance. ‘The duty to cooperate in good faith’ may restrain such an assertion from the viewpoint of maintaining the contractual relationship as much as possible. As already mentioned, this norm is called *Favour Contractus*, which is now broadly accepted in international transactions.

At the stage of termination, especially in the case of a lease contract on real property, the lessor may terminate the contract if, for example, the lessee fails to pay the lease amount within 90 days (see Sec. 621(1)(a)). However, such a lease contract is a long-term contract, and it may not be reasonable to allow termination only because of one non-payment. In such a situation, the good faith may apply ‘to relax the requirement to terminate a contract.’ In Japan, unless the confidential relationship is found to have been destroyed, case law concludes that the contract cannot be terminated even if there is a default. This is justified on the basis of the good faith principle as well.



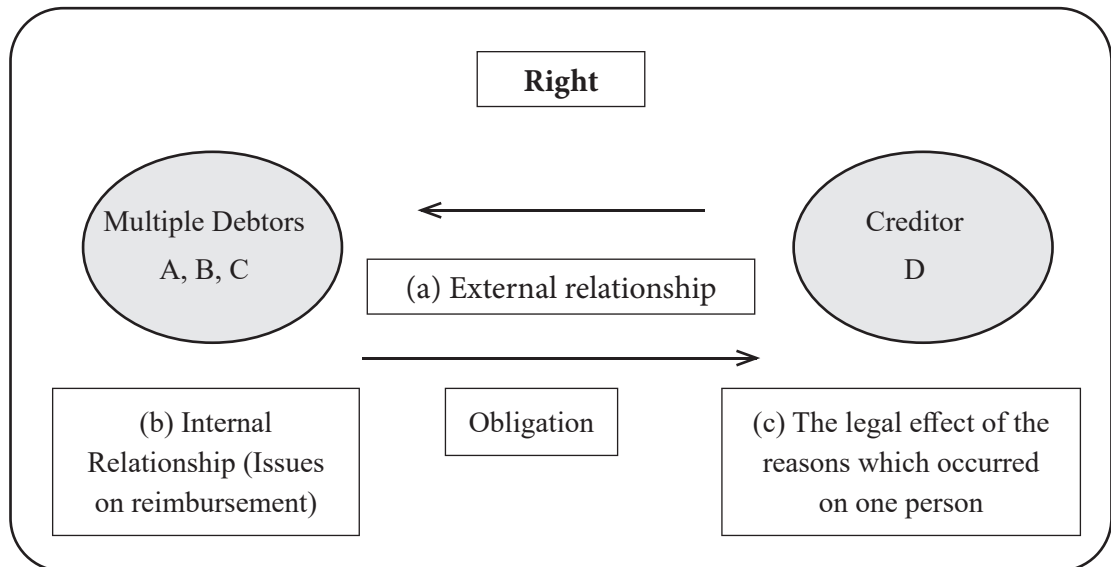
## 4.2) Obligations owed by multiple parties

There are several situations where multiple parties owe obligations:

- (1) When ABC purchases a car from D, or ABC leases a house from D;
- (2) When A borrowed money from D and B&C becomes the surety for A; and
- (3) When ABC jointly infringes the rights or interests of D.

In all of these situations, there is only one creditor (D) and three debtors (ABC) in a contract by joint purchase or joint lease (1), in a joint liability on guarantee (2), and in a joint liability on tort (3). (See also Sec. 681.)

Under this chapter, in principle, each person shall fulfill an obligation equally (Sec. 497), and such an obligation may be divisible (Sec. 498). See also Section 681 (Joint tort liability). Therefore, if ABC owes 3 million rupees to pay or compensate as a whole, each debtor individually owes 1 million rupees against D. As a matter of course, the parties may change the portion by agreement. However, as showed in the next Figure, it may be necessary to consider more detailed issues regarding the multiple debtors' relationships. It should also be noted that there is another related provision in Chapter 4 of Part 5 (Sec. 529(4)(5) and (6)) where there are multiple debtors in contract.



### (a) External relationship

How can creditor D claim for payment? Does he have to claim against ABC individually for 1 million rupees or can he claim against one of the parties to pay the total amount of 3

million rupees? In the case of a contract, ‘any or all ... joint promisor shall fulfill ... the obligations under the contract, except as otherwise provided for in the contract’ (Sec. 529(4)). Therefore, it depends on creditor D’s decision. However, it is not clear in the case of other situations, such as in the case of joint tort.

**(b) Internal Relationship (issues on reimbursement)**

In principle, obligation is considered as equal, and reimbursement will also be done equally. There is also a provision for reimbursement on a pro rata basis in the case of a contract (Sec. 529(5)). But, especially in the case of joint tort liability, it may be necessary to change the portion considering the position and contribution in the situation of torts.

**(c) The legal effect of the reasons which occurred on one person (e.g., exemption).**

If creditor D decides to exempt obligation for B, will the legal effect of exemption between B & D affect the other debtors A and C or not? If A and C still owe 3 million rupees, the exemption is only affected between D and B relatively. On the other hand, if A and C only owe 2 million rupees, the exemption is affected among ABC absolutely. In the case of a contract, there is a provision which seems to adopt the former relative effect (Sec. 529(6)), but it is not clear in other situations.

## **2. Contract Law I: General Principles**

### **2.1 Formation of Contracts (Chap. 2)**

#### **1) Source**

This chapter (Secs. 504-516) supersedes the content in Chapter 2 (Secs. 3-12) of the Nepalese Contract Act, 2000, which was modeled after Chapter 1 (Secs. 3-9) and Chapter 3 (Secs. 31-36) of the Indian Contract Act 1872. There are also newly established or modified provisions.

#### **2) Contents**

- 504. Contract deemed to have been made
- 505. Contract enforceable by law
- 506. Persons competent to conclude contract
- 507. Parties to be autonomous
- 508. Offer and acceptance deemed to be completed
- 509. Offer or acceptance may be revoked
- 510. Offer deemed to be revoked
- 511. Contract according to offer made before the public

- 512. Place of formation of contract
- 513. Contingent contract
- 514. Application of general provisions of contract
- 515. Interpretation of contract
- 516. Statute of limitation

### **3) Summary**

This chapter governs the rules on formation of contract, and given their related provisions in previous statutes, it is strongly influenced by common law. Contracts are established owing to ‘offer and acceptance’ (Sec. 504(2)), and it is required to fulfill some conditions to make a contract enforceable (Sec. 505), such as the consent to be bound, capacity or qualification to conclude the contract, certain matters for the creation of an obligation, lawful obligations, and written forms or conduct. However, the requirement of consideration peculiar to common law is not explicitly required.

The details on offer and acceptance are provided on the basis of the provisions of the Contract Act with some modifications, such as revocation of offer (Sec. 510), an offer by an advertisement (Sec. 511). Section 513 provides for the condition attached to the contract. The provision concerning interpretation of contract (Sec. 515) is newly introduced and will be discussed below.

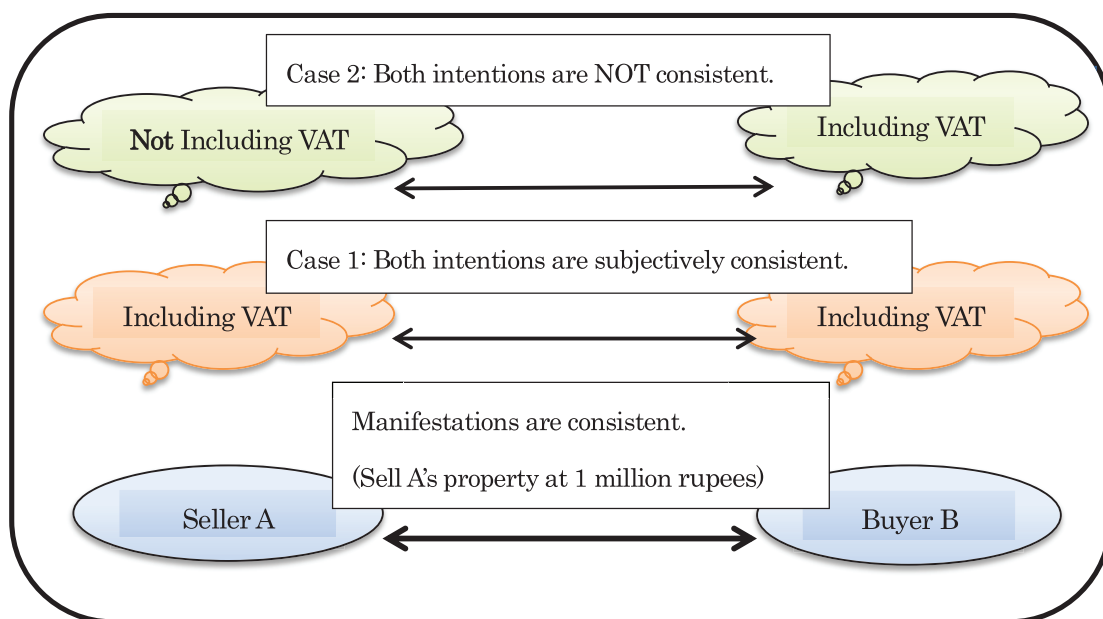
In addition, the provisions from Chapter 2 to 5 shall be applicable to any contract (Sec. 514) such that it means that these chapters are deemed to be the general principles of contract law. The statute of limitation under this chapter is two years (Sec. 516).

### **4) Key Points**

#### **4.1) Interpretation of contract**

To establish a contract, manifestations of intention on the part of both parties are necessary, but sometimes intention and manifestation are not consistent. In such a situation, a new provision for the interpretation of a contract (Sec. 515) will be applied.

The next Figure, shows a contract between A & B, and Seller A sells his property to buyer B for 1 million rupees. Manifestations between A and B are consistent, but it is not clear whether the VAT is included in the manifestation of 1 million rupees.



Section 515 prepares both subjective and objective standards for interpretation. Primarily, ‘a contract shall be interpreted according to the common interests of parties’ (Sec. 515(1)). Therefore, if both A and B have had an intention that the VAT is included in the manifestation of ‘1 million rupees’ (see Case 1 above), the intentions are subjectively consistent regarding the meaning of ‘1 million rupees’. As a result, 1 million rupees is interpreted as the price including VAT.

However, if A had an intention that VAT was not included, and B had an intention that VAT was included (see Case 2 above), the intentions are not consistent. Therefore, it is necessary to interpret the meaning of ‘1 million rupees’ objectively ‘in the light of the entire contract or the context in which such terms and expressions are used’ (Sec. 515(4)).

## 2.2 Validity of Contracts (Chap. 3)

### 1) Source

This chapter (Secs. 517-520) supersedes the content in Chapter 3 (Secs. 13-14) of the Nepalese Contract Act, 2000, which was modeled after Chapter 2 (Secs. 10-30) of the Indian Contract Act 1872. There are also newly established or modified provisions.

### 2) Contents

517. Void contracts

518. Voidable contracts

519. Unenforceable contracts

520. Statute of limitation

### **3) Summary**

This chapter governs the rules on validity of contract, and given their related provisions in previous statutes, it is strongly influenced by common law.

Section 517 provides the reasons to make a contract void, such as (a) a contract restraining the exercising of any profession, trade or business, (b) a contract restraining a marriage, (c) a contract restraining the enjoyment of any public facilities, (d) a contract restraining legal rights, (e) a contract concluded contrary to law, (f) a contract concluded against public order or interest, (g) a contract which cannot be performed because the parties have not ascertained or know about the matter, (h) a contract which cannot be performed because of its impossibility, (i) a contract which is vague, (j) a contract concluded by a person not competent, (k) a contract with an illegal purpose, and (l) a contract concluded by bilateral mistakes (Sec. 517(2)). A void contract is invalid *ab initio* (Sec. 517(3)), but partial invalidity is allowed so that remaining parts shall be enforceable (Sec. 517(4)). Provisions on bilateral mistakes (Sec. 517(2)(l)) and partial invalidity (Sec. 517(4)) are newly established in this Code.

Section 518 provides the reasons to make a contract voidable, such as a contract concluded by (a) coercion, (b) undue influence, (c) fraud, (d) misrepresentation (Sec. 518 (2)). There are no major changes regarding reasons of rescission as before, but a claim of rescission is now requested to be submitted to court (Sec. 518(1)). Also, the provision of third-party protection is newly introduced (Sec. 518(6)), which will be described in detail below.

Section 519 is a provision of unenforceable contracts, which is still valid but unenforceable in the case of a contract not being concluded (a) in written form, (b) in fulfillment of any particular formality or procedure or by being registered (Sec. 519(2)). This is a new provision modeled after the Statute of Frauds found in common law countries. Through the introducing this rule, it can be assessed that the formality of a contract is strongly respected in Nepalese contract law. In addition, a contract concluded (c) on behalf of another person, but concluded on a matter not authorized, or beyond the authority given, is also unenforceable (Sec. 519(2)).

The statute of limitation is one year under Section 518, two years under Section 519, but there is no such limitation under Section 517 (Sec. 520).

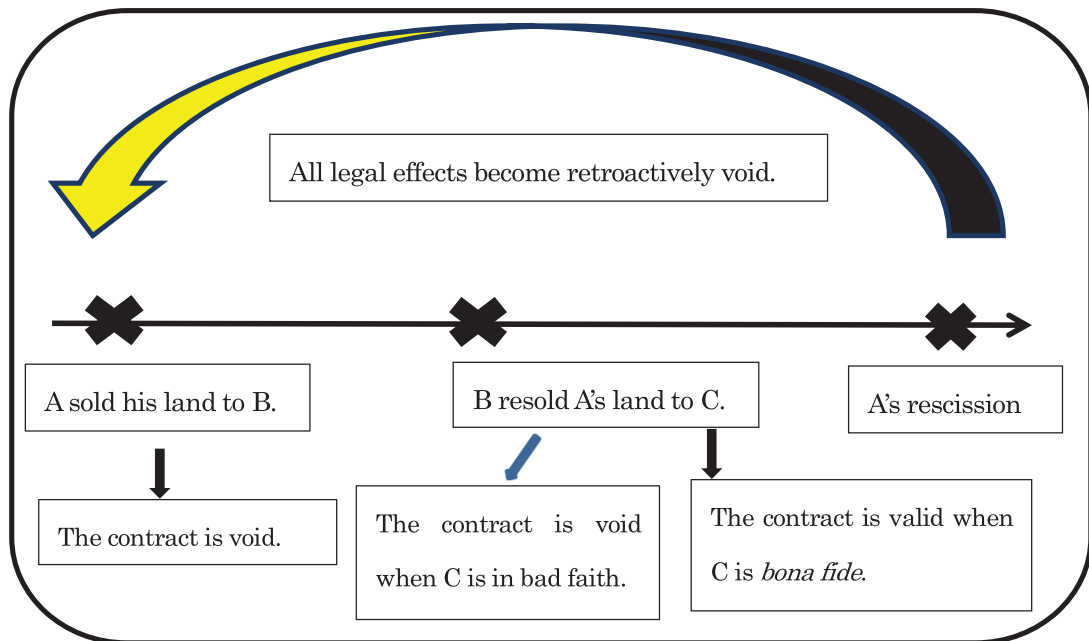
### **4) Key Points**

#### **4.1) Third-party protection in the case of voidable contracts**

The provision of third-party protection is newly included in the Civil Code. According



to Section 518(6), ‘If any contract is voided ..., the legal right or interest of a *bona fide* third party shall not be prejudiced merely by the reason of such avoidance.’



As shown above, suppose that A sold his land to B, and B resold the land to C. Then, A exercised his right to rescind the contract on the grounds of B's fraud. As a result, all legal effects become retroactively void (see also, Sec. 518(3)(a)). Therefore, the contract between A and B becomes void, but the contract between B and C does not become void automatically.

It depends on the third party C's state of mind, whether he is in bad faith or in good faith (*bona fide*). When C is in bad faith, the contract is void, but when C is in *bona fide*, the contract is valid. The third party in good faith who has acquired rights in the subject matter of the contract is protected from the perspective of safety of transaction.

## 2.3 Performance of Contracts (Chap. 4)

### 1) Source

This chapter (Secs. 521-534) supersedes the content in Chapter 10 (Secs. 71-73) and Chapter 11 (Secs. 74-81) of the Nepalese Contract Act, 2000, which was modeled after Chapter 4 (Secs. 36-67) of the Indian Contract Act 1872. There are also newly established or modified provisions.

### 2) Contents

- 521. Obligation under contract to be fulfilled
- 522. Reciprocal performance of contract

- 523. Time and manner for performance of contract
- 524. Place for performance of contract
- 525. Performance of contract deemed to have been delayed
- 526. Time to be considered as essence of a contract
- 527. Circumstances where a contract need not be performed
- 528. Assignment of rights and liabilities under a contract
- 529. Party who must perform a contract
- 530. Only the parties to a contract can demand its performance
- 531. Discharge of contracts in the event of fundamental changes in circumstances
- 532. Facilities to be provided
- 533. Contract may be suspended or altered
- 534. Statute of limitation

### **3) Summary**

This chapter governs the rules on performance of contract, and given their related provisions in previous statutes, it is strongly influenced by common law.

Section 521 is a provision to confirm that each contractual party has a duty to fulfill his or her obligation. Section 522 provides both simultaneous performance and prior performance in reciprocal contracts, and the legal effects on non-performance for each case. Sections 523 and 524 provide the rules on time, manner, and place for performance in detail. Newly added provisions regarding delayed performance in Section 525 and 526 will be discussed below. Section 527 establishes the cause of extinguishment of contractual obligations, such as (a) waiver (exemption), (b) rescission, (c) breach of contract, and (d) change of circumstances. Section 528 concerns the assignment of contractual rights and obligations due to the death and mental disorder of the parties. Section 529 includes the rules on the performance by the agent or the mandatary, the performance by the third party, and performance in a case where there are multiple parties. Section 530 specifies the right to claim performance, including in the case of a contract for third parties. Section 531 follows the detailed rule on ‘change of circumstance’ from the previous related provision, adding some new rights for the parties. Section 532 requires for parties to provide facilities which may be needed for performance of contract, and this provision can be regarded as a specific form of duty to cooperate in good faith (see also Sec. 499). Section 533 stipulates the suspension and alteration of contract by agreement. Section 534 is a provision of statute of limitation under this chapter, which is set at two years.

The comments on the provisions newly introduced in this chapter are as follows.

## 4) Key Points

### 4.1) Delayed performance

Normally, delayed performance is considered as a type of non-performance or breach of contract, and the related provision is now stated in Section 525. However, it is just a delay, and performance is still possible. Therefore, if the contract can still be performed, one party ‘may notify the other party to perform the contract, having given a reasonable time’ (Sec. 525(2)). In such a case, the notifying party may also claim compensation for losses caused by a delayed performance (Sec. 525(3)).

As above, the debtor is still obliged to compensate for losses caused by a delayed performance. For example, if there is a delay of performance on delivering a house for a month, the buyer needs to stay in a hotel until the seller delivers the house. The cost of the hotel’s fee for one month is the loss which the buyer may claim as a result of delayed performance.

However, in a case where a particular day, time, or period is to be considered as an essence of the contract, the other party may rescind the contract immediately for the delayed performance of the other party (Sec. 526). Suppose that after you ordered a wedding cake from a bakery the cake was not delivered on the day of the wedding. In such a situation, time is considered as an essence of the contract. Even if you received the cake the day after the day of the wedding, it is meaningless. Therefore, the purchaser may rescind the contract immediately without notice in such a case.

### 4.2) Discharge of contracts in the event of fundamental changes in circumstances

The provision relating to the fundamental change in circumstances existed in the Contract Act, 2000, but now a provision for the right to negotiate to review or alter the terms and conditions is newly included (Sec. 531(4)).

More specifically, Section 531(1) states that ‘the act according to the contract need not be performed’ in a case where there is ‘a fundamental change’ at the time of conclusion of the contract which makes impossible to perform, and what constitutes a fundamental change is listed in Section 531(2). Section 531(3) lists the circumstances where there is no fundamental change so that it is still necessary for contractual parties to perform in such a circumstance. The content so far is the same as the previous provision in the Contract Act, 2000. However, as a new rule stated in Section 531(4), it is now allowed for parties ‘to negotiation to review or alter the terms and conditions’ in the case of circumstances where there is no fundamental change

This is also a request to satisfy the norm of *Favour Contractus*, which is broadly accepted in international transactions from the viewpoint of maintaining the contractual relationship as much as possible.

## **2.4 Breach of Contracts and Remedies (Chap. 5)**

### **1) Source**

This chapter (Secs. 535-544) supersedes the content in Chapter 12 (Secs. 82-87) of the Nepalese Contract Act, 2000, which was modeled after Chapter 6 (Secs. 73-75) of the Indian Contract Act 1872. There are also newly established or modified provisions.

### **2) Contents**

- 535. Breach of contract deemed to have occurred
- 536. Indivisible nature of the authority to rescind contract
- 537. Compensation for breach of contract
- 538. Consequences of rescission or voidance of contract
- 539. Amount to be recovered in proportion to performed contract (quantum meruit)
- 540. Specific performance of contract
- 541. Power of court to make an order
- 542. Compensation to be ascertained in monetary value
- 543. Power of court to consider matters
- 544. Statute of limitation

### **3) Summary**

This chapter governs the rules on breach of contracts and remedies, and given that their related provisions in previous statutes, it is strongly influenced by the common law.

According to Section 535(1), a breach of contract occurs in the following situations: when a party ‘fails to fulfill the obligation under the contract’, ‘gives a notice to the other party that he or she will not perform ...’, or ‘is incapable of performing ...’.

As to the remedies thereof, (a) the rescission (termination) of contract (Secs. 535(2), 536, 538, and 539), (b) the compensation (Secs. 537, and 542), (c) the specific performance (Sec. 540), and (d) the injunction (Sec. 541) are provided.

According to Section 537(1), there are two types of loss or damage which the aggrieved party shall be entitled to recover in the case of a breach of contract: ‘actual loss or damage caused by the breach’ or ‘such loss or damage which the ... parties knew when they made the contract to be a likely result of the breach’. Section 537(2) provides ‘liquidated or stipulated damages’, but the amount shall not exceed that sum pursuant to Section 537(1). No compensation may be recovered for any indirect or remote loss or damages (Sec. 537(3)).

Section 543 is a new and unique provision related to determining the scope of compensation in the case of a breach of contract. According to the provision, in determining compensation, the court shall consider the intention or recklessness on the part of the breaching party and the benefit received by the innocent party.

The statute of limitation under this chapter is two years (Sec. 544).

### **3. Contract Law II: Special Contracts**

#### **3.1 Contracts of Sale of Goods (Chap. 6)**

##### **1) Source**

This chapter (Secs. 545-562) supersedes the content in Chapter 7 (Secs. 40-55) of the Nepalese Contract Act, 2000, which was modeled after Chapter 7 of the Indian Contract Act 1872. Later on, this chapter was deleted, and the Sale of Goods Act 1930 was newly enacted in India. There are also newly established or modified provisions.

##### **2) Contents**

- 545. Contract of sale of goods
- 546. Contract of sale of goods to be void
- 547. Determining price of goods
- 548. Payment of price of goods
- 549. Description of goods
- 550. Condition as to title to goods to be sold
- 551. Condition as to quality of goods
- 552. Right to accept or reject goods of different quantity
- 553. Deemed to be contract for sale by sample
- 554. Provisions relating to transfer of ownership of goods
- 555. Bearing of risks
- 556. Right of buyer to ascertain goods
- 557. Goods deemed to have been accepted
- 558. Time for delivery of goods
- 559. Documents concerning sold goods to be handed over
- 560. Not to deliver goods in quantity different from quantity specified in contract
- 561. Special provisions relating to compensation
- 562. Statute of limitation

### 3) Summary

This chapter governs the rules on contracts of sale of goods, and given their related provisions in previous statutes, it is strongly influenced by common law.

The 'goods' in this chapter are limited to 'any kind of movable property' (Sec. 545). In addition to the special rules which apply to a contract of sale of goods that may overlap with the general rules prescribed in the preceding chapters, such as the provisions of 'invalidity' (Sec. 546) and 'compensation' (Sec. 561), many rules specific to such a contract are defined in this chapter.

Firstly, although it is not necessarily to determine the price of goods at the time of making a contract (Sec. 547), a description of goods is required (Sec. 549).

Secondly, the provisions on warranty are partially modernized in the NCC (Secs. 550-553). This part will be discussed in detail below.

Thirdly, the transfer of ownership of goods (Sec. 554(5)) and the transfer of the risk of any loss or damages to goods (Sec. 555) are both at the time of the transfer of goods to the buyer. It should also be noted that documents related to the ownership of goods must be handed over, otherwise the ownership shall not be deemed to have been transferred (Sec. 559).

In addition, detailed provisions relating to the delivery of goods are stipulated (Secs. 556-560). As to the statute of limitation, it is two years under this chapter (Sec. 562).

### 4) Key Points

#### 4.1) Condition as to quality of goods

According to Section 551(1), 'the goods sold or to be sold shall be deemed to be of satisfactory quality'. As to the standard of warranty, it shifts from merchantable quality to satisfactory quality. Therefore, the quality should be satisfactory from the viewpoint of a reasonable person, not a merchant.

This is influenced by the amendment of the British 'Sale of Goods Act' in 1994 on the issue. As a part of modernization of contract law, the change from 'merchantable quality' in 1893 Act (Sec. 14(2)) to 'satisfactory quality' in 1994 Act (Secs. 14(2) and 14(2A)) is also reflected in Nepalese contract law.

#### 4.2) Right to accept or reject goods of different quality

There is a new provision to give some remedies to the buyer in the case of a breach of warranty. According to Section 552, the buyer has a right to accept or to reject the goods of different quality and may also claim to have other goods delivered or to improve the quality of the goods. This is also considered as satisfying the request of *Favour Contractus* by allowing

cure as a remedy. This provision is modeled after Section 2-601 of the Uniform Commercial Code (U.C.C.) in the USA.

## **3.2 Contracts of Guarantee (Chap. 7)**

### **1) Source**

This chapter (Secs. 563-574) supersedes the content in Chapter 4 (Secs. 15-24) of the Nepalese Contract Act, 2000, which was modeled after Chapter 8 (Secs. 127-147) of the Indian Contract Act 1872. There are also newly established or modified provisions.

### **2) Contents**

- 563. Contract of guarantee deemed to have been made
- 564. Surety's obligation
- 565. When surety is discharged from obligation
- 566. Relation between the surety and the principal debtor
- 567. Surety to substitute creditor
- 568. When contract of guarantee can be voided
- 569. Obligation of sureties to be equal
- 570. Continuous guarantee
- 571. Contract of indemnity deemed to be concluded
- 572. Provisions relating to subrogation
- 573. Rights of subrogator
- 574. Statute of limitation

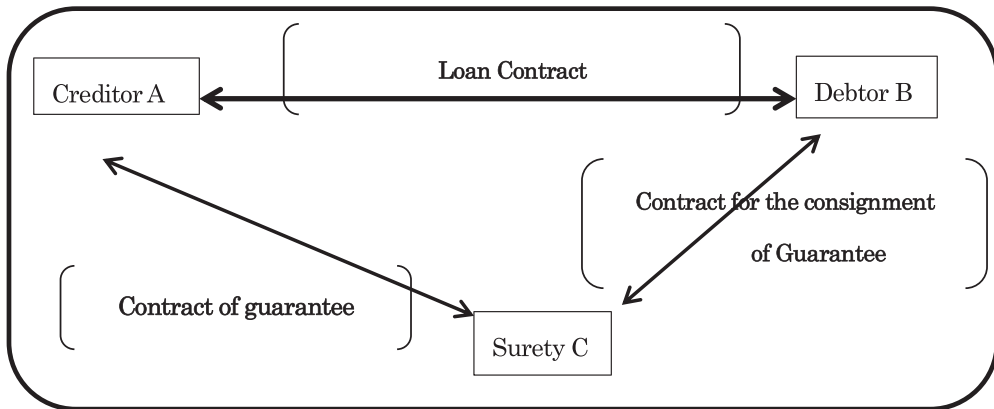
### **3) Summary**

This chapter defines both 'contracts of guarantee (Secs. 563-570) and contracts of indemnity (Secs. 571-573), and most of the provisions follow the previous related provisions in the Contract Act, 2000.

Under the contract of guarantee, based on the loan contract between creditor A and debtor B, the third party C as a surety 'undertakes to repay the loan or fulfill the obligation' on the part of debtor B (Sec. 563(1)) if debtor B 'fails to repay or discharge such loan or liability (Sec. 563(2)). Therefore, there are three contracts in such a situation (see Figure on the next page.): the loan contract between A and B, the contract of guarantee between A and C, and the contract for the consignment of guarantee between B and C. The contract of guarantee shall be made in written form (Sec. 563(4)), determining 'the terms and conditions of guarantee (Sec. 563(3)). The detailed rules concerning guarantee contracts from Sections 564 to 569 are in accordance with the previous provisions in the Contract Act, 2000, but the provision on continuous guarantee in Section 570 is newly introduced this time. This will be described later.

Under the contracts of indemnity, promisor A bears any loss or damages caused to the other party B or third party C (Sec. 571(1)). Identity guarantee in employment contracts and various insurance contracts are included here. However, when B or C suffers any loss or damages by person D with *mala fide* intention or negligence, A shall not bear any loss or damage, and instead, D is personally liable for it (Sec. 571(3)).

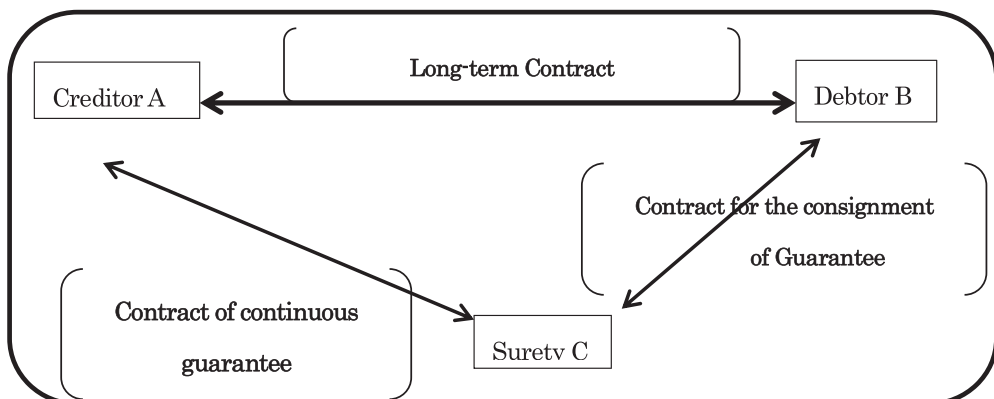
As to the statute of limitation, it is two years under this chapter (Sec. 574).



#### 4) Key Points

##### 4.1) Continuous Guarantee

There is a new provision for continuous guarantee. When creditor A and debtor B conclude a long-term contract, and surety C undertakes a continuous guarantee, it means that a guarantee is ‘given as to extend to a series of transactions’ (Sec. 570(1)) and the surety C is ‘liable to the extent of the amount of guarantee that could not be recovered in the entire period of the contract of guarantee’ (Sec. 570(2)). Although the surety may revoke such guarantee as to the future transactions by notice (Sec. 570(3)), it may be necessary to set the surety's obligation within a certain specified scope in advance, because the surety may owe an unidentified and unlimited obligation in such a situation.





### 3.3 Contracts of Bailment (Chap. 8)

#### 1) Source

This chapter (Secs. 575-584) supersedes the content in Chapter 5 (Secs. 25-34) of the Nepalese Contract Act, 2000, which was modeled after Chapter 9 (Secs. 148-181) of the Indian Contract Act 1872.

#### 2) Contents

- 575. Contract of bailment
- 576. Bailment deemed to have been completed
- 577. Disclosure of faults in goods bailed
- 578. Obligations of bailee
- 579. Return of bailed goods
- 580. Bailor to be liable for other's goods bailed
- 581. Goods given for repair and maintenance to be returned
- 582. Costs incurred in taking care of bailed goods
- 583. Contract of bailment to be void
- 584. Statute of limitation

#### 3) Summary

This chapter governs the rules on contracts of bailment. According to Section 575, this contract shall be concluded when ‘a person delivers any goods to another person such that the goods shall be **returned** to him or her or **handed over** or **sold** to any other person according to his or her direction’. Therefore, the bailment contract is focusing on 'a change in possession but not in title' of property, following the concept of bailment under common law. The purpose therein is not particularly limited, and the bailee may hold the bailor's property for a certain purpose, including lease of movable property, loan for use, pledge and so on.

The ‘goods’ referred to in this chapter is limited to movable property (Sec. 575, Explanation), and a delivery of goods is required for a contract to be established (Sec. 576(1)), and a deed shall be executed when the value of the goods exceeds 25 thousand rupees (Sec. 575(2)). Then, provisions relating to obligations and liabilities for both bailor and bailee (Secs. 577-582), and the provision on reasons of invalidity for bailment contract (Sec. 583) are provided. As to the statute of limitation, it is two years under this chapter (Sec. 584).

The provision on ‘Goods found may be kept upon giving information to police’, which used to be placed on the chapter of bailment in the Contract Act, 2000 (Sec. 31, Chap. 5), is now transferred to the chapter of unjust enrichment (Sec. 670, Chap. 16, part.5).

### 3.4 Contracts of Collateral or Deposit (Chap. 9)

#### 1) Source

This chapter (Secs.585-590) supersedes the content in Chapter 6 (Secs. 35-39) of the Nepalese Contract Act, 2000. There is no related chapter in the Indian Contract Act 1872.

#### 2) Contents

- 585. Contract of collateral or deposit deemed to have been made
- 586. Return of goods collateral or deposited
- 587. Rights of the person who obtains collateral or deposit
- 588. Consequences of collateral or deposit of goods by non-owner
- 589. Creditors to be on equal footing (*pari passu*)
- 590. Statute of limitation

#### 3) Summary

This chapter governs the rules on contracts of collateral or deposit. According to Section 585, both the collateral and deposit contracts are common in respect of taking delivery of goods from one person to another person, but each purpose is different: whilst the former is concluded ‘as a security for payment of a debt lent’, the latter is ‘as a security for the performance of a promise’.

Unlike the bailment contract in the previous chapter, the goods referred to in this chapter cover any property, including both immovable and movable property (Sec. 585, Explanation). Besides that, a title or an instrument establishing a title to that property are also included (*ibid*).

The goods shall be returned after the payment of debt or performance (Sec. 586). In the case of a default in payment of the debt under the collateral contract, the party who obtains collateral may initiate the right to recover the debt by selling or auctioning the collateral (Sec. 587(1)). In the case of non-performance under the deposit contract, the party who obtains deposits may use such goods for the performance or recovery of expenses incurred in such performance (Sec. 592(4)).

Section 588 regulates the situation where the delivered goods as collateral or deposit belong to someone other than the pledgee. Section 589 establishes the principle of creditor equality (*pari passu*) in the case where there are two or more creditors. As to the statute of limitation, it is two years under this chapter (Sec. 590).

### **3.5 Contracts of Agency (Chap. 10)**

#### **1) Source**

This chapter (Secs. 591-601) supersedes the contents in Chapter 8 (Secs. 56-64) of the Nepalese Contract Act, 2000, which was modeled after Chapter 10 (Secs. 182-238) of the Indian Contract Act 1872. There is only one newly established provision (Sec. 596).

#### **2) Contents**

- 591. Contract of agency deemed to have been made
- 592. Recognition of transaction carried out by agent
- 593. Power to appoint sub-agent
- 594. Matters to be complied with by agent
- 595. Agent to be responsible
- 596. Principal to be liable when creating the belief that act is done with authority
- 597. Termination of agency
- 598. Agent may not be removed
- 599. Renunciation of agency by agent not allowed
- 600. Removal of sub-agent together with agent
- 601. Statute of limitation

#### **3) Summary**

This chapter governs the rules on contracts of agency. According to Section 591, a contract of agency shall be concluded when any person (the principal) appoints any other person (the agent) ‘to do any act ... except on the matter of [the principal’s] ... personal ability,’ ‘to conduct business ... or carry on any transaction with a third person ... or to represent [the principal] ... or to establish any type of legal relation with ...the principal and a third person’ on behalf of the principal.

Section 592 establishes the basic effects on agency contracts. Section 593 is a provision on sub-agents. Sections 594 and 595 determine the obligations and responsibilities on the part of the agent. Sections 597 to 600 are related to the termination of agency contracts, and Section 601 is a provision of statute of limitation, which is set at two years.

The content of the above provisions is not changed from that in the previous statute, but as to the issue on unauthorized agency, the acts which have been made beyond the scope of the agency right, the provision of the appearance agency is newly introduced in Article 597. Details will be described below.

## 4) Key Points

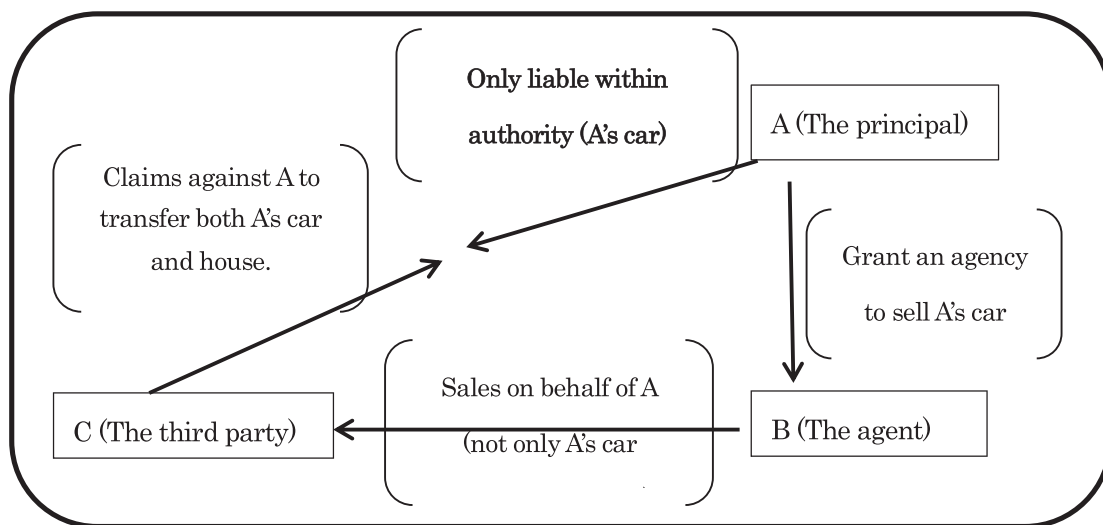
### 4.1) Maintaining the provisions of unauthorized agency

Firstly, the provisions on unauthorized agency are stated as below:

Art. 592(2, proviso): ‘... if the agent has done any act beyond his or her authority, the principal shall not be liable for such an act other than that accepted by him or her.’

Art. 592(3): ‘..., if, out of the acts done beyond the authority, ...(some acts are within, but some are beyond the authority), the principal shall be liable to the extent of the acts done within the authority.’

Therefore, when A (the principal) grants an agency to sell A’s car, B (the agent) will do sales on behalf of A. B is supposed to sell A’s car, but if B sold not only A’s car, but also A’s house, this is a situation where unauthorized agency occurs. When C (the third party) claims based on the sale with B to deliver or transfer the ownership on both A’s car and A’s house, according to the provisions above, A is only liable to the extent of the acts done within authority. As a result, A must deliver or transfer only his car to C.



### 4.2) Introducing the provisions of apparent agency

However, A should be liable to the whole unauthorized agency in a certain circumstance in terms of the third party’s protection or security on transaction. Therefore, the provision of apparent agency is newly included in the NCC and is based on Article 237 of the India Contract Act. When the Contract Act, 2000 was enacted in Nepal, this provision was not adopted. According to Article 596:

Art. 596 (Principal to be liable when creating the belief that the act is done with authority):

(1) If ... (the principal creates the belief that the act is done with authority), the principal shall be liable for any act done by the agent ... unless the third party has come to know or has reasonable ground to know that the authority has not been so given.

(2) ..., the principal may be liable for the act done by the agent beyond the authority if there is a reasonable ground for the third party to believe that the agent has authority.

Therefore, if B sold not only A's car, but also A's house, A may still be liable for the act done by agent B beyond authority (A's car and A's house) when there is a reasonable ground for third party C to believe that the agent has authority.

### **3.6 Contracts of Carriage of Goods (Chap. 11)**

#### **1) Source**

This chapter (Secs. 602-609) supersedes the content in Chapter 9 (Secs. 65-70) of the Nepalese Contract Act, 2000. There is no related chapter in the Indian Contract Act 1872.

#### **2) Contents**

- 602. Contract for carriage of goods deemed to have been made
- 603. Carrier's obligations
- 604. Carrier to be liable
- 605. Right to sell goods without consent of owner
- 606. Carrier's liability to be limited
- 607. Bearing of compensation
- 608. Termination of carrier's liability
- 609. Statute of limitation

#### **3) Summary**

This chapter governs the rules on contracts of carriage of goods, but 'carriage' in this chapter means a transport service other than air or marine transport (Sec. 602(2), Explanation). The provisions for carrier's obligations and liabilities (Secs. 603-608) are provided. As to the statute of limitation, it is two years under this chapter (Sec. 609).

### **3.7 Contracts of Lease (Chap. 12)**

#### **1) Source**

This chapter (Secs. 610-623) is newly introduced. . There is no related chapter in the Nepalese Contract Act, 2000 or in the Indian Contract Act 1872. This chapter is said to be

modeled after Chapter 5 (Lease of Immovable Property) in the Transfer of Property Act 1882 in India.

## **2) Contents**

- 610. A contract of lease deemed to have been made
- 611. Form of the leased goods not to be changed
- 612. Use of leased goods in good faith
- 613. Repair and maintenance of leased goods
- 614. Lessor to be informed if goods are not usable
- 615. Lessee to be liable
- 616. Payment of lease rent
- 617. Validity period of contract of lease
- 618. Leased goods may be sub-leased
- 619. Return of leased goods
- 620. Special provision relating to the contract of lease of immovable property
- 621. Contract of lease may be terminated
- 622. Provisions relating to house rent to apply
- 623. Statute of limitation

## **3) Summary**

This chapter governs the rules on contracts of lease, covering both leases on immovable and moveable property (Sec. 610(1), Explanation). However, in matters concerning house rent, the provisions of Chap. 9, Part 4 shall be applied (Sec. 622). There is a special provision for a contract of lease on immovable property (Sec. 620), which states that such a contract shall be concluded in writing (Sec. 620(1)), and in the case where a lease period is more than ten years, registration is required (Sec. 620(2)). Other provisions are commonly applied to both leases on immovable and moveable property.

Detailed provisions on the rights and obligations for both lessor and lessee are provided (Secs. 611-616, and 619). Although the lease period corresponding to each lease subject is individually determined (Sec. 617(1)), it can be extended by agreement between the parties (Sec. 617(2)). In addition, there are provisions for sub-lease (Sec. 618) and the cause of the termination of the lease contract (Sec. 621).

As to the statute of limitation, it is two years under this chapter (Sec. 623).

### **3.8 Hire-purchase Contracts (Chap. 13)**

#### **1) Source**

This chapter (Secs. 624-639) is newly introduced. . There is no related chapter in the Nepalese Contract Act, 2000 or in the Indian Contract Act 1872. This chapter is said to be modeled after the Hire-Purchase Act 1972' in India.

The law of hire-purchase is peculiar to common law countries. Hire-purchase transactions were initiated in the 1860s by the Singer Sewing Machine Company in England. Nowadays, hire-purchase is used to purchase expensive consumer goods such as cars, computers, and televisions. In the industrial sector, purchase of machinery is also financed by the method of hire-purchase.

Since this is a newly introduced contract in Nepalese society, it may be helpful to refer to the common law statutes governing this contract and the case law relating to it. In the United Kingdom, the Hire Purchase Acts 1938, 1954 & 1964 (consolidated in 1965) once existed, but now the hire-purchase transaction is regulated under the Consumer Credit Act, 1967. In the 1967 Act, the law of hire-purchase was largely reenacted with few alterations except that much of it applies to other consumer credit agreements as well. Among other commonwealth countries, in addition to the Hire Purchase Act 1972 in India, the Hire Purchase Act 1967 in Malaysia is also considered as a useful reference.

#### **2) Contents**

- 624. Hire-purchase contract deemed to have been made
- 625. Matters to be specified in hire-purchase contract
- 626. Conclusion of more than one contract to be deemed as conclusion of a single contract
- 627. Consequences of formation of hire-purchase contract
- 628. Transfer of ownership of goods
- 629. Goods on hire to be cared for and maintained
- 630. Installment to be paid
- 631. Termination of contract by paying installment
- 632. Termination of contract by returning goods
- 633. Right of hirer to transfer his or her right and interest
- 634. Liability for use of goods contrary to terms and conditions
- 635. Information of actual condition of goods to be given
- 636. The owner of goods may terminate contract
- 637. Rights of hirer in the case of forfeiture of goods

- 638. Status of hired goods in the case of hirer becoming bankrupt
- 639. Statute of limitation

### 3) Summary

This chapter governs the rules on Hire-Purchase Contracts. A contract of hire-purchase contains two elements. It is a hire which also gives the hirer an option to purchase the goods. Hire is a form of bailment, the situation where one puts in the possession of goods belonging to another (For contracts of bailment, see Chap. 8, Part 5). Thus, a hire purchase agreement is an agreement for the bailment of goods whereby the bailee (the hirer) has an option to purchase them.

When such a contract is concluded, ‘the hirer has the right of possession and use of the goods, on the condition of payment of the rent amount by installments on a periodic basis for such goods’ (Sec. 624(1)(a)). The ‘goods’ in this chapter is limited to ‘any movable property’ (Sec. 624, Explanation (1)). The contract shall be concluded in writing (Sec. 624(2)), and matters to be specified in writing are listed (Sec. 625). As to the transfer of ownership in such a contract, ‘The ownership of such goods would be transferred to the hirer upon payment of the last installment’ (Secs. 624(1)(c) and 628) if the hirer exercises his or her option to purchase. On the other hand, ‘The hirer may terminate the contract at any time prior to the transfer of ownership’ (Sec. 624(1)(d)).

Therefore, as shown in the next Figure, when a hire-Purchase Contract is concluded in writing between owner A and hirer B, A owes a duty to deliver goods which are movable, and B owes a duty to pay in installments. However, the ownership on goods is on A even after concluding the contract, and B only has a right of possession on the goods. Transfer of ownership will be finally accomplished after the payment of the last installment, and if B exercises his or her option to purchase.

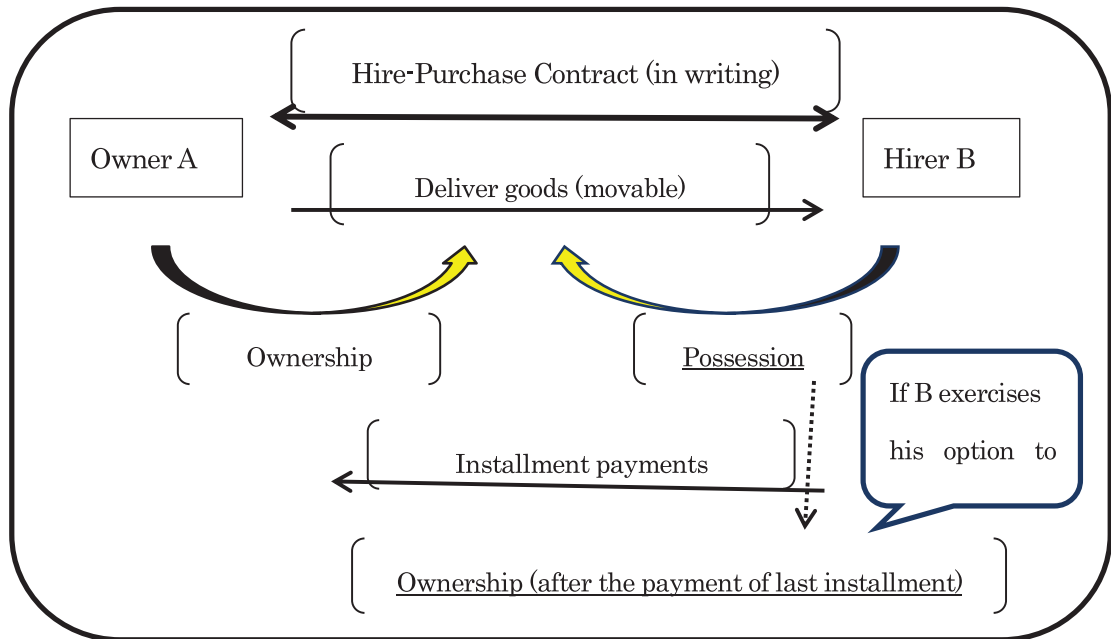
According to Section 626, several contracts, such as a guarantee contract and bailment contract, may be concluded in connection with the making of a hire-purchase contract, and these contracts shall be deemed to be a single contract.

There is a provision on the right and duty of transfer of goods including warranty on the hired goods imposed on the owner (Sec. 627), and several provisions on the obligations for hirer are provided (Secs. 629, 630, 634, and 635). In addition, there are some provisions for the cause of the termination of the hire-purchase contract (Secs. 631, 632 and 636).

As the nature of this contract is a title retention (see Sec. 624(1)(c)), there are related provisions regarding the transfer of hired goods by the hirer to another person (Sec. 633), attribution of the hired goods in the case of forfeiture of goods (Sec. 637), and in the case of the hirer’s bankruptcy (Sec. 638).



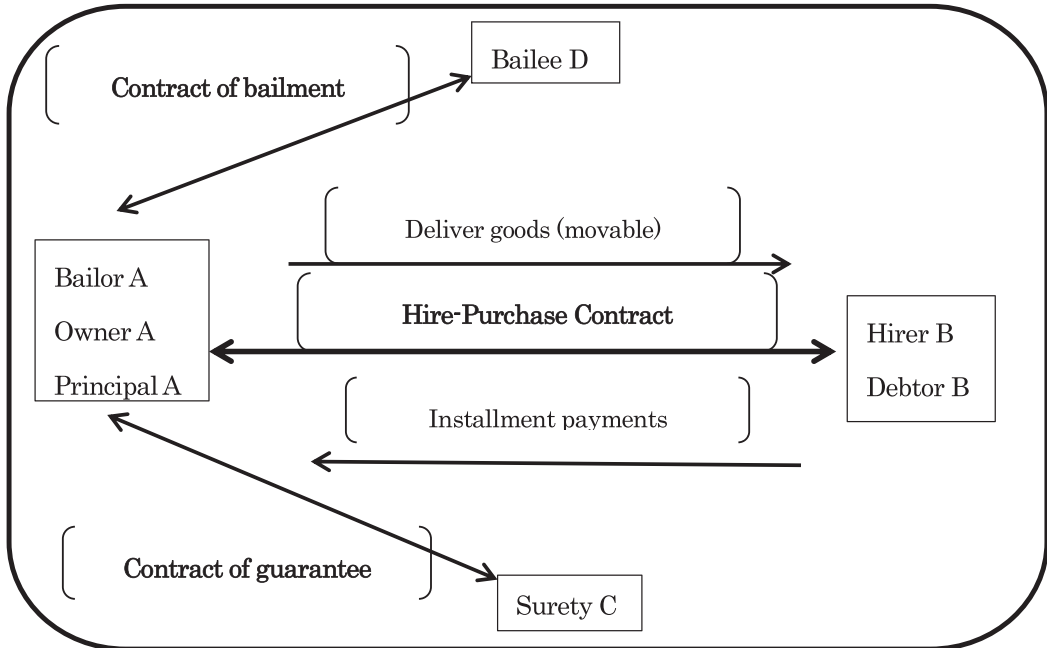
As to the statute of limitation, it is two years under this chapter (Sec. 639).



#### 4) Key Points

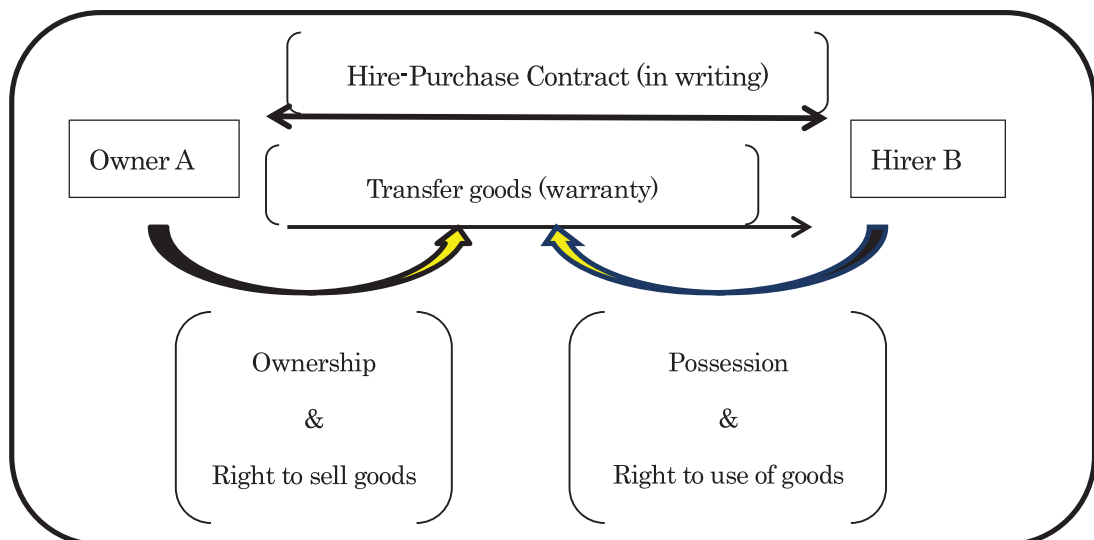
##### 4.1) The conclusion of more than one contract

The conclusion of more than one contract to be deemed as the conclusion of a single contract. According to Section 626, several contracts, such as a guarantee contract and bailment contract, may be concluded in connection with the making of a hire-purchase contract, and these contracts shall be deemed to be a single contract. Suppose that a hire-Purchase contract is concluded between owner A and hirer B. A must deliver goods to B, but the goods may be kept in warehouse D. Therefore, a contract of bailment between A and D as a bailor and a bailee may exist. On the other hand, B must pay instalments to A, and to guarantee such debt, a contract of guarantee may be concluded between A and Surety C. All these contracts are considered as a single contract.



#### 4.2) Rights and duties on transfer of goods

Section 627 focuses on the right and duty of transfer of goods. The hirer has the right of uninterrupted possession and use of the hire goods (Sec. 627(1)(a)). The owner of the goods has the right to sell the hired goods (Sec. 627(1)(c)). As to the duties, warranty on the hired goods is imposed on the side of the owner. As well as in the case of a contract of sales, the goods should be in satisfactory quality (Sec. 627(1)(e)), but exemptions on warranty are also provided (Sec. 627(2)).

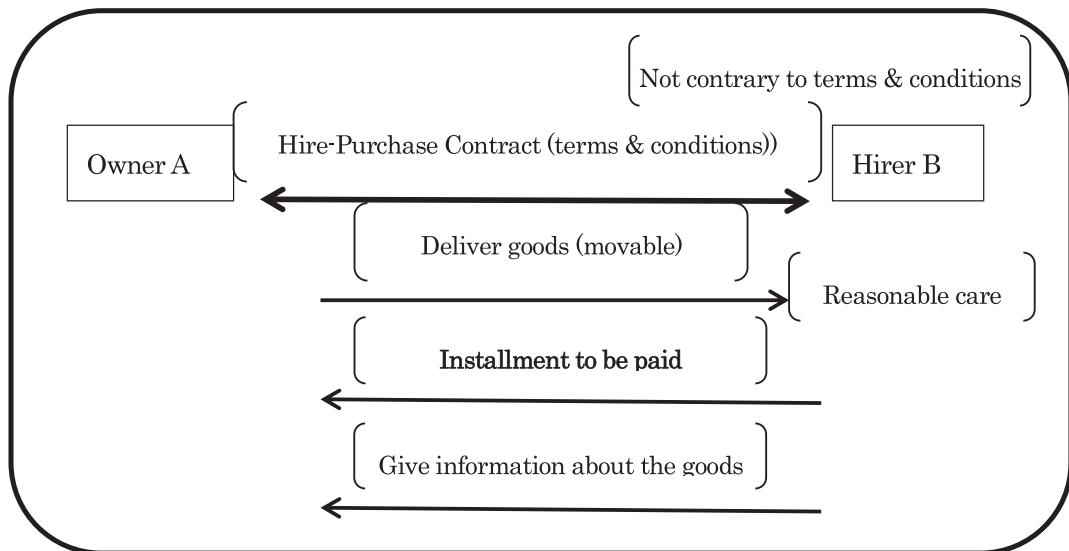


According to Section 627(1), it is stated, ‘notwithstanding anything contained in the contract’ so that this provision is considered as a default rule. It may be necessary to consider the situation where owners prepare exemption clauses for his or her warranty in advance. Common law countries regulate such exemptions, especially when hirers are consumers.

#### 4.3) Obligations on the side of hirer

There are several provisions on the obligations for hirer. The primary obligation is to pay the amount of installment as determined in the contract (Sec. 630). Besides that, the hirer shall take reasonable care and maintain the goods as if the goods were those owned by himself or herself (Sec. 629(2)), and if such goods are lost or damaged because of the failure to take care and maintain them, the hirer shall be liable therefor (Sec. 629(3)). Also, if the hirer uses the goods under the contract contrary to the terms and conditions thereof, the hirer shall be liable therefor (Sec. 634). If the owner of goods demands the hirer to give information related to the goods, the hirer shall give information thereof to the owner within fifteen days (Sec. 635).

As explained later, the violations of such obligations on the side of hirer can be a cause of termination from the owner of goods.



#### 4.4) Termination of the hire-purchase contract

There are two ways to terminate the hire-purchase contract from the side of the hirer. One is termination by paying the price of the goods or outstanding installment with an advance written notice (Sec. 631). Another is termination by returning the hired goods to the owner with an advance written notice (Sec. 632(1)). As a legal effect, the hirer shall deliver or return the hired goods (Sec. 632(2)) and pay up to half of the hire purchase price if the hirer has paid less than half of the amount (Sec. 632(3)).

Section 636 is the provision to terminate the contract from the side of the owner of the goods. The owner of the goods shall be entitled to terminate the hire-purchase contract when the hirer defaults to pay more than one installment (Sec. 636(1)) or fails to perform the contract or the terms and conditions referred to in Section 629 [Goods on hire to be cared and maintained] or in Section 635 [Information of actual conditions to be given] by giving an advance notice (Sec. 636(3)).

As its legal effect, the owner of goods may exercise the following rights: (a) to take back the goods; (b) to determine the amount of rent recoverable, and inform the hirer to take back the exceeding amount; (c) to forfeit the amount, if any, taken as a deposit from the hirer at the time of hiring the goods; (d) to seize the hired goods; and (e) to recover compensation (s.636(4)).

It should be noted that the practice of ‘snatching back goods’ accompanying the legal effect of termination by the owner of goods has been reported in other common law countries. Suppose that the owner A attempts to repossess the goods by termination on the pretext of Hirer B’s minor default where almost all the installments had been paid by B. Therefore, as already mentioned, the evaluation of the hirer’s breach of obligations must be made with caution.

### **3.9 Wages (Chap. 14)**

#### **1) Source**

This chapter (Secs. 640-647) supersedes Chapter 4, Part III of the *Muluki Ain*. There is no related chapter in the Indian Contract Act 1872.

#### **2) Contents**

- 640. Employment in work
- 641. Wages to be paid
- 642. Provisions of safety measures to be made
- 643. Prohibition of employing for more than eight hours
- 644. Special provisions relating to domestic helpers
- 645. Undertaken work not to be left incomplete
- 646. Wages to be paid to employee
- 647. Statute of limitation

#### **3) Summary**

This Chapter governs the rules on ‘Wages’, but there is already a ‘Labour Act, 1992’ in Nepal, which regulates employment contracts when there are more than ten employees. Other related legislations also exist, such as ‘Bonded Labour (Prohibition) Act, 2002’, ‘Children Labour (Prohibition and Regulation) Act, 2000’, and ‘Labour Rules, 2018’. Apart from these

legislations, the reason for including this chapter 'Wages' is to govern employment contracts (including domestic helpers) in cases where the number of employees is less than ten, and to fill the lack in the law.

According to Section 640, the employable age is considered to be fourteen years old or higher with the consent of such an employee, and over sixteen years old in a hazardous business or work.

The employer shall pay the wages to employee, and the provisions related to wages are provided (Secs. 641 and 646). The employer also must provide safety measures for the employee to prevent possible risks or danger (Sec. 642). On the other hand, the employee shall have to undertake work not to be left incomplete (Sec. 645), but working hours should not be over eight hours a day in principle (Sec. 643(1)), and in a case where working hours are more than eight hours with the consent of employee, additional wages per hour shall be paid (Sec. 643(2)), but this sub-section shall not apply to domestic helpers (Sec. 643(3)). There is a special provision for domestic helpers (Sec. 644), a person employed in household work at any time as per necessity (Sec. 643, Explanation).

As to the statute of limitation under this chapter (Sec. 647), it is three months for cause of action in Section 644, and thirty-five days in the case of other matters. The period of limitation under this chapter is greatly shortened compared with other chapters.

# VII Law of Other Liabilities (1) – Indirect or Quasi-Contracts and Unjust Enrichment

Prof. Hiroshi Matsuo

## 1. Indirect or Quasi-Contracts (Chap.15)

### 1.1 General Features of Indirect or Quasi-Contracts

Indirect or quasi-contracts are the sources of creating obligations. Obligations shall be created by (a) the law, (b) contract, (c) indirect or quasi-contract, (d) unjust enrichment, (e) unilateral commitment of any person to assume obligation, (f) tort, and (g) quasi-tort (Sec. 494, NCC). Indirect or quasi-contract shall create obligations on both parties: a person who conducts administration of the office (the office administrator) and a person who benefits by the office administration (the principal) even if there is no contract to create such obligations between them.

Indirect or quasi-contracts are systems which impose certain legal obligations on the office administrator to perform the obligation in good faith, and on the principal to reimburse certain expenses incurred by the office administrator when he/she performed the obligation.

The purpose of an indirect or quasi-contract is to maintain a social system in which members of a society can be mutually supportive to live sustainable social lives. However, it should neither force a person to give any kindness to others, nor recommend a person to do anything for others for remuneration.

### 1.2 Provisions on Indirect or Quasi-Contracts

#### 1) Source

Chapter 15, Part V, from Section 648 to Section 663, newly provided for indirect or quasi-contracts which had not existed in the old *Muluki Ain*.

#### 2) Contents

- 648. Indirect or quasi-contract deemed to be made
- 649. If other's property is managed voluntarily, not to be abandoned (*negotiorum gestio*)
- 650. To care for or manage property taken in custody
- 651. Not absolved from obligation by delegation of authority
- 652. Reasonable costs to be paid for saving property in times of disaster
- 653. Right to claim reimbursement

- 654. Right to claim for maintenance
- 655. Successor to reimburse expenses incurred in obsequies of deceased
- 656. Relative to bear expenses in maintenance of incompetent person
- 657. Treatment expenses to be reimbursed
- 658. To bear expenses generated by public bodies
- 659. To reimburse amount paid by person interested in
- 660. To pay price or remuneration
- 661. Right to recover price of goods or services
- 662. Property in custody to be kept as bailed property
- 663. Statute of limitations

### **3) Summary**

#### **3.1) Definition of indirect or quasi-contract**

Chapter 15, Part V (Secs. 648-663) defines indirect or quasi-contracts and provides obligations to be performed by the office administrator and those to be performed by the principal who benefits by the actions of the office administrator.

Section 648 defines indirect or quasi-contracts. If a person does certain action which is “lawful, voluntary or unilateral ... that may give rise to a juridical relationship, an indirect or quasi-contract shall be deemed to be made” (Sec. 648 (1), and it creates obligations on the part of the office administrator and on the part of the principal under this chapter.

#### **3.2) Obligations on the part of the office administrator**

Section 649, 650, 651, and 662 stipulate obligations to be performed by the office administrator of an indirect or quasi-contract.

Firstly, the office administrator shall be obliged to continue management which was once initiated by him/her. For instance, if a person A began to manage a business or keep a property of another person B without concluding any contract with B, A has to continue to manage the business or keep the property as long as such business or property continues to exist, and A cannot abandon the business or property before A hands it over to B, B’s successor, or B’s agent, or B removes A from doing so (Sec. 649).

If a person A is entrusted by another person B to do any act and is delegated a power to do that act in a manner not to prejudice B, A shall not be free from his/her obligation (Sec. 650).

Secondly, the office administrator of indirect or quasi-contract shall be obliged to take care of or manage the property in his/her custody “in good faith as if the property were his/her own property” (Sec. 650 (1)).

If the office administrator causes loss or damage to the property with *mala fide* intention or recklessly, he/she shall pay compensation for the loss or damage (Sec. 650 (2)). This is the result of a breach of obligation imposed on the office administrator by the provision of law (Sec. 650 (1)).

If a person A keeps a property in his/her custody which is owned by another person B to be retained according to law, A has to keep the property as a property under bailment (Sec. 650 (2)). This obligation to keep the property is also imposed on the office administrator by the provision of law.

### **3.3) Obligations on the part of the principal**

Obligations are also imposed on the principal who benefits by the actions of the office administrator. Provisions from Section 652 to Section 661 stipulate obligations of the principal to reimburse various expenses incurred by the office administrator in each concrete case.

- (1) If a person A saved or protected a property of another person B from disaster such as fire, flood, landslide, storm, or earthquake without an agreement to do so, B, the owner of the property, shall be obliged to reimburse “the reasonable expenses” incurred to the person who saved or protected it (Sec. 652).
- (2) If a person A fulfilled an obligation required by law at his/her own expense and another person B benefited by the fulfillment of the obligation, B shall be obliged to reimburse the expenses incurred to the person who fulfilled the obligation (Sec. 653 (1)). However, if the person fulfilled the obligation for an illegal purpose, he/she shall not be entitled to claim for reimbursement from the person who benefited (Sec. 653 (2)).
- (3) If a person A pays a certain amount of money which another person B is bound to pay by law, because A promised B that A would pay it if B fails to do so, B shall be obliged to reimburse the amount to A (Sec. 659).
- (4) If a person A delivers any goods to or does any work for another person B, B shall be obliged to pay the price of such goods or service or remuneration of the work to the person (Sec. 660).
- (5) If a person A has supplied any goods or service to another person B who is incapable of concluding a contract under law or to a person C who is legally responsible to support B, B or C who received the goods or service shall be obliged to reimburse the price of the goods or service to A (Sec. 661).
- (6) If a person A rears and maintains another person B without an agreement with a person C who is obliged to rear and maintain B, C shall be obliged to reimburse the expenses incurred by A who rears and maintains B (Sec. 654 Main text). However, if A rears



and maintains B from his/her compassion or gratification or with intention to do so gratuitously, A shall not be entitled to claim for the reimbursement (Sec. 654 Proviso).

- (7) If a person A maintains or takes care of B who is a person of unsound mind, a person with physical infirmity, or a helpless minor having no income, because a person C who is obliged to maintain or take care of B refuses to perform his/her obligation, C shall be obliged to reimburse the expenses which are incurred to A (Sec. 656).
- (8) If a person A voluntarily provides or arranges to provide medical treatment of a person B who becomes seriously ill owing to an accident or other reason, because B's heir living in the joint family, relative, or close person does not provide or arrange to provide necessary medical treatment, the heir, relative, or person close to B shall be obliged to reimburse the expenses for medical treatment incurred to A (Sec. 657 Main text). However, if A has provided or arranged to provide the medical treatment with the intention of doing so gratuitously, the expenses need not be reimbursed (Sec. 657 Proviso).
- (9) If a person performs the funeral and obsequies acts of a deceased person in accordance with his/her rites, tradition, and culture, without an agreement with his/her heirs or close relatives, the closest heir or, in the absence of the heir, the relative shall be obliged to reimburse the expenses for the funeral and obsequies acts to the person who performed them (Sec. 655).
- (10) If the government or public body provides a person with measures necessary for health or safety according to law for the protection of body, life, or property of him/her or of the public, because the person does not take those measures voluntarily, the person shall be obliged to reimburse reasonable expenses to the government or public body (Sec. 658).

#### **4) Key Points**

##### **4.1) Actions performed by the office administrator with compassion or gratification or gratuitously**

As is confirmed in 4.1 above, the purpose of indirect or quasi-contract is to maintain a sustainable social life by the members of a society who are expected to be supportive of each other. However, it would neither force them to give kindness to others nor recommend a person to do anything for others for remuneration.

This is the reason why, for instance, if a person A rears and maintains another person B from his/her compassion or gratification or with intention to do so gratuitously, A shall not be entitled to claim for the reimbursement for the expenses (Sec. 654 Proviso). Similarly, if a person A has provided or arranged to provide the medical treatment of another person B with the intention of doing so gratuitously, the expenses for the medical treatment need not be reimbursed (Sec. 657 Proviso).

This principle may be applied to other cases such as Sec. 656, even though the explicit provision does not exist to that effect.

#### **4.2) Various obligations of the office administrator caused by indirect or quasi-contract**

As confirmed at 4.2, 3.1) above, the office administrator shall be obliged to continue management which was once initiated by him/her (Sec. 649). He/she shall also be obliged to take care or manage the property in his/her custody “in good faith as if the property were his/her own property” (Sec. 650 (1)). As a result, if the office administrator causes loss or damage to the property with *mala fide* intention or recklessly, he/she shall pay compensation for the loss or damage (Sec. 650 (2)), because it is a breach of obligation imposed on the office administrator by the provision of law (Sec. 650 (1)).

However, if the office management was conducted to avoid imminent harm to a person’s body, reputation, or property, the person performing office management shall be liable for damages only for malicious intent or gross negligence and shall be exempt from liability for minor negligence. This is called “the emergent office management” and is based on the theory of indirect or quasi-contract. This is explicitly provided by Civil Codes of other countries (e. g. Sec. 698, JCC). In a future amendment to the NCC, this exceptional rule may be stipulated in Chapter 15, Part V., (Article 698).

In addition, there may be other obligations to be imposed on the office administrator based on the indirect or quasi-contract. For example, the office administrator shall be obliged to give a notice about the commencement of office management and make a report about the status of office management, and deliver all the things which the office administrator received and transfer all the rights which he/she acquired during the office management. These obligations are based on the theory of indirect or quasi-contract and are explicitly provided by the Civil Codes of other countries (e. g. Secs. 645, 646, 647, 701 of the JCC). In a future amendment to the NCC, these obligations may be stipulated in Chapter 15, Part V.

#### **4.3) Applied usage of indirect or quasi-contract**

As it is provided in Section 648 (1), obligations shall be caused by indirect or quasi-contract if the office administrator does any “lawful” action for the benefit of the principal. Consequently, if a person conducts actions unlawfully, no obligations shall be created by indirect or quasi-contract.

However, there is a theory which exceptionally recognizes the obligation to be created by indirect or quasi-contract. For instance, if a person A has made a profit by using another person B’s money or other property which A embezzled or stole from B, B may claim against A to deliver all the profits which A acquired by using B’s money or property on the basis of obligation to deliver all the things which A received (as for the obligation to

deliver all the things which the office administrator received during the office management, see 4.2) above).

This is an applied usage of the theory of indirect or quasi-contract, even though A conducted actions unlawfully. The purpose of this applied usage is to give a sanction to A who conducted actions unlawfully by imposing obligation to deliver all the thing which A received by using B's money or property. This result cannot be achieved by the provisions on unjust enrichment and tort, because the amount of unjust enrichment and compensation for tortious damage shall be limited to the loss of A. By applying the obligation to deliver all the things received by the office administrator to the principal to be created by indirect or quasi-contract, all the benefits shall be delivered to the principal even if it exceeds the amount of loss suffered by the principal.

In order to introduce this applied usage, however, it is necessary to provide the obligation of the office administrator to deliver all the things received during the office management, and the treatment of obligation of the principal to reimburse the expenses incurred by the office administrator which may be reduced when he/she conducted actions unlawfully and in bad faith.

### **1.3 Limitation Period**

A person who is aggrieved from any act done or action taken under this Chapter may file a lawsuit within two years after the date of accrual of the cause of action.

## **2. Unjust Enrichment (Chap.16)**

### **2.1 General Features of Unjust Enrichment**

Unjust enrichment is one of the sources that create obligations. As Section 494 of the NCC provides, obligations shall be created by (a) the law, (b) contract, (c) indirect contract (or quasi-contract), (d) unjust enrichment, (e) unilateral commitment of any person to assume obligation, (f) tort, and (g) quasi-tort.

The unjust enrichment (Item (g) above) will create an obligation of a person to return a benefit which the person acquired without any justifiable legal ground to another person who suffered a loss caused by the acquisition of the benefit by the former. This obligation creates a claim of the latter to recover the loss.

Typically, unjust enrichment arises when a property is transferred by a person to another person without a contract, with a void contract, or with an avoidable contract which was avoided. Thus, the unjust enrichment is closely related with the property law. If a property which was delivered from an owner to a purchaser by a sales contract which was void, the owner (seller) of the property may claim for its recovery on the basis of ownership and for

the recovery of use value of that property on the basis of unjust enrichment. However, if the property is lost, consumed, or has disappeared, and cannot be returned to the original owner on the basis of ownership, the benefitted person (purchaser) shall be obligated to return all the acquired benefits in money equivalent to the property on the basis of unjust enrichment. In this case, the original owner does not need to prove any other causes of obligation to return the benefits, such as a tort.

In addition, unjust enrichment may be recognized when a person has benefitted not only by the delivery of a property, but also by receiving services or exemption of obligation without any justifiable legal ground.

The old *Muluki Ain* did not include an independent and comprehensive chapter on “unjust enrichment.” The NCC newly created a chapter titled “Unjust Enrichment” in Chapter 16, Part V. It adopted the concept and provisions of unjust enrichment from the civil codes in Civil Law Jurisdiction, such as Sections 1303-1303-4 of the FCC, Sections 812-822 of the GCC, and Sections 703-708 of the JCC.

As for the detailed definition and requirements of unjust enrichment, see 5.2 4) below.

## **2.2 Provisions on Unjust Enrichment**

### **1) Source**

Part V, Chapter 16, from Section 664 to Section 671, newly provided for unjust enrichment which did not exist in the old *Muluki Ain*.

### **2) Contents**

- 664. Unjust enrichment to be deemed
- 665. Thing taken by mistake to be returned (*solutio indebiti*)
- 666. To pay back debt paid by mistake
- 667. To return goods or amount taken with *mala fide* intention and benefits accrued therefrom
- 668. To pay debt paid by a third person
- 669. Right to claim reimbursement if payable tax paid by another person
- 670. Goods found may be kept upon giving information to police
- 671. Statute of limitations

### **3) Summary**

Section 664 defines unjust enrichment and provides its basic requirements, typical patterns, and its effects (see Figure on page 171 and 4.1) below).

Section 665 recognizes the obligation of a person to return the benefit received from another person’s goods without any entitlement “by mistake.”

In contrast, Section 667 provides for the case in which a person who received a benefit from another person's loss without any entitlement "with male fide intention"; that is, when the former knew that he/she has no justifiable legal ground to receive the benefit. In this case, the person who received the benefit shall have an obligation not only to return the benefit, but also to pay the interest of the benefit after its receipt and compensate for any loss incurred on that benefit because of his/her *mala fide* intention.

Unjust enrichment is typically recognized when a person received a benefit directly from another person who delivered a property or paid certain amount of money without any legal ground. However, unjust enrichment may also be recognized when the delivery of property or the payment of money is made by a third party. Sections 668 and 669 provide for this pattern.

Section 668 provides that if the debt is payable by a person who is not the debtor, and the person paid the debt to the creditor, the debtor shall have an obligation to pay the amount of debt to the person who had paid it to the creditor.

Similarly, Section 669 is concerned with the payment of a tax payable by a person who is not the taxpayer, and the case where the person paid the tax, the taxpayer shall have an obligation to pay the amount of tax to the person who had paid it to the government.

Section 666 is a special rule on unjust enrichment. It provides for the case where a person paid a certain amount of money to another person "by mistake" thinking that he/she was bound to pay although he/she owed nothing to pay to that other person. In this case, the person who made the payment can demand the receiver to return the payment (see 4.2) below).

Section 670 treats the case where a person found any goods which belongs to another person who lost it. In this case, the person who found the goods shall have an obligation to return it to the owner. This obligation will arise as the effect of both ownership and unjust enrichment if the owner claims to recover it.

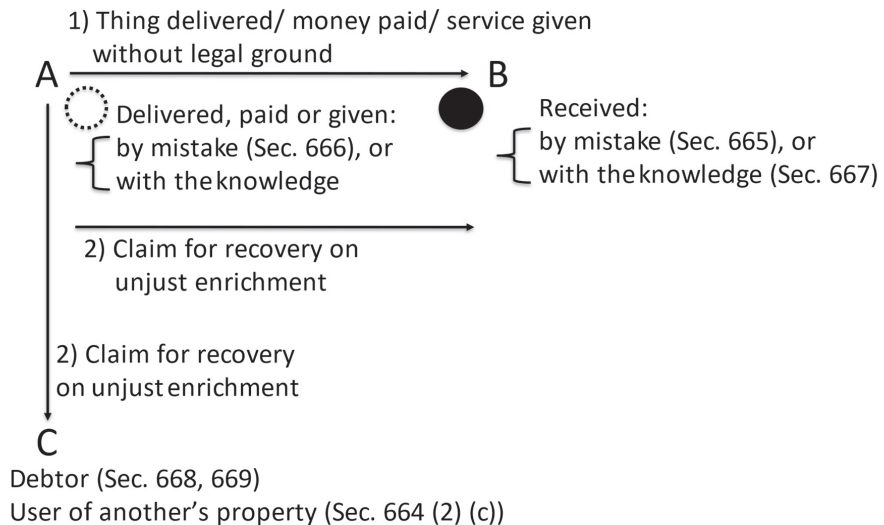
However, if the finder cannot know who and where the owner is, it is difficult to perform the obligation to return it to the owner. In this case, the finder shall have an obligation to notice it to the police as provided by Section 670 (1). If the owner is identified, he/she shall bear the expenses incurred to the finder in finding the owner of the goods and retaining them. This can be regarded as the unjust enrichment by the owner. Section 670 (2) provides that the finder may retain the goods until the payment of the expenses.

But the main focus of this section is Section 670 (3), which provides that if three years have passed after the notice to the police, the founder shall acquire ownership of the property. This is a type of the original acquisition of ownership of goods (movable property) called lost property and treasure trove in the civil codes of other countries.

Finally, Section 671 prescribes the limitation period of the claim for the recovery based

on unjust enrichment. It is limited to within two years after the date of the accrual of the cause of action; that is, after the date of receiving a benefit by a person who is obliged to return it to a person who suffers a loss caused by the acquisition of the benefit.

## Unjust Enrichment



1

## 4) Key Points

### 4.1) Definition of unjust enrichment and its basic requirements

As one of the sources of obligations, unjust enrichment creates an obligation of a person who acquired a benefit to return it to another person who suffered a loss as a result of the acquisition of the benefit by the former without any justifiable legal ground. The obligation of the former to return the benefit to the latter shall emerge even though there is no valid contract or quasi-contract between them (see Sec. 664 (5)). Thus, Section 664 (1) defines unjust enrichment as follows: If any person gets any benefit or advantage from another person, without 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 gotten an unjust enrichment.

From Section 664 (1) it is found that there are four basic requirements for unjust enrichment: [1] a benefit acquired by a person, [2] a loss suffered by another person, [3] causal relationship between the benefit and loss, and [4] non-existence of any justifiable legal ground for the acquisition of benefit.

Section 664 (2) shows the major patterns of acquiring benefit by a person in the loss of another person. They include cases, such as (a) an increment in the property or decrease in the

liability, (b) receiving a service from another person or causing another person to do work, and (c) the use of another's property.

However, if there are any justifiable legal grounds for acquiring the benefit, a person who received it has no obligation to return it. Such grounds include cases of obtaining any goods, service, benefit, or advantage from another person such as (a) under a law or a contract, or (b) by an agreement with free consent not to take back or reimburse them (Sec. 664 (3)).

Section 664 (4) confirms that the unjust enrichment shall be recognized even if the benefitted person who acquired a benefit as a result of a loss by another person without any justifiable legal ground lost all or a part of the benefit after the acquisition of that benefit.

#### **4.2) Two major types of unjust enrichment**

Unjust enrichment can be classified into two types.

The first type is acquisition of a benefit by a person directly from another person without any justifiable legal ground, such as a valid contract or donation and gift. For instance, if a purchaser received a property from a seller through a sales contract and the seller received a price for the property, but the sales contract is found to be invalid or voided by the purchaser or seller, then the purchaser bears an obligation to return the property to the seller, and the seller bears an obligation to return the price to the purchaser, as it constitutes unjust enrichment (see Sec. 665). Thus, each party is obliged to restore another party into the original position that would have been so if the contract had not been concluded (see Sec. 518 (3) (a)). Restoration after voidance of contract is one of the typical cases of unjust enrichment. It must be noted that there are provisions of unjust enrichment included in chapters other than Chapter 16, Part V.

The second type of unjust enrichment is acquisition of a benefit by a person indirectly from another person. For example, if a person paid another person's debt or a tax that can be payable by a third party to a creditor, the latter bears an obligation to return the benefit to the former, and the former can claim for the reimbursement of his/her payment. These are typical examples of the second type of unjust enrichment. The NCC provides them in Section 668 and 669 (see Figure on page 171).

Section 668 provides that if the debt is payable by a person who is not the debtor, and the person paid the debt to the creditor, the debtor shall have an obligation to pay to the creditor the amount of debt to the person who had paid it. Section 669 is concerned with the payment of a tax payable by a person who is not the taxpayer, and when the person paid the tax, the taxpayer shall have an obligation to pay the amount of tax to the person who had paid it to the government.

Another example is that if a person used another person's property without holding any right to use it, the former shall be obliged to return to the latter the benefit acquired from the use of the property.

#### **4.3) Unjust enrichment by mistake or with *mala fide* intention**

Unjust enrichment is also classified into that received by mistake and that received with *mala fide* intention.

On the one hand, Section 665 treats the case where a person received a benefit without any entitlement "by mistake."

On the other hand, Section 667 provides the case in which a person who acquired a benefit from another person's loss "with male fide intention"; that is, the former knew that he/she has no justified and legal reason to acquire the benefit. In this case, the person who received the benefit shall have an obligation not only to return the benefit, but also to pay the interest of the benefit after its receipt and compensate for any loss incurred on that benefit.

#### **4.4) Special rules of unjust enrichment**

##### **(a) *Solutio indebite***

Section 666 provides that a person can claim to return a payment made to another person "by mistake" although the former owes nothing to the latter.

This provision can be interpreted that if the person makes the payment to another person with the knowledge that the former owes nothing to the latter, the former cannot claim the latter to return it. Section 705 of the JCC provides that a person who has paid money or delivered a thing as a performance of an obligation may not claim to return the money paid or the thing delivered if the person knew, at the time of payment or delivery, that the obligation did not exist. This is because the person who paid money or delivered the thing knowing that he/she had no obligation is deemed to have waived his/her right to recover it as unjust enrichment. This rule is a special rule on unjust enrichment called "*solutio indebiti*."

The term "*solutio indebiti*" is used in the title of Section 665. However, it should be used for the title of Section 666.

In addition to "*solutio indebiti*," there are other special rules on unjust enrichment from the viewpoint of comparative law. For instance, The JCC provides the following provisions as special rules on unjust enrichment in addition to "*solutio indebiti*" (Sec. 705, JCC).

##### **[2] Performance of obligation before the due date**

If a debtor performed an obligation that has not yet fallen due, the debtor cannot claim for the return of the thing delivered or the money paid as the performance. However, if the



creditor performed it “by mistake,” the debtor must return the interest gained as a result of the performance before the due date (Sec. 706, JCC).

[3] Performance of obligation by a person who is not a debtor by mistake and loss of proof for the claim by a creditor in good faith, etc.

If a person who is not a debtor performed an obligation by mistake, and the creditor, believing that the obligation was performed by a true debtor, lost the proof for the claim, waived the security, or lost the claim by limitation period, the person who performed the obligation cannot claim for the return of the performance (Sec. 707 (1), JCC). In that case, the person who performed the obligation can claim the debtor for reimbursement for the performance (Sec. 707 (2), JCC).

[4] Performance of obligation which was created by an illegal cause

A person who performed an obligation which had been created by an illegal cause cannot claim for the return of the thing delivered or the money paid as his/her performance of obligation which was void because of its illegal cause (Sec. 708 Main text of the JCC). If the claim were to be recognized, the law would have benefitted the person who performed the void obligation due to the illegal cause. However, if the illegal cause existed only on the part of a person who received the thing or money, the claim for the return can be recognized.

#### **4.5) Provision on the Lost Property and Treasure Trove**

Section 670 on “Goods found may be kept upon giving information to police” succeeds the provisions of the *Muluki Ain*, Part II, Chapter 3 (treasure trove, findings) and Chapter 6 (lost property). From the viewpoint of comparative law, the rules on findings of another person’s property, treasure trove, and lost property are provided as a part of the rules on the original acquisition of ownership (see Sec. 717, FCC, Secs. 965-983, GCC, Sec. 240, JCC).

If a person finds any goods, he/she has to notice to the police about the finding with its actual description, and safely retain it until the owner is found (Sec. 670 (1)).

If the owner is found, such owner has to pay the expenses incurred in finding the owner and retaining the goods, and the finder can retain the goods until the payment of the expenses is reimbursed to the finder (Sec. 670 (2)). The obligation of the owner to reimburse those expenses to the finder is caused by unjust enrichment.

However, if the owner has not appeared to claim the goods retained by the finder within three years from the finding, the goods shall belong to the finder (Sec. 670 (3)). This is the acquisition of ownership of the lost property by the force of law.

## 2.3 Limitation Period

A person who has a claim to recover his/her loss on unjust enrichment (Part 5 , Chapter 16) can file a lawsuit within two years after the date of accrual of the cause of action (Sec. 671). In this provision “the date of the accrual of the cause of action” can be interpreted as the date of receiving a benefit by a person who is obliged to return it to a person who suffers a loss.

For instance, if a purchaser received a property from a seller through a sales contract and the seller received a price for the property, but the sales contract is voided by the court for the reason of the seller’s misrepresentation (Sec. 518 (2) (d)), then the purchaser bears an obligation to return the property to the seller, and the seller bears an obligation to return the price to the purchaser as unjust enrichment (see Sec. 665). If the seller or purchaser does not perform the obligation to return the money or property, the purchaser or seller can bring the case to the court within two years from the date of receipt of the money or property (Sec. 671).

However, it should be noted that the limitation period of avoidance of a voidable contract shall be one year after the date of accrual of the cause of action for avoidance (Sec. 520). This means that the purchaser must ask the court to void the sales contract for the reason of the seller’s misrepresentation (Sec. 518 (2) (d)) within one year after the conclusion of the contract.

# VIII Law on Other Liabilities (2) - Tort

Prof. Hiroyuki Kihara

## 1. Overview

The ‘non-contractual liabilities’ from Chapters 15 to 18 of Part 5 in the NCC are totally new. The significance of including a chapter on tort law into the Civil Code should be emphasized. Prior to the NCC, only a few provisions could be found in individual statutes which allowed compensation for victims under the Libel and Slander Act, 1959 and the Vehicles and Transportation Act, 1993.

The Libel and Slander Act, 1959 (2016)

Section .12 (Compensation): ‘If a person is held to have libeled or slandered another person, the adjudicating authority may order the payment of compensation in a reasonable sum by the offender to that other person having regard also to his or her social prestige and honor as well as to the expenses incurred in the case by the offender to that other person.’

The Vehicles and Transportation Act, 1993 (2049):

Section . 163 (Payment of medical and obsequies expenses and compensation): ‘(1) If any kind of loss or damage is caused to any party by a motor vehicle accident, the following amount shall be caused to be paid as medical expenses and compensation by the driver or owner or manager of the motor vehicle to the victim: ...’

Case laws play a very important role in this area. It is impossible to manage and cover numerous types of torts by simply applying the limited tort provisions in the NCC to solve disputes. Academics will be expected to contribute to this area by framing a theory or by categorizing issues, on the basis of the accumulation of case laws. In enacting some special acts or revising the NCC in future, case laws will provide a guiding principle.

## 2. Provisions of Torts (Chap. 17)

### 1) Source

This chapter (Secs. 672-684) is newly introduced. .

### 2) Contents

672. Tort deemed to be committed

673. Parents to bear liability

- 674. Guardian or curator to bear liability
- 675. Employer to bear liability
- 676. Owner of animal to bear liability for loss or damage caused by animal
- 677. House-owner to bear liability for loss or damage caused by its collapse
- 678. Owner of property to bear liability
- 679. Head of household to bear liability
- 680. Bearing of liability for trespass
- 681. Bearing of liability jointly
- 682. Compensation to be paid for liability
- 683. Not bearing liability if separate provision is made
- 684. Statute of limitation

### **3) Summary**

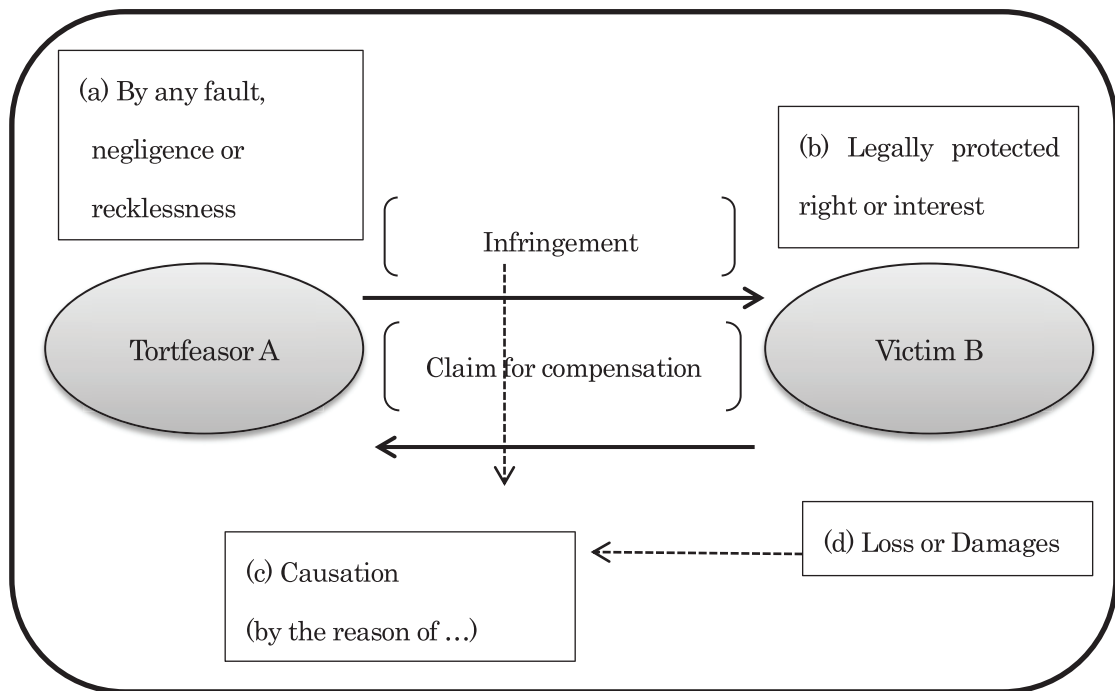
This chapter governs the rules on tort liability. The general requirements to establish tort liability are stated in Section 672, which functions to determine tort liability in general. Provisions of special requirements to establish tort liability follow thereafter (Secs. 673-681). As to the legal effect of tort liability, Section 682 is a provision for compensation to be paid. There are provisions on exemption of tort liability (Sec. 683, see also Sec. 672(2)). Finally, there is a provision of statute of limitation (Sec. 684).

### **4) Key Points**

#### **4.1) The general requirements for tort liability**

The general requirements to establish tort liability are stated in Section 672(1): ‘No person shall cause loss or damages, in any manner, to another person’s body, life or property or legally protected right or interest by the reason of commission or omission done, whether by any default, negligence or recklessness ...’

Four requirements derived from Section 672 to establish tort liability are as follows: (a) fault, (b) legally protected right or interest, (c) causation, and (d) loss or damages.



## (1) Fault

First, ‘fault’ on the side of the tortfeasor, which derives from the terms ‘by and default, negligence, or recklessness’ in Section 672(1), is required. The content and criteria of ‘fault’ must be clarified for each individual case, such as in the case of traffic accidents, medical errors, pollution, privacy, defamation, etc. Therefore, refining the content of ‘fault’ in each context depends primarily on the development of case law.

Moreover, burden of proof is generally imposed on the side of the plaintiff, that is, on the side of the victim. However, it is not always easy for the plaintiff to prove the defendant’s fault at the time of infringement because it is in nature a state of mind of the tortfeasor, which could have recognized the result of his act but failed to do so because of his lack of attention. Therefore, it may be necessary to consider how to relax the burden of proof, and there are several methods to do so.

One is the prima facie presumption and, once the plaintiff proves the estimated fact indicating the prima facie fault on the side of the defendant, the court would evaluate it as the fact that the fault existed, unless the defendant rebuts this estimation.

Another is the presumption in fact, and it allows for the plaintiff to submit a fact indicating the tortfeasor’s fault based on indirect evidence, and then the court will infer another fact therefrom, unless the defendant rebuts this indirect evidence.

Finally, there is a way to consider fault objectively as a breach of duty, especially in cases of environmental pollution and malpractice. It may be possible to impose a duty to avoid pollution for a company and to impose a higher duty of care for a doctor or hospital. Proving breach of duty becomes much easier than proving a state of mind of a tortfeasor.

## **(2) Legally protected right or interest**

Secondly, it must be an infringement of a legally protected right or interest on the side of the victim. Again, case law should play an important role here to determine the unlawfulness or illegality in each of tort case.

In the case of infringement of a legally protected right, which is considered as an absolute right, such as rights of property, life, body and health, the determination of illegality is not so difficult. If there is a fact of such an infringement, the requirement of unlawfulness or illegality might be deemed to be satisfied.

On the other hand, in the case of infringement of a legally protected interest, first of all, the content of such an interest must be clarified by the development of case law. For example, the following issues may be considered to establish tort liability by reason of infringement of interest to a person or personality, such as interests to enjoy sunshine, a view, landscape or the like, interests to prevent noise, bad smells, wind damage or the like, interests to prevent several types of harassment, and so on. There may be strong and weak legally protected interests listed above, and the determination of illegality must be considered separately. In such a situation, both the nature of interest and the manner of infringement must be considered correlatively to determine the requirement of unlawfulness or illegality.

## **(3) Causation**

Thirdly, causation between infringement by a tortfeasor and losses incurred by a victim is required, which derives from the terms ‘by the reason of commission or omission done’ in Section 672(1).

The burden of proof on causation is also generally on the side of the plaintiff, the victim’s side, and how to reduce the burden of proving causation between infringement and losses may become a crucial issue. In the case of commission, it is still acceptable, but in the case of omission, for example, in a case of medical error, the plaintiff must prove the causation between the lack of early detection of cancer and the profit of life extension. It is not always easy to prove it because the plaintiff must deny the other possibility of lacking the profit of life extension.

The methods of prima facie presumption and the presumption in fact, already mentioned in the part of ‘fault’, are also able to be used in the context of proving causation between the tortious act and the loss.

#### **(4) Loss or damages incurred**

Fourthly, there is no tort liability unless loss or damage occurs on the side of the victim. How to define the damage and how to calculate individual damage items are typical issues therein. In particular, the formula for calculation of lost profits is a very crucial issue in the case of personal death and injury.

In the case of personal injury, reduction in income for reasons of hospitalization or outpatient visits, and loss of working capacity for reasons of after-effects may be considered as lost profits of victims.

In the case of personal death, the basic formula is to calculate the gross income for the victim's work expectancy out of his or her life expectancy on the basis of his or her income at the time of his or her death. For calculating the amount of income losses, expected future raises in salary may also be taken into account, but on the other hand, interim interest and living expenses shall be deducted.

It is difficult to calculate lost profits when the victim, the deceased, is a child, woman, or foreign worker, because the basis of his or her income at the time of his or her death is unknown or unclear. In such a case, the amount calculated shall be as objective as possible and based on materials such as various statistical data of average income of workers and in accordance with empirical rules and good common sense.

#### **4.2) The special requirements for tort liability**

There are some special provisions for tort liability. The meaning of 'special' in this context is that those provisions modify the general requirement of tort liability (Sec. 672) in some respects. There are two categories.

One is to modify the principle of fault and to impose tort liability on persons who are not a tortfeasor but who are in a special position to bear liability for acts of others, such as parents (Sec. 673), guardians or curators (Sec. 674), employers (Sec. 675), owners of animal (Sec. 676), house-owners (Sec. 677), owners of property (Sec. 678), and heads of households (Sec. 679).

The other is to modify the requirement of causation in the case of joint Liability (Sec. 681), where more than one person commits any act to be deemed a tort (see also Sec. 498). The requirement of causation would not be properly applied in the case of joint tort. It is almost impossible to prove the causal relationship between the tortious acts by more than one tortfeasor and the loss incurred by the victim. Therefore, 'each of such persons shall ...be jointly and severally liable for any damages caused by that act, in proportion to the culpability of the tort committed by each person.' (Sec. 681(1)).

In addition, there is a provision for trespass as a type of tort (Sec. 680).

### **4.3) The legal effect of tort liability**

There is a provision for compensation to be paid for tort liability (Sec. 682). According to the provision, ‘the person who commits the tort shall pay compensation’ (Sec. 682(1)).

The compensation is limited to ‘the actual loss or damages’ and ‘remote or unactual’ loss or damages is not recoverable (Sec. 682(3)).

There is no specific provision for the scope of damages in the case of tort, but ‘the court may order reasonable compensation to be paid’ (Sec. 682(5)). Also, ‘the quantum of such compensation shall be lesser’ considering ‘any omission, fault, recklessness or negligence’ on the part of the injured person (Sec. 682(3)). This is a rule of comparative negligence, as well as being accepted in the case of a breach of contract (see Sec. 543).

### **4.4) Exemption of tort liability**

#### **(1) Relationship between tort liability and criminal liability**

Section 683(1) states that, ‘... if a tort ... is treated as a criminal offence ... or provides for a separate legal remedy in relation to such a tort, no liability under this Chapter may be borne.’

According to this provision, where there is a criminal liability, there is no tort liability. As a tradition of the Nepalese law, compensation for victims has been stipulated in the criminal law. And now, as the *Muluki Ain* was divided into five separate laws, there are provisions that the court will order damages as a penalty against wrongdoers in the new Penal Code (Sec. 40) and the Criminal Offenses (Sentencing and Execution) Act 2017 (Secs. 41-s.45). Section 683(1) in the Civil Code corresponds to these provisions.

However, while the purpose of the criminal law is punishment for the wrongdoer, the purpose of the tort Law is to recover the damage to the victims. As already mentioned, defining the damage and calculating individual damage items, especially on lost profits, are crucial issues, but there is a possibility that the determination of the scope of damages in the tort Law and criminal law may be developed separately. Therefore, it is necessary to consider the relationship between criminal and tort liabilities in this respect.

As to the interpretation of Article 683(1), there is the following comment contributed by Mr. Taro Morinaga, proposing that it is necessary to consider a rational and reasonable interpretation not to unduly limit the victim’s legitimate right to compensation.



## Column

### **Some comments with respect to the relationship between Chapter 17 of the Civil Code and the damages compensation scheme provided for in the Muluki Penal Code, 2017 and the Criminal Offenses (Sentencing and Execution) Act, 2017**

**(- Prof. Taro Morinaga)**

The expected function of Section 683(1) of the Civil Code seems to be to avoid duplication of compensation for damages caused by wrongdoings which constitute criminal offenses and on the other hand to relieve victims from procedural burdens which could otherwise be borne by them by having to file a separate complaint in a civil court for recovery. Under the legal tradition of Nepal, where compensation for damages caused by criminally punishable acts is considered to be a type of criminal punishment (Sec. 40(1)(e), Penal Code), and payment of compensation is specifically stipulated in many chapters of the Penal code, this seems understandable.

Still, the actual implementation of Section 683(1) of the Civil Code needs utmost care because otherwise it may create a loophole in terms of proper remedy and relief.

Such a loophole may be caused as a direct outcome of a difference in understanding or interpretation of the text of Section 683(1), particularly the understanding of the expression “...is treated as a criminal offense...”. If an adjudicating body construes it to mean that a certain act (or omission) in question falls under the statutory category stipulated as an offense in the Penal Code or any other statute, then there will be no liability under Chapter 17 of the Civil Code, irrespective of whether the criminal liability with respect to that particular act is actually pursued or not. This means that if the wrongdoer is not prosecuted or acquitted for some reason (there are multiple reasons for non-prosecution or acquittal other than insufficient proof as to the facts constituting the offense), the victim will never be entitled to any relief or remedy even if it is apparent that such act actually took place (as for non-prosecution, considering Section 14 of Chapter 2 may partially help in avoiding such an unreasonable situation, since this Section says that initiation or non-initiation of a criminal case alone shall not affect civil liability).

The difference in the level of proof in the criminal procedure and the civil procedure may make the situation even more complicated; that is, once a wrongdoing is dealt with in a criminal proceeding, the establishment thereof requires “proof beyond reasonable doubt” – a very high threshold – while it requires only a “preponderance of evidence” if the same comes into question in a civil proceeding. The victim may end up in a disadvantageous situation, if the prosecutor fails to meet such high criteria of proof, which he/she might not have suffered if the same wrongdoing was handled in a civil tort lawsuit.

Thus, Section 683(1) requires rational and reasonable interpretation so as not to unduly limit the victim's legitimate right to compensation. Although several ways of understanding and interpretation are conceivable, the phrase "treated as a criminal offense" may be construed as meaning "a criminal court has formally declared that the wrongdoing in question constitutes a criminal offense and is punishable". A more daring interpretation may be that it means that "a criminal court punished the wrongdoing in question with an order to pay compensation".

## **(2) Relationship between tort liability and contractual liability**

Section 672(2) states that 'If the parties do not have any prior contractual relationship in relation to any commission or omission referred to in Sub-section(1), the loss or damages resulted from such a commission or recklessness shall be deemed to be a tort.'

According to this provision, if there is no contractual relationship, the damages shall be deemed to be a tort. Conversely, the loss or damages by a tort may not be covered when there is a contractual relationship. However, there are several situations where contract and tort will coexist, as described below, and it may be necessary to consider the relationship of remedies between tort and contract.

### **a) Medical Malpractice**

The patient may sue a doctor for malpractice and choose to claim compensation either by reason of breach of medical contract between them or by reason of infringement of his right (life, body) under tort law.

### **b) Accidents in a hazardous workplace**

If an employee has an accident at such a workplace, he may claim compensation based on tort liability against the employer, or he may claim compensation against the employer based on the breach of obligation to consider the safety of employees, which derives from the good-faith principle.

### **c) Precontractual Liability**

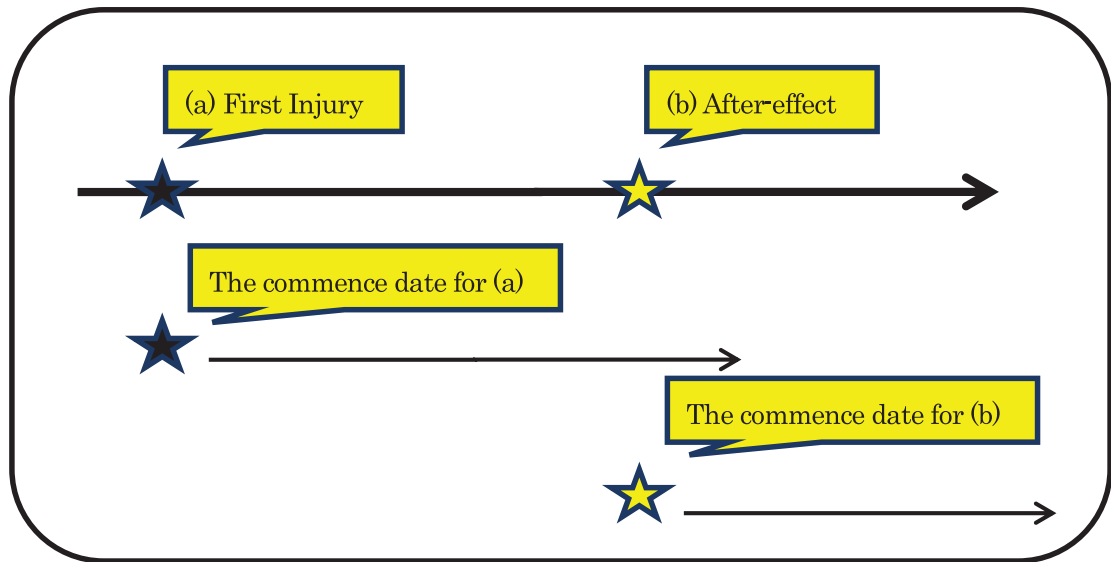
At the stage of contract negotiations, if one party breaks off the negotiation without any good reason, and as a result, the other party has suffered a loss, such a liability may be established as a contractual or quasi- contractual liability, as a tort liability, or as a breach of duty on the basis of good faith.

## **4.5) Statute of limitation**

According to Section 684, 'A person who is aggrieved from any act done or action taken under this Chapter may file a lawsuit within six months after the date on which such an act was done or action was taken'.

Compared to other provisions of statute of limitation, six months in the case of tort is very short. In other chapters of Part 5, most are within two years (Chaps. 1-13, 15-16), and even product liability, which is considered as a type of tort, is within one year (Chap. 18). Only the period of limitation under Chapter 14 is greatly shortened.

However, in tort cases, loss or damage caused by tort is not necessarily to be expressed immediately at the moment the tortious act has been done. For example, in traffic accidents, damage may occur in the form of after-effects a while after the accident. In such a case, it may be necessary and reasonable to consider the possibility of setting the commence date later by interpretation. That is, when an after-effect has been expressed for a while after the tortious act, the commence date for this damage should be set from the date when the after-effect becomes apparent.



### 3. Liability for Defective Products (Chap. 18)

#### 1) Source

This chapter (Secs. 685-691) is newly established.

#### 2) Contents

- 685. Liability for defective product
- 686. Claimant to prove that product is defective
- 687. Discharge of liability
- 688. Quantum of liability may be reduced

689. Product not deemed to be defective

690. Not prejudicing other rights

691. Statute of limitation

### **3) Summary**

This chapter governs the rules on Liability for Defective Products, so-called product liability. The nature and requirements of product liability are stated in Sections 685 and 686. The provisions for exemption or reductions of such liability follow thereafter (Secs. 687-689). Section 690 states that liability under this chapter shall not prejudice other rights. As to the statute of limitation, it is one year under this chapter (Sec. 691).

### **4) Key Points**

#### **4.1) The Nature of Product Liability**

Product liability in this chapter shifts from fault liability to strict liability. According to Section 685(2), ‘The producer of a defective product ... shall bear liability ... for the loss or damage, if any, caused to the body, life or property of any person as a result of the consumption of such product sold or distributed by anyone’. Therefore, strict liability shall be imposed on any producer who ‘ultimately produces, sells and distributes any defective goods or services’ (Explanation (2) of Sec. 685).

Consequently, claimants, the victims, only need to prove that the product is defective: ‘... the relationship between such defective product and the injury’ and that ‘such injury has resulted solely from the consumption of such product’ (Sec. 686).

It should be noted that the victim is still required to prove causation between the defect of product and the loss, which is sometimes difficult for the plaintiff to prove in a case where the defective parts had already disappeared.

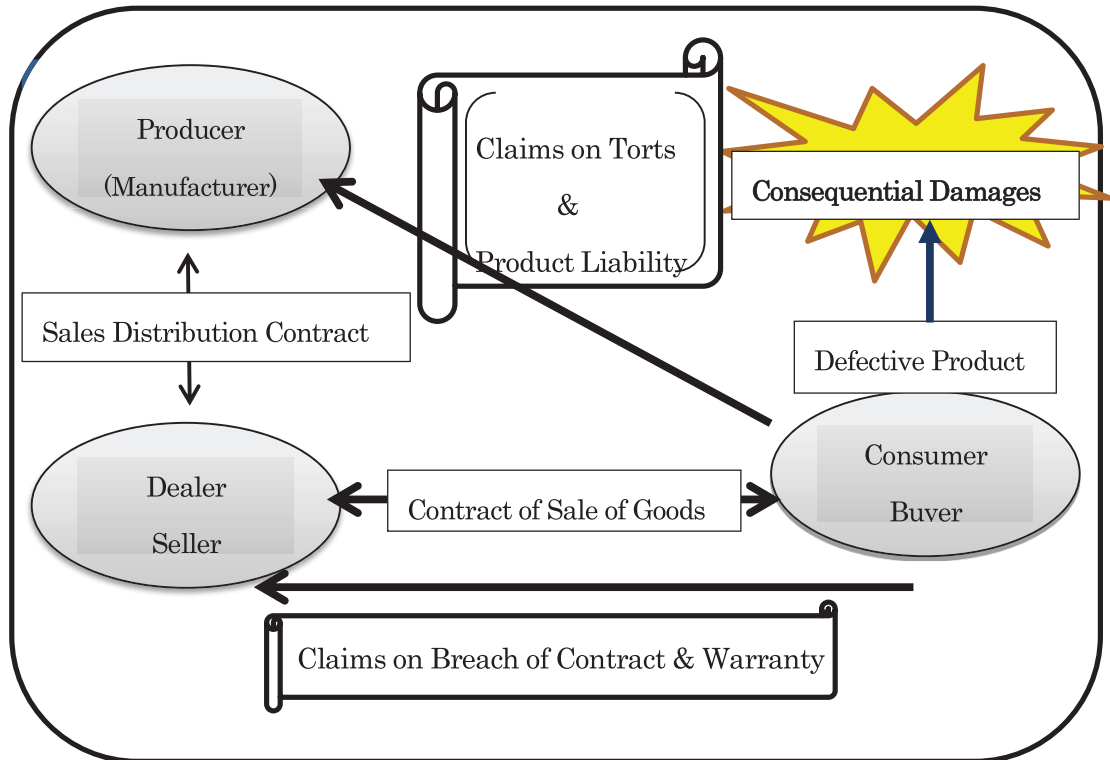
#### **4.2) Exemptions or Reductions of Product Liability**

This chapter imposes strict liability on producers, but it also provides a provision to exempt such liability on them (Sec. 687). Also, the quantum of liability on a producer may be reduced in a case where ‘the injury has been caused owing to both the producer and the consumer of a defective product (Sec. 688). More importantly, the product shall not be considered a defective one ‘merely by the reason that any goods or services of quality higher than that of such goods or services are available in the market.’ (Sec. 689).

Depending on the interpretation of these three provisions, the nature and degree of strict liability stipulated in this chapter may change.

### 4.3) Relationship with other liability

According to Section 690, the liability under this chapter shall not prejudice other rights. Therefore, claimants may claim on tort against the producer (Chap. 17) and on breach of contract (Chap. 5) or breach of warranty of goods (Chap. 6) against the seller.



# IX Private International Law

Prof. Taro Morinaga

## 1. Overview

Sections 692 through 721, which form the last part of the NCC, provide for choice-of-law rules to be observed when dealing with legal situations in the area of private law involving certain foreign elements, and some procedural rules for international civil cases. The former rules are generally referred to as “private international law” in its narrow sense (and often “conflict of laws” in Anglo-American jurisdictions) and the latter rules are referred to as “international civil procedure law”. Although Part 6 of the NCC includes both sets of rules under the title “Private International Law,” using the term in the broad sense, they need to be distinguished from one another since private international law in the narrow sense is a set of rules for choosing proper substantial laws to be applied in a concrete case of law, while the international civil procedure law deals with matters of a procedural character, which is a different area of law. Within Part 6, Sections 692 through 715 are choice-of-law provisions, and Sections 716 through 719 are procedural provisions. Section 720 seems to relate to both, and Section 721, although it may be a little controversial (because, literally, it may be applied to procedural rules in Part 6, too), is, again, a rule for choice of law.

## 2. General Principles of Private International Law

Private international law has developed for the purpose of ensuring the application of the most appropriate law to a given legal situation in the realm of private law, where the principle of self-determination and private autonomy is given priority, even in the international context. The adoption of a number of choice-of-law provisions in the NCC shows the determination of Nepalese law to adhere to the common principles of private international law recognized worldwide. The underlying philosophy is fairness and equality among the parties, as well as equality between different laws of different states or jurisdictions and international harmony in the area of private law. Laws differ from state to state, from jurisdiction to jurisdiction, but no law of any country should rank higher than another country as long as they are both sovereign states. No law of any jurisdiction should be treated as inferior insofar as the law is in force as a positive law in that jurisdiction. Parties involved in a legal case or situation deserve to be protected, and to be bound, by substantive laws most relevant to their given situation, regardless of where the legal situation comes into question. That is the reason why a court must search for and apply

laws other than the laws of the place where it is located (*lex fori* = the law of the forum) and treat not only the parties, but also the potential applicable laws equally.

Despite its name, private international law is domestic law and should be distinguished from international law, such as conventions and treaties. Private international law of a country is enacted by that country and implemented by courts and institutions of that country only. So, it is quite natural that the Nepalese private international law is laid down in the civil code.

However, it should be noted that despite its domestic character, private international law provisions should not be put on the same level as that of domestic substantial law since they are not substantial laws and have different purposes from those of domestic substantial laws. While domestic substantial laws are basically designed to govern domestic legal relationships based on common sense and values that a country maintains as its own, private international law governs situations involving foreign elements from a different point of view: that is international harmony and equality of laws of different countries and jurisdictions. Therefore, even if private international law provisions use the same terms as those used in domestic substantive laws, the meaning of those terms may sometimes differ or have a narrower or broader scope. When interpreting a private international law provision, one must be sensitive and careful, always bearing in mind that private international law calls for an interpretation from its unique viewpoint as rules for choice of law.

### **3. Mechanism of Private International Law**

#### **3.1 Basic Mechanism**

Private international law is a set of rules for choosing a substantial law which should be applied to a concrete private legal relationship. It does its function by first designating a certain category of legal matters, such as legal capacity, succession, or tort and so on, and then giving that category a certain “connecting factor”, such as nationality, habitual residence, or place of occurrence, which connects the legal matter to a law of a certain country or jurisdiction. The Nepalese private international law, Part 6 of the NCC, also adopts this mechanism; for example, Section 693(1) states, “the legal capacity of any foreign natural person shall be determined according to the law of the country of his or her nationality.” Here, the law designates, first, a category of legal matter which is the “legal capacity of a foreigner” and gives it a connecting factor, the nationality of that foreigner, which connects the matter to the law of the country of that nationality. This is the most basic mechanism of choosing a certain law for a certain legal relationship or situation in question, and the chosen law is referred to as “governing law”.

### 3.2 Categories of Legal Issues

Private international law provisions usually categorize legal relationships or situations by groups of issues expressed as legal concepts, such as capacity or competency of persons, marriage, parent and child relationship, adoption, divorce, succession, contracts, extra-contractual relationships and so on. The scope of each category may be narrow or wide depending on legislation. For example, hypothetically, a private international law provision of a country may establish a simple and broad category, say, “marriage”, and connect all matters relating to marriage to one single law. Another country may divide the issue into more detailed categories, such as form of marriage, establishment of marriage and effect or consequence of marriage, and give each category the same or different connectors.

The NCC also provides such categorization. On the premise that its choice-of-law rules apply to all private legal relationship involving a foreigner, foreign object or any act conducted in a foreign country, it divides the legal issues into several categories. Picking up the example of marriage, Nepalese law also divides matters relating to marriage into several categories, which is substantive elements of the conclusion of a marriage (Secs. 699 (1) and 700(1)), forms of conclusion of a marriage (Secs. 699 (2) and 700 (2)), and consequence of marriage (Sec. 701). And, it treats the matters of separation of bread and board as well as divorce as different categories of issue (Secs.s 705 and 706).

### 3.3 Characterization

Legal disputes or issues come as specific arguments, based on concrete sets of facts before courts and institutions, seeking solutions. Before determining a certain connecting factor, courts and institutions must find out to what category of legal concept the concrete issue in question belongs. For instance, when a claim for payment of maintenance by a child against his/her father who divorced his/her mother comes into question, there may be different arguments. One may say that this is an issue of the consequence of a divorce, while the other may argue that this is a matter of the parent and child relationship. If the issue came before a Nepalese court, it would raise the question of which one of Section 702 or Section 705 is applicable. This is the issue of “characterization” (in the European Court of Justice, the term “classification” is used). Characterization is a task of the court to determine what kind of characteristic the given legal issue has, and seen from the other side, it is in its essence a matter of interpretation of the relevant private international law provisions, that is, what the actual scope of coverage a certain private international law provision in question has. In such an operation, it is widely acknowledged that the courts should interpret the provision in question from a viewpoint different from that of domestic laws and jurisprudence, bearing in mind the purpose and characteristics of private international law.



### 3.4 Connecting Factors

Once the characterization process is completed and it is determined that a given legal situation belongs to a certain category set forth in the provisions, then it is the connecting factor that connects the category to a certain country's or jurisdiction's law. There is a variation of connecting factors, which is necessary because private international law aims, after all, to determine the most relevant and closest law to given situations, which in themselves have different features and characteristics and call for suitable connecting factors. For instance, it is quite clear that when the legal capacity or competency of a person comes into question, the most relevant law will be the law which is positive in the country where he/she is originally from and which gave him/her the capacity or competency as a person – the law of the country of his/her nationality. But, if a property, especially a real property, is in question, there is quite a good reason to say that it should be governed by the law which is positive at the place where it is located and not by the law of the country where the owner or right holder has nationality. The NCC also provides a variety of connecting factors.

#### (1) Connecting factors regarding natural persons

- 1.1) Nationality
- 1.2) Habitual residence
- 1.3) Residence
- 1.4) Place of habitual martial life

#### (2) Connecting factors regarding corporate bodies

- 2.1) Place of incorporation
- 2.2) Location of registered office or headquarters

#### (3) Connecting factors regarding property

- 3.1) Location of property
- 3.2) Destination (for *res in transitu*)

#### (4) Connecting factors regarding legal acts

- 4.1) Place of conclusion of marriage
- 4.2) Place of appointment of guardian or curator
- 4.2) Court before which the matter is *sub judice*
- 4.3) Place of performance of a contract
- 4.4) Place of conclusion of a contract
- 4.5) Choice by the parties

4.6) Place of execution of a deed or contract

4.7) Place of donation

**(5) Connecting factors regarding extra-contractual relationship**

5.1) Place of the act

5.2) Place of consequence

Sometimes, connecting factors themselves may not be clear and need interpretation. While concepts, such as nationality or place of incorporation of a company may be less vague, concepts such as “habitual residence” certainly require some interpretation. But even the Hague Convention on Private International Law does not give any clear definition of habitual residence. Usually, it is said that whether a person has a habitual residence at a certain place is basically a matter of fact-finding. Attempts have been made to define it, such as in some legislation stating, “usually and normally resides”<sup>84</sup>, but with less success. The courts must decide upon it on a case-by-case basis.

### **3.5 Variety of Connecting Methods**

In order to reach appropriate outcomes, private international law of many countries usually provides for multiple ways of connecting a legal issue to a certain substantial law. So does the NCC. Generally, five types of connecting methods can be conceived.

#### **1) Simple Connection**

This is the basic way of connecting, where only one connecting factor connects a single legal matter to a single country’s or jurisdiction’s law. An example from Part 6 can be drawn: Section 713. Here, the liability for quasi-contract or unjust enrichment is, without any exception or reservation, connected to the law of a certain country by a single connecting factor, which is the place of the act.

#### **2) Distributive Connection**

Distributive connection is adopted in cases where it is appropriate that each party fulfills its own requirement under its own applicable law for realizing a wanted legal consequence, and that is sufficient. A typical example would be Section 700 providing for requirements for marriage between a foreigner and a Nepalese citizen. It states, “each person shall comply with the capacity, qualification and condition as specified by the law of the respective country of his or her nationality.” Under this provision, for example, if a Nepalese man marries a Japanese woman, the man just has to fulfill the requirements under substantive family law of Nepal and does not have to fulfill the substantive conditions prescribed in the relevant Japanese law, and the woman just has to follow the Japanese law and not the Nepalese law.

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84 Cf. The Domicile and Habitual Residence Act of Manitoba, Canada

### 3) Cumulative Connection

Cumulative connection is much more restrictive. It is the opposite of distributive connection, in that the connecting factors and the laws connected will apply cumulatively and therefore the realization of a desired legal consequence requires the fulfillment of all applicable requirements or conditions of all designated laws. This type of connection seems not to exist in the NCC. However, if there is to be any future specific law relating to private international law enacted (Section 714 seems to perceive such a situation), this also may come into consideration. There are examples in other countries' private international law provisions. Just for reference, the Japanese law provides, with respect to tort, that even if the primary connector refers a tort case to a foreign law, the Japanese law also applies as *lex fori*, and therefore, tort will not be recognized unless the situation fulfills the requirements of tort in both countries.

### 4) Selective Connection

Unlike cumulative connection, selective connection allows the desired legal consequence to be realized much more easily. It is an "either this or that" decision. In this case, there are two or more connecting factors available, and if the law connected by one connector allows the legal consequence, then the result will be legally recognized. It is commonly seen in private international law provisions of many countries in the area of form of marriage. Nepalese law also follows this. Under Sections 699 and 700 of the NCC, international marriage can be realized by either following the law of the place where the marriage is concluded, or the law of the country to which the embassy or consulate belongs. Here, the couple can choose which way to go. Both are valid in terms of their forms.

### 5) Stepwise Connection

Stepwise connection is used in many provisions in the NCC. This method of connection first designates one connector, and if this does not work out, it searches for the next one. Sections 693 to 697, 701 to 705, 709, 712 and 715 adopt stepwise connection. It is an effort that the law makes under the common principle of private international law which requires the court to search for an appropriate law as relevant as possible to the given legal issue and not to resort on *lex fori* easily. Section 693 (1) and (2) is a good example. It instructs the court first to identify the nationality of the person in question, and if the nationality cannot be ascertained<sup>85</sup>, then it allows the connection to a law which governs his/her habitual residence. And if the habitual residence cannot be determined, then the last connecting factor, the current residence comes into light.

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85 Please do not confuse this with a situation where it can be ascertained that a person has two or more nationalities. Such a situation is governed by Section 715. Also, a situation where it can be determined that a person does not have any nationality is another different issue. This is also dealt with under Section 715, in its Subsection (3), referring to refugees and stateless persons.

### 3.6 Reference to a Foreign Law

Usually, under private international law, connecting factor refers a given legal relationship or issue to a law of a specific country or jurisdiction, and so does the NCC. For example, Section 698 (1) states, “*succession to a movable property shall be governed by the law of the country of habitual residence of the deceased at the time of his or her death*”, and simply designates “the law of the country”. It does not state, “the law of succession of the country” or “civil law of the country”. This creates some technical issues which may also be considered as a unique feature of private international law. Some points should be considered carefully.

#### 1) Scope of Reference

There has been an academic dispute as to whether the “law of the country” referred to by a certain connecting factor includes the choice of law rules of that certain country or not. Those who do not limit the scope of reference argue that the wording “the law of the country” means the law of that country as a whole, so there is no reason to exclude the private international law of that country. Dissenting opinions argue that it would be irrational if private international law which is a choice-of-law rule designates another private international law, and it should be construed that a private international law provision can only refer to a substantial law and not a choice of law rule. There are pros and cons to each theory, and the decision as to which theory to follow is left up to the court or institution handling the matter. And, it should be noted that this difference in understanding is not merely theoretical, but sometimes leads to practical questions such as follows.

#### 1.1) Renvoi (remission)

The French word “*renvoi*”, “remission” in English, refers to a system where a private international law of a country refers to the law of another country, but allows that, if the other country’s private international law designates the law of the original country, the original country’s law be applied. In short, it is country A → country B → country A. This happens when it is construed that a private international law refers to another country’s law as a whole, including its private international law. If it is considered that private international law does only designate substantial law, such operation will not happen. Remission can be defined as: “determining another governing law by making reference to the private international law included in the designated foreign law”. There are further variations of remission, such as double remission (A → B → A → B), transmission (A → B → C) and indirect remission (A → B → C → A).

The NCC is silent as to remission. Since remission is sometimes criticized as potentially destabilizing the private law order and as being against the principles of private international law, it may well be that the NCC did not incorporate any provision for remission, and if so, it

may be construed that Nepalese law does not recognize it. But there may be arguments that even without any express provision, remission is possible if the theory that states that private international law designates not only the substantial law of one country, but also its choice of law rules is prevailing. Again, this is a matter which the courts having concrete cases before them should decide.

### **1.2) Reference to the law of a country having multiple territorial jurisdictions**

There are countries in the world which have within themselves multiple territorial jurisdictions with different private law and legal systems, such as the United States or China (cf. Hong Kong and Macau). Here, a similar issue arises when the private international law of, say, Nepal instructs the connection to such state, say, the U.S.A. The United States has its own choice-of-law rules, the inter-state conflict of laws. Now, the question is whether Nepalese law refers the matter first to the choice of law rules of the U.S. and lets the U.S. law be the standard to determine which of the laws of the fifty states of the U.S. should apply or it directly designates the law of the state in question based on the standards of Nepalese private international law. This again is an issue to be solved by the court having a concrete case before it by interpreting the Nepalese private international law.

### **1.3) Reference to a law of a state which has two or more systems of law applicable to different categories of persons**

There are countries in which laws applicable to certain issues differ among certain groups of people owing to religion, culture, or ethnic background, etc. Here again, the question is whether the Nepalese or any other private international law should refer the matter directly to the law applicable to the group to which the person in question belongs or let the choice of law rules of that country determine the designation. An example can be seen in the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Nepal is not a contracting party; the example is cited here as just for the purpose of reference). In its Article 32, it states, "In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State," and lets the choice of law rule of that country in question handle the matter.<sup>86</sup>

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<sup>86</sup> Interestingly, the same Hague Convention does not allow reference to the choice of law rules of that country when the matter is about a country with multiple territorial laws. In its Article 31 it states, "In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units, *a*) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State; *b*) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides."

## **2) Reference to the Law of a State Not Recognized**

Cases may be rare, but there are countries which Nepal still has not recognized as a state. If the law of such a country comes into question, then it would be another issue for private international law to resolve. One could easily argue that the term “country” as used in Part 6 of the *NCC* means a country which is formally recognized by Nepal, thus application of the law of a country not recognized by Nepal is out of question. This may be a sensitive matter, but it is a predominant understanding from the viewpoint of private international law values that such a country’s law should also be referred to, even if the country in question is not recognized as a state, insofar a positive private law order exists in that area. Private international law is for justice and fairness in the realm of private law, where self-determination and private autonomy is prioritized, and, as such, irrelevant to diplomacy or political relationship.

## **3.7 Application of Foreign Law**

### **1) Exclusion of Foreign Law by Public Order Doctrine**

Once the characterization is completed, and the issue is referred to by a certain connecting factor to a certain foreign law, the foreign law shall be applied to the instant case as a substantial law by the domestic court handling that matter. However, chances are that the application of that foreign law may lead to a concrete situation or consequence that is intolerable in light of the fundamental or core values of private law order of the forum state. Therefore, quite a number of states adopt what is called the “public order doctrine” to avoid such a situation or consequence by exceptionally refusing the application of that specific foreign law in question. The *NCC* follows suit – Section 721 states in its Sub-section (1), “Notwithstanding anything contained elsewhere in this Part, if the application of any legal provision under this Part in Nepal would be contrary to public order, the provision contained in this Part shall not be applicable in such circumstance.” Here, the Code instructs the Nepalese courts not to apply the specific choice-of-law rule contained in its Part 6 and look for another solution. The wordings may be controversial since it does not straightforwardly say to refuse the application of the foreign law – instead, it orders the refusal of the choice-of-law rule in question – but it can be understood that it follows the internationally recognized principles that public order doctrine is something that can be invoked only in exceptional situations where the concrete outcome of application is violating the fundamental principles or core values of private law of a country. It is an exceptional measure because it is contrary to the general principles of choice of law for which purpose the whole of Part 6 exists.

One should be very careful when considering public order doctrine in that it is not simply a matter of comparing domestic law and foreign law. Those who do not understand the principle of public order doctrine correctly are apt to just compare the wording of the domestic law and foreign law and jump to the conclusion that the foreign law should be excluded

because it is contrary to what the domestic law prescribes. This is nothing but an entire refusal to apply any foreign law which makes private international law senseless. What the public order doctrine requires is to perceive the consequence of application of the specific foreign law and to consider whether such concrete consequence is tolerable in light of fundamental values of private law order, and from the viewpoint of the principles of private international law. A quite frequently cited hypothetical example is, when a husband and two wives, coming from a country where polygamy is traditional and legal, start residing in another country where polygamy is considered illegal and immoral, and in that country, some legal issues arise with respect to their marriages. In that country, both, or more likely, the second marriage may be, if public order is invoked, determined as null and void, but if the husband subsequently dies, and the matter is an issue involving the right to succession of the second wife, it would be questionable to deny the right of the second wife to succession by saying that because of the public order doctrine, the second marriage is void *ab initio* and the second wife is not a wife at all, and thus has no right to succession.

It is undeniable though, that in actual practice, domestic courts generally have a tendency to refuse foreign law as much as possible and prefer to resort to domestic laws (this attitude is sometimes called “homeward trend”), and in order to justify that attitude, they may cite public order. However, it is apparent that this attitude is not what private international law contemplates, and overuse or misuse of public order doctrine may come under harsh criticism, especially if it is aimed at unduly avoiding foreign law and preferring domestic law. Here, the equality among parties and equality among laws of different states should be recalled.

Moreover, even if public order doctrine is invoked and the choice of law provision is denied its application, it does not necessarily mean that domestic substantial law is to be applied. Section 721(2) rightly provides that, “If there arises a circumstance referred to in sub-section (1), the matters contained in this Part shall be governed by other linking criteria, and if such criteria cannot be determined, by the law of Nepal.”, and instructs the court to search for another suitable connecting criteria before coming to the application of *lex fori*, the Nepalese law.

## **2) Some Practical Issues Concerning the Application of Foreign Laws**

### **2.1) Interpretation of foreign laws**

When applying a specific foreign law as a governing law of the case before the court or the institution, interpretation of that specific law, be it a statutory provision or established jurisprudence, is inevitable in most cases. Here, the question arises as to whether such interpretation should be made based on the theory or jurisprudence of the forum state or the foreign state. This again is a matter that must be decided by the competent court handling the case, taking into account the pros and cons. If the foreign law is interpreted on the basis of the



forum state's theory or jurisprudence, it can be expected that the same matter will tend to be treated in the same way within the forum state. However, in that case, there is considerable possibility that the same matter will be treated differently between the forum state and the state of the governing law if the theory or jurisprudence for interpretation is different. If the foreign law is to be interpreted on the basis of the theory or jurisprudence prevailing in that particular foreign state, then international harmony may be achieved.

## **2.2) In case the content of the foreign law cannot be ascertained**

Knowing exactly the content of a foreign law is not always easy. This is indeed one of the factors which generate the unwanted "homeward trend" at courts and institutions. Especially, the content of a law of a foreign state or jurisdiction with which the forum state has little relationship or does not recognize at all is in many cases almost impossible. Still, efforts must be made to clarify the content as much as possible, through the diplomatic channel or by other means. Plus, translation is essential.

The question would be what the court must do when it cannot determine the content of the designated governing law. Dismissing the lawsuit because of that would be a denial of justice. In such a case, two different approaches are conceivable. One is to solve it at the level of private international law itself, that is, looking for another appropriate connecting factor which would lead to reference to a different law of which the content can be ascertained. The other is to find a "proximate" law by assuming that another country's specific law of which the content is known must be very similar to that of the country of which the content of the law cannot be ascertained. And, after all such efforts are exhausted, then there will be no other choice than to apply *lex fori* as the last resort.

## **2.3) The responsibility of determining the content of a governing law**

This issue is a very practical one, but it is at the same time something related to the basic theory. The question is whose responsibility it is to determine the content of the foreign law in question. It relates to the issue of whether, in the forum state, determining a foreign law is a matter of law or matter of fact. If it is considered to be a matter of law, just like any other matters of law in the domestic area, then, of course, it is the responsibility of the court to determine the law and apply it. But there are arguments that the matters of foreign law are not matters of law but are matters of fact. If it is so, then, at least in a jurisdiction where an adversarial system is adopted and matters of fact must be alleged and proven by the party who desires to benefit from its existence, the court can rule against such party who does not properly allege or fails to prove the existence and content of the governing law it seeks to be chosen<sup>87</sup>. Moreover, if the question

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87 If the forum state adopts an inquisitorial system in a civil litigation where ex-officio inquiry into matters of fact is mandated, then the court will of course be responsible to determine the content of a foreign law.



of foreign law is conceived to be a matter of fact, then the parties will be barred from appeal based on errors in the application of foreign law<sup>88</sup> if the appeal court, for instance the supreme court, is a pure court of law and does not handle questions of fact-finding at all. Although a solution as to this issue awaits the further development of Nepalese jurisprudence on private international law, it may be pointed out that the majority of private international theories regard foreign laws also as laws and treat them equally as domestic laws.

### **3.8 Preliminary Questions and the Issue of Adaptation**

When handling lawsuits or cases involving foreign elements that need the application of private international law, one may sometimes come across the following two issues that need to be carefully examined.

#### **1) Preliminary Questions**

Take for a hypothetical example, a case before a Nepalese court in which the succession of a foreigner who died in Nepal is under dispute by alleged heirs, and the court needs to determine who the successors to the property left in Nepal are. Applying Section 696 (1) of the NCC, the determination of the successor is to be governed by the law of the country where the deceased had nationality at the time of his/her death. That means, if, at the time of his/her death, his/her nationality was Japanese, Japanese law applies. And, under Japanese law, the primary successors are, the spouse and children. This issue is the so-called “main question”. However, as a preliminary issue as to this main question, sometimes the qualification as a spouse comes into question, such as an allegation that the marriage was null and void and so the man/woman is no spouse at all. Now the court must decide upon whether the marriage was lawfully concluded or not. This is a separate question that needs another consideration and a choice of law and is called a “preliminary question”. As with the private international laws of many countries, the NCC remains silent as to this topic and seems to leave it open for interpretation. There are two different theories to solve the issue, sometimes resulting in different conclusions. One is that the choice of law rule to solve the preliminary question should be subject to the governing law of the main question, i.e., in this example, the private international law of Japan. The other alleges that, since the preliminary question is a separate issue which requires another independent choice of law determined by the forum state, it is the private international law of Nepal which refers the case to a substantial law. Again, both have their pros and cons; the former theory has a disadvantage in that the same relationship may be governed by different laws depending on whether the question appears before the court as a main question or a preliminary question. The latter can avoid such disadvantage, but it may

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88 Here, the issue is about the error in application of the ascertained governing law and not the application of private international law provisions. The latter is undoubtedly a matter of law as to which the error can be contested in an appeal court which is a court of law, such as the supreme court.

result in applying different laws to a closely related legal relationship. Nepalese jurisprudence is expected to consider and establish reasonable solution as to this issue.<sup>89</sup>

## 2) Adaptation

Another complicated issue which inevitably arises from the difference of laws and legal systems of different countries, and which may sometimes create difficult situations, is the issue called “adaptation”. It is also rarely set forth in express provisions and requires a solution by interpretation and jurisprudence. Adaptation may be described as an issue of mending a “loophole” that can be created as a result of the application of choice of law provisions which may lead to, for instance, denial of certain rights of parties which would have otherwise been granted or assured.

Suppose a husband with a nationality of country A and his Japanese wife lived together under a common habitual residence in Japan. Subsequently, the husband died in Japan. He had property both in country A and Japan. A dispute arises between the widow and other heirs with respect to such property before a Japanese court. If this issue is characterized as a matter of succession, then, under the Japanese private international law, the connecting factor is the nationality of the deceased, so the governing law will be country A’s law. On the other hand, if this is characterized as a matter of property of husband and wife, the private international law of Japan adopts common habitual residence as a connector and refers the case to Japanese law. Now, hypothetically, under country A’s law, the widow enjoys a right under the system of property of husband and wife but does not have any right to succession. Under Japanese law, the widow has a right to succession, but does not have any right under the system of property of husband and wife. Therefore, even though the laws of both countries grant spouse’s right, as a result of operation of private international law, such right cannot be protected (such a situation may easily happen in Nepal also because as to the issue of spouse’s right, Nepal has a quite similar system to that of Japan). How to cope with such unwanted situation is a matter of adaptation, sometimes also called “adjustment”.

Two solutions are conceivable. One is at the level of private international law that is to interpret the choice-of-law rules so as to expand the scope of the governing law and conceive that, in the context of private international law, the concept of “succession”, which is generally a matter of fair distribution of the deceased’s property among the left family members, includes the spouse’s right under the husband and wife’s property system. The other one is at the level of operation of the domestic substantial law, saying that, since the nature of such spouse’s right under the husband-and-wife property system as to which the domestic law lacks express

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89 In this regard, Section 719 of the NCC may attract attention, but since this provision is a procedural rule and simply tells about the subject-matter jurisdiction of Nepalese courts, it should not be confused with the issue of preliminary question.

provisions is similar to the right to succession, analogous interpretation of domestic substantial provisions relating to succession can be made and such provision can be applied to such spouse's right.

The possibility that adaptation will be required may not be very small. Especially in Nepal, where its private law does not recognize the system of will, contravention may arise between Nepalese law and the law of another country which has the system of will. If the issue of a foreign will comes into question before a court in Nepal, the court may have to consider adaptation, and possibly consider some ways to utilize some existing provisions regarding, say, testamentary gift properly in order to achieve a fair and well-balanced result.

## **4. Provisions of the NCC, Part 6**

The provisions of Part 6 of the NCC can be divided into three different categories: provisions on the applicability of Part 6, choice-of-law provisions, and provisions for procedural matters. Choice-of-law provisions may further be categorized into general provisions and specific provisions.

### **4.1 Provisions on the Applicability of Part 6**

Sections 692 and 720 fall under this category and together constitute a general rule and an exception. Section 692 is a general declaration that Part 6 applies to private legal relationships with foreign elements, but the application will be, by operation of Section 720, denied exceptionally when there is a treaty which, by its nature, supersedes the relevant provisions of Part 6.

Although Section 692 somewhat seems to specify the matters to which Part 6 is applicable, it shows that it is intending to apply Part 6 to almost all kinds of private legal relationships having foreign elements by the generality of its wordings. Section 692(2) lists the matters which shall be governed by Part 6, but these may be considered as being just typical examples since it expressly states that the generality of Sub-section (1) shall not be impaired by such listing.

Incidentally, with respect to the applicability of Part 6, Section 714 may come into light, because it may read that if anything may seem to fall out of the scope of the wording of Part 6, different rules may apply, and thus, Section 714 may be understood as being a provision on the exception to the general applicability of Part 6. However, since Section 714 is positioned after the series of choice-of-law provisions (Secs. 693-713) and before the procedural rules (Secs. 716-719), and, moreover, sets a choice of law rule by its own, it should be construed that Section 714 belongs to the category of choice-of-law provisions and not the category of general applicability of Part 6.

## 4.2 Provisions for the Choice of Law

### 1) General Provisions for the Choice of Law

In contrast to the provisions of Sections 693 through 713, which are concrete provisions that set forth specific connecting factors to each of the categorized and characterized legal issues, Sections 714, 715 and 721 are provisions having a general nature, applicable to multiple situations and issues and which affect, or sometimes assist, the interpretation and application of the specific provisions.

Section 714 is a supplementary rule which helps in situations where there is a certain case before the court that does not explicitly fall under any of the categories provided in Part 6. Here, the provision requires a search for another express statutory rule within Nepalese law first, and if it cannot be found, it requires the court to rely on the recognized principles of private international law. It may be viewed as adopting a principle which is similar to “stepwise connection”, although it is not a stepwise connection in its strict sense. What is to be carefully considered here is that since the NCC as a whole is committed to base itself on the internationally recognized theory of private international law as mentioned repeatedly heretofore, this Section may not be construed as permitting a “homeward trend” by understanding that it gives priority to Nepalese substantial law. Rather, as it can be understood from the wording, Section 714 expects another specific choice-of-law rule to be found or established under Nepalese law, and if such choice-of-law rule is nowhere to be found, then it instructs the court to search for “recognized principles of private international law”. Thus the “separate provision in relation to that matter” means a choice-of-law rule expressed in another law of Nepal and not any substantial private law provision.

Sub-section (2) is a quite unique provision, allowing choice of law by agreement between the relevant parties, regardless of the nature of the matter in question. Although this Sub-section is applicable only to matters falling out of the scope of application of Part 6 and therefore cases may be rare, it requires careful interpretation. Generally, in cases or situations where party autonomy may be widely recognized, such as in commercial transactions, choice of law by agreement can be easily allowed, such as it is in the case of contracts (cf. Sec. 709, which provides for governing law applicable to contracts). However, if the matter in question is something where private autonomy shall not be recognized or shall be restricted to a certain level, application of Sub-section (2) may become irrational or unjust in certain circumstances.

After all, Section 714 seems to be a provision which should be applied with restraint. Other specific choice-of-law provisions in Part 6 should be applied as much as possible by construing them in a rational but flexible way so as not to overuse Section 714 and divert easily from the general principles of private international law, which Part 6 is duly representing.

Section 715 is a supplemental provision which helps to connect the issue to a country's law in cases where the connector is primarily nationality but the person in question has multiple nationalities or is a refugee or stateless person. Nationality as a connecting factor is used quite frequently in determining the governing law, especially when matters concerning persons such as status, capacity, competency come into question (cf. *lex personalis*). It adopts, for persons with multiple nationality, habitual residence as a primary connector and "closest connection" as a secondary connector but among the relevant countries of nationality. For refugees and stateless persons, it provides habitual residence primarily and current residence secondarily. For persons with multiple nationalities, Section 715 makes what is called a "reservation", stating that if Nepal is one of the multiple nationality countries in question or the person has a habitual residence in Nepal, Nepalese law shall apply.

Section 721 is, as already mentioned, a provision that declares the so-called "public order doctrine," which, again, should not be overused (see 7.1) above).

## **2) Specific Provisions for the Choice of Law**

The choice-of-law provisions in the strict sense are those which stipulate certain connecting factors for respective private law issues. The NCC has such provisions in the field of persons, succession and family matters, property, contractual relationships, and extra-contractual relationships.

### **2.1) Persons, succession, and family matters**

Section 693 is the basic rule for determining the governing law of capacity and competency of natural and juridical persons. Though the provision uses only the term "capacity", there is no doubt that it includes the issue of competency because otherwise it would be irrational to say that the Nepalese private international law has no provisions dealing with competency. The competency issue of a natural person is primarily connected to the law of nationality, and stepwise, to habitual residence, and then the current residence.

For body corporates such as companies, the primary connector is the place of registration, secondary is the place of its headquarters. Sub-section (3) further provides for a third connector, which is the place of transaction, which needs some interpretation because this is not always clear. However, for the purpose of this Sub-section, it may be construed that it refers to the place where the body corporate in question usually carries out its main business. Still, invoking the place of transaction as a connector for the issue of competency must be very rare because a situation where both the place of registration and the place of headquarters of a corporation cannot be ascertained is not easily conceivable. If so, there may be a big question as to whether the relevant party is a body corporate at all.

Another issue of persons, here natural persons, is presumption of disappearance, to which Section 694 applies. In line with many other issues concerning persons, here stepwise connection is adopted: first, nationality, second habitual residence, and third, the last known residence.

Sections 695 and 696 concern the matter of succession involving a foreigner. Section 695 provides for determining the successor to a foreigner residing in Nepal but does not limit the location of the property, while Section 696 covers a foreigner who died in Nepal (having a residence in Nepal does not seem to be required) but excludes the property located outside Nepal. Both provisions adopt stepwise connection with nationality first and habitual residence second, but for the third priority connector, 695 adopts current residence and 696 adopts *lex fori*. The reason may have to be ascertained by Nepalese jurisprudence, but it may be that in cases of Section 695, the foreigner is still alive and may change his/her residence after the succession procedure takes place, while in Section 696 cases, the foreigner will not be able to change his place anymore and it is about the property located in Nepal.

Section 697 is something that regulates the very narrow matter of whether a body corporate is public or private. This may be because the NCC attaches very much importance to this issue, which may lead to different consequences. Here again, stepwise connection is adopted, putting the place of incorporation first, and the place of registered office or headquarters second. It should be noted that depending on the interpretation of the wording “registered office”, a body corporate may have multiple registered offices, which may make the situation a little complicated.

Section 698 divides property into movable property and immovable property and allows succession to movables be governed by the law of the country of the habitual residence of the deceased and succession to immovables by the law of the country of its location. This is also in line with legislation of many other countries, where movable property is considered to be usually personal and may frequently change its location, and immovable property is considered something to be regulated by the law of its location because of its nature and public aspects and usually need registration and other procedures which are not always solely private and are subject to public administration.

Sections 699 through 701 are provisions relating to marriage. As already mentioned, the NCC divides matters concerning marriage into three issues: the substantial conditions form of marriage, form of marriage and consequence of marriage, and gives respective connecting factors to each of them. First, the issue of condition of marriage as stipulated in Section 699(1) (for Nepalese citizens) and in Section 700(1) (for foreigners) are connected to the respective nationality of each of the couple by so-called distributive connection. Thus, the prospective husband and wife just have to fulfill the conditions of their own homeland law and that suffices.

As to the form of marriage, a selective connection is adopted; while the law of the country where the marriage is concluded governs the formalities, the couple may also choose a “consular marriage” which will also be recognized as a valid marriage.

As to the consequences of a marriage, including matrimonial relationship, Section 701 searches stepwise for common nationality, common habitual residence and common residence. And, if this does not work, it designates the law of the country of the marriage, which may be interpreted as the law of the country where the marriage was concluded.

The dissolution of a matrimonial relationship, which is separation of bread and board, and divorce is covered by Sections 705 and 706. Issues of separation are connected to the governing law, again stepwise, by common habitual residence, last common habitual residence, and lastly, to the law of the country where the court presently handling the issue of alimony is located.

Choice-of-law rules for other family issues such as parent and child, adoption, guardianship, and curatorship are stipulated in Sections 702 through 704. Section 702 applicable to parent and child relationship (but the law remains silent as to the establishment of a parent-child relationship and some jurisprudence is needed here), including parental authority, adopts a stepwise connection putting priority on the nationality of the child over the common habitual residence and residence of the father and the mother.

In contrast, Section 703, which relates to the consequences of adoption, gives priority to the law of the nationality of the person who adopted the son or daughter, then secondarily to the habitual residence of the adoptive person, and thirdly, the place of habitual marital life of the adoptive parents. This may be because the adopted child usually resides with the adoptive parent and the protection of the child may be easier if it is done under the law to which the adoptive parent has closer connection. It should be noted that Section 703 only provides for the consequences of adoption. For the issue of conditions to adoption, separate rules are expected to be established.

Section 704 covers the issues of establishment and consequences of establishment of guardianship and curatorship. As to the issues concerning establishment, such as qualification, capacity, and required conditions, the governing law is the law of the country of nationality of the person to be protected. If the nationality cannot be ascertained, Sub-section (2) provides for stepwise connection by habitual residence or the current habitual residence. Contrary to this, the consequences or the effects of an established guardianship or curatorship come under control of the law of the guardian or curator (which can be understood as the nationality law of the guardian or curator) or the law of the country of appointment. Here, it can be understood that this rule under Section 704(3) adopts a selective connection. Further, the proviso stipulates a reservation by Nepalese law if the habitual residence of the protected person is in Nepal.



## 2.2) Property law

Two Sections, 707 and 708 are related to property. Section 707 is a basic rule and follows the well-established principle regarding tangible property, that is, property follows the law of its location. With respect to this rule, Section 698 (1) is a rule regarding succession which also applies to movable property and subjects it to the *lex personali* of the deceased. Therefore, the governing law designated by Section 698 – the law of the habitual residence of the deceased – and Section 707 – the law of the location of the property come into question at the same time. This creates a difficult theoretical issue, which again needs interpretation by the court that handles the actual case. Traditionally, it seems that cumulative application was predominant, saying that a valid transfer of the property by succession must fulfill the requirements of both the law on succession and the law of the location. But eventually, because of the ineffectiveness of such operation of multiple laws, now there are other theories, too, such as interpreting the law on succession as the general rule and the law of the location of the property as a specific rule and under the principle of “special law repeals general law (*lex specialis derogat legi generali*)”, excluding the law of succession.

Section 708 is a provision for *res in transitu*. It is a well-established rule whereby property which is underway shall be governed by the law of the destination, and the NCC also follows it.

## 2.3) Contractual and extra-contractual relationship

In light of the principle of private autonomy, it is quite common for private international law of a country to allow much freedom of the parties in a contractual relationship even at the choice-of-law level and as to jurisdictions. Thus, many written international contracts usually have provisions which are called “governing law clauses”, “jurisdiction clauses” and “arbitration clauses” and such provisions are normally respected by the courts in the process of solving contractual disputes. The NCC follows suit and provides for in its Section 709 (1) that “The governing law of any contract shall be as determined in the contract by its parties.” Only if there is no agreement as to the governing law, Sub-section (2) instructs to use, stepwise, country of its performance or the country of conclusion, as a connecting factor. However, this stepwise connection is disregarded by a small reservation by the proviso thereto that contracts concluded in Nepal shall be governed by Nepalese law. It should be noted that this proviso is only for Sub-section (2) and not for Sub-section (1). Otherwise, Section 709 would be regarded as not recognizing party autonomy for any contract concluded in Nepal, which would be not only irrational but also a serious neglect of well-established principles of private international law.

Section 710 seems to provide for the form of contract. In many jurisdictions, certain contracts need to be concluded in writing or require some formalities to be performed in order to acquire validity, such as the execution of deeds. Here, this Section declares that the issue



of form of contract shall be connected to the place of its conclusion, and Nepal courts will recognize such contract to be valid if it fulfills the formality requirement that is in force in the jurisdiction where the contract has been concluded and will not require any further formality to be followed.

Section 711 is another specific provision for donations and gifts. Here, this Section, in its Sub-section (1), employs the nationality of the donor as a connecting factor as to the substantial validity of the donation or gift, and with Sub-section (2), connects the formality issue to the law of the place where the donation or gift was made.

Part 6 divides the matter of extra-contractual relationships into two categories and provides for stepwise connection for tort liability (Sec. 712) and a simple connection for liability arising from quasi-contract or unjust enrichment. For tort liability, the primary connector is, if the tort in question and the consequence thereof take place in the same country, the place of the tortious act, and if the consequence occurs in a different country other than the place of the tortious act, the place of the consequence. So, for a hypothetical example, if, owing to a negligent or reckless mistake by a bus engineer in a pre-departure safety check causes an accident at the destination and kills a foreign passenger, the law of the country where the pre-departure check was performed will govern if it was domestic transportation, and if it was an cross-border route, the law of the country where the destination is located will govern (Sub-sections (1) and (2)).

Sub-section (3) provides for stepwise connection to the law of the country where the tortious act has been committed in cases where the liability cannot be determined pursuant to Sub-section (2). The meaning of this Sub-section seems to be somewhat obscure. It may either mean a situation where the place of consequence is not clear (or it may have occurred where there is no country, such as on high waters), or that, even if the place can be determined, the liability cannot be determined because the law of that place does not recognize the act in question as tort, or both. In light of giving proper protection to the tort victim, the latter may be an attractive understanding, but here again, it is up to the Nepalese courts how to construe this provision to reach a just and fair conclusion.

Quasi-contract and unjust enrichment call for a very simple connection using the place of act under Section 713. But in actual cases, quite skillful operation may be needed because determining where such place of act is may not always be easy. Moreover, the characterization of the issue in question may sometimes be puzzling because it is not always clear what falls under the category of quasi-contract or unjust enrichment in the context of private international law. This may be a good example of how these concepts are not always the same as they are when used in the domestic substantial law, and the courts must find out what these terms “quasi-contract” or “unjust enrichment” as used in Part 6 of the NCC really mean.

### 4.3 Procedural Provisions

The four sections, Sections 716 through 719, are provisions for court procedure, most of them touching upon Nepalese courts' powers and jurisdiction<sup>90</sup>. Sections 716 and 717 provide for situations where there is concurrent litigation either to be expected or already in place with respect to the same dispute. Section 716 gives the parties, subject to the permission of the Nepalese court, liberty to terminate, upon mutual agreement, the procedure before a Nepalese court and file the case elsewhere with a foreign court. Section 717 provides for a situation where there is a litigation pending before a foreign court on the same matter as it is "*sub judice*", i.e., pending before a Nepalese court. And, if the outcome of the foreign process may directly affect the Nepalese court's case, then the Nepalese court may, upon application by the parties, adjourn the case if it considers it is proper to do so. There is no explicit wording, but it is rational to understand that it implies that the Nepalese court can take the content of the decision of the foreign court into account when further proceeding with the adjourned trial and eventually rendering its judgment or decision. This can be understood as being a provision that tries to avoid contradictory outcomes coming from domestic and foreign proceedings, which tries to secure the principle of harmonization under private international law by operation of procedural rules.

Sections 718 and 719 stipulate subject-matter jurisdiction of Nepalese courts. Section 718 provides for a wide range of jurisdiction over matters involving foreign elements in addition to the general jurisdiction of Nepalese courts as set forth in the *Muluki* Civil Procedure Code. Section 719 affirms that if a Nepalese court has jurisdiction on the main dispute of the litigation, it also has jurisdiction over related matters that should be settled at the same time.

With the stipulation of Clauses (a) through (h) in Section 718, almost all questions as to whether a Nepalese court has jurisdiction over a certain legal issue are answered, although in some cases the question of jurisdiction may require some in-depth consideration. For example, as to Clause (g), which provides for jurisdiction over non-contractual liability cases, for example, it can be understood that this clause is expanding the general principle of jurisdiction over "place of act" reflected in Section 19 of the *Muluki* Civil Procedure Code, in that it allows proceedings to be carried out in a Nepalese court even if the place of act is not in Nepal if both parties to the dispute are Nepalese citizens or habitual residents. Still, there may be cases in which it may be viewed as unfair or unjust if the Nepalese court rejects a lawsuit because of lack of jurisdiction by rigidly applying Clause (g). A hypothetical example may be a case where

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90 Please be reminded that these provisions are just supplementary provisions to the provisions of the *Muluki* Civil Procedure Code, Chapter 3, which stipulate various matters concerning the jurisdiction of Nepalese Courts and should be construed in harmony with them. The basic provisions of international civil procedure are stipulated in the *Muluki* Civil Procedure Code. For example, the very important principle of the freedom of choice of forum in contractual matters is, even if only partially, reflected in Section 20 of the *Muluki* Civil Procedure Code.

a Nepalese citizen was killed in an accident abroad caused by negligence or recklessness of an employee of a big-sized foreign international corporation having its head office outside Nepal but having a rather big branch office in Kathmandu, and the citizen's family in Nepal would like to sue the corporation for damages in Nepal. The question would be whether the Nepalese court can always dismiss such a lawsuit or there are certain exceptional situations where the Nepalese court can accept the lawsuit. As it is with choice-of-law provisions, procedural provisions also require rational and appropriate interpretation, and the responsibility to attempt such interpretation is primarily to be shouldered by the courts of Nepal.

It should be remembered that the issue of jurisdiction is a matter of international civil procedure law and should be distinguished from the issue of choice-of-law and governing law. Even if a Nepalese court is authorized to exercise jurisdiction over a legal dispute, it does not mean that such court may apply Nepalese substantial law to the case. Hence, if two Nepalese citizens had a quarrel in Tokyo and one beat up the other and made him suffer injuries and damages, the damaged party can file a tort lawsuit in Nepal under Clause (g) of Section 718, but the governing law will still be Japanese law, pursuant to Section 712(1), which designates the law of the place of the act. This is also true with regard to Section 719. Section 719 just allows the Nepalese court to handle issues related to the main dispute even if the related issue was something, if treated separately, over which the Nepalese courts would not have jurisdiction. But that does not mean the Nepalese courts can apply the same governing law to the main dispute and the related issue; these must be respectively connected to their own governing laws by way of applying the choice-of-law rules of Part 6 and the theory and established principle on private international law. Here the issue of "preliminary question" as already mentioned<sup>91</sup> must also be considered when determining the governing law of the main dispute and the preliminary question.

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91 See 3. - 8.1) above.

# X Future of the Civil Code of Nepal

Prof. Hiroshi Matsuo

## 1. Historical Significance of the Civil Code of Nepal

The Civil Code of Nepal (NCC) clarifies the civil rights of natural persons and legal persons, their creation, effects, and protection more comprehensively and systematically than did the old *Muluki Ain*. It has modernized the basic principles of civil law by keeping the traditional customs which are not contrary to the provisions of law.<sup>92</sup> It provides in a clear manner the simple and basic rules of private law which regulate various actions of the people in their family relations, daily lives, and business transactions based on the fundamental principle of equality of every citizen. In this sense, it can become a very basis of clarifying the rights and duties of citizens and thus creating the peaceful order of a more equal and stable society.<sup>93</sup> This is the historical significance of the NCC as the fundamental law of the civil society to be characterized as “the Constitution of Civil Society”.

In order to realize the historical significance of the NCC as the fundamental law of the Nepali civil society, it must be disseminated by using every occasion of education in schools and universities, used in transactions for daily life and business activities to avoid possible conflicts, and applied in negotiations and court procedures to solve conflicts between parties by making necessary interpretation.

Through such a practical usage of the NCC, it will develop further in accordance with the development of civil society in Nepal. It should be a good thing for the Civil Code to be used and fostered by the citizens.

It can also be developed by exchanging mutual and continuous communications with legal professionals abroad through the comparative study of law and legal practices in the globalizing world. This would strengthen the historical significance of the NCC as the fundamental law of the Nepali civil society.

## 2. Further Development of the Civil Code of Nepal

Individual comments on each provision of the NCC for possible amendments in the future have already put in each Part above in this book. The following comments are concerned with possible revisions of the basic provisions and structures related to multiple Parts of the NCC for its further development.

92 As for the principles stipulated in Chapter 2, Part I, see II. 2 *supra*.

93 As for the civil rights provided in Chapter 3, Part I, see II. 3 *supra*.

### **(a) Clarification of the relationship between property law and contract law**

In the NCC, the relationship between provisions of property in Part IV and those of contract in Part V may be further clarified. For instance, provisions of contract of sale in Chapter 6, Part V shall not be applied to the sale of immovable property, because they shall be applied to “goods,” which means “movable property” (Sec. 545 Explanation). However, how about the provisions of contract in Chapter 2 on the formation of contract, in Chapter 3 on the validity of contract, Chapter 4 on the performance of contract, and Chapter 5 on the breach of contract and remedies in Part V? It seems unclear whether they are applied to the sale of immovable property, since there are some provisions in Part IV on the remedies for a purchaser of a property sold when the purchaser is deprived of enjoying the property wholly or partially because the transfer was invalid for any reason (Sec. 424 (1)), or when the property had been damaged, destroyed, or of low quality which was not known to the purchaser and the seller sold that defective property by misrepresentation or with deviation from the particulars set forth in the deed (Sec. 430).

However, from the theoretical point of view, the ownership of immovable property and movable property can be transferred through a contract of sale through the following two steps. (i) First, the sales contract creates the obligation of the seller to transfer ownership and deliver the property, and the obligation of the purchaser to pay purchase money. The seller and the purchaser have to perform their obligations. (ii) Second, the transfer of ownership shall take place by performing the obligation of the seller. The provisions of contract on the formation, validity, performance, and breach of contract and remedies shall be applied to sales contracts of immovable property and movable property. The provisions of transfer of property shall be applied to action of the seller of both immovable property and movable property.

In the future, the applicability of provisions of a sales contract of goods in Chapter 6, Part V to the sales contract of immovable property can be reconsidered. In that case, provisions of the transfer of ownership will be kept in Part IV, while provisions of the sales contract for both immovable property and movable property will be put in Part V, because there are common provisions that can be applied to both immovable property and movable property.

For reference, provisions of contract of lease in Chapter 12, Part V shall already be applied not only to movable property, but also to immovable property (see Secs. 610 Explanation, 616 (2), 617 (1), 619 (1), 620).

From the viewpoint of arranging the comprehensive, systemic and consistent provisions of contract, provisions on house rent in Chapter 9, Part IV may be combined and coordinated with those on contract of lease in Chapter 12, Part V. In addition, provisions on donations and gifts in Chapter 10, Part IV, and those on transactions in Chapter 15, Part IV may also be moved into Part V as types of contracts.

On the other hand, provisions on collateral or deposit in Chapter 7, Part V seem to be a part of property law and they may be moved into Part IV, which includes provisions on mortgages of immovable property in Chapter 12, Part IV as a type of collateral. This would increase the comprehensive, systemic and consistent provisions of collateral in Part IV.

The clarification of relationship between property law and contract law is very important for improvement of the basic structure of the civil code.

### **(b) Balanced protection of right-holders and third parties in transactions**

In order to protect the rights of citizen on the one hand and facilitate transactions on the other, the civil code needs to provide detailed rules that can strike a proper balance between the protection of right-holders and protection of a third party who transacted in good faith.

However, there are limited provisions in the NCC that protect a *bona fide* third party for the purpose of increasing the credibility and efficiency of transactions. For instance, if a contract is avoided for the reasons of coercion, undue influence, fraud, or misrepresentation, the legal right or interest of “a *bona fide* third party” shall not be prejudiced merely by the reason of such avoidance (Sec. 518 (6)).

But on other occasions, it seems difficult for the third party to be protected even though he/she transacted while believing that the other party has a legal right, i.e., *bona fide* (in good faith). For example, A and B are coparceners of a piece of land which is registered in the name of A, and A made a deed to sell the land to C, received purchase money, delivered the land, and registered the transfer of ownership from A to C. After that B claimed that this transaction was not approved by B and that B should be recognized to hold a share of the land.

According to Section 421 (1) NCC, no person can transfer a property to another person in which anyone else has ownership (Sec. 421 (1) NCC), and if a person makes a transaction of a property which belongs to someone else, such a deed shall be void (Sec. 421 (2) NCC). If the owner makes a claim for recovery of the property transferred pursuant to Section 421 (1) NCC, the transferee of such property has to return it to the owner (Sec. 421 (3) NCC). If Section 421 is applied to the case above, B’s claim shall be recognized. It should be just and right in the protection of the right-holder.

However, it will affect the property transactions, because it is sometimes difficult for a third party, such as C in the case above to confirm whether or not there are right-holders other than the registered owner. In order to maintain a proper balance to protect right-holders and a third party who has transacted in good faith, provisions should be given that stipulate clearly who the coparceners of a property are, and they should be easily confirmed by the registration.

In addition, if a third party such as C in the above case believed that the land is owned by A because only A is registered as the owner of the land, and A and B did not mention that B

is a coparcener of the land at the transaction between A and C, then C may be protected as the new owner of the land, especially in the case where B had sufficient opportunities to register as a coparcener of the land. For that purpose, it is necessary to add some provisions in Section 421 or in other Sections.

### **(c) Creation of an independent chapter on limitation period**

The NCC stipulates the limitation period for a lawsuit in the individual provisions at the end of each Chapter, such as Sections 29, 41, 66, 84, 92, 104, 123, 134, 152, 168, 187, 204, 235, 250, 265, 275, 286, 298, 313, 351, 367, 382, 405, 412, 434, 453, 462, 473, 492, 503, 516, 520, 534, 544, 562, 574, 584, 590, 601, 609, 623, 639, 647, 663, 671, 684, and 691. This arrangement of separate provisions on limitation period depending on the cause of action seems to be based on the understanding of the limitation period as the limitation of the right to bring the case to the court.

The length of limitation period is from three months (e.g. Sec. 41 (a)), through six months (e.g. Secs. 41 (c), 684), one year (e. g. Secs. 41 (b), 691), two years (e. g. Secs. 534, 544), three years (e.g. Sec. 66 (a)) to no limitation (e.g. Secs. 434, 432), depending on the nature of rights and duties as the causes of action.

As for the commencement of the limitation period, for some causes of action it shall be counted from the date on which a certain act was done or action was taken (e. g. Secs. 29, 41 (a), (c), 66 (a), (c), 684), and for some causes of action it shall commence from the date of knowledge of a certain act done or action taken by a person who is aggrieved from that act or action (e.g. Secs. 41 (b), 66 (b), 275, 434).

However, the consistency of the different provisions of limitation period and its commencement may be reviewed again by coordinating the protection of civil rights as causes of action and the convenience of the case management by the court. For example, the aggrieved creditor by a breach of contract may claim for compensation within two years after the breach by the contracting debtor (Sec. 544), while the aggrieved victim by a tort action may claim for compensation within six months after the tortious action by the wrongdoer (Sec. 684). It may be difficult to justify the reason for the difference in limitation period between the claim for compensation due to the breach of contract and that due to the tort action from the viewpoint of the protection of the claim right for compensation. The contracting party may avoid the risk caused by the breach of contract by establishing security or guarantee, while the victim of the tort might not have always been able to easily foresee the damage and take measures to avoid it, because the tortious action may not always be predictable. It seems necessary to strengthen the protection of the victim of tortious action by extending the limitation period and/or by counting the limitation period from the date of knowledge by the victim of the damage and the wrongdoer. For reference, the aggrieved



owner of the property may claim for the recovery of the property within six month from the date of knowledge (Sec. 434).

Another example is the claim for recovery by the owner of a property which was taken by another person without entitlement. The owner may bring a lawsuit for the recovery of the property “within three months after the date of knowledge” of the taking (Sec. 275).<sup>94</sup> However, the length of a limitation period of a claim based on ownership is provided differently in the following case. No one can transfer to another person a property in which any one else has ownership (Sec. 421 (1)). If a person made a deed to transfer another person’s property in contravention of Sec. 421 (1) and delivered it to the transferee, the deed shall be void (Sec. 421 (2)). If the owner of the property makes a claim for recovery of the property, the transferee has to return it to the owner (Sec. 421 (3)). This claim of the owner for recovery of his/her property is also based on the ownership of the property (*rei vindicatio*). But, in this case, the limitation period is “within six months after the date of knowledge” by the owner about the transaction of his/her property (Sec. 434). It would be more consistent when the length of limitation period is the same if the claim for recovery is based on ownership for both cases above.

In order to avoid inconsistency, it would be necessary to create an independent chapter which stipulates the consistent provisions of the commencement, duration, interruption, and renewal of the period, and effects of the non-exercise of rights for a certain period of time. This would transform the provisions of limitation period from the restriction on filing a case to the court as a part of procedural law to the provision of the extinction of claim rights with the passage of time as a part of substantive law.

The examples described above are a part of objects of study for the further development of the NCC. It will be improved step by step by reflecting the deliberations and discussions among various stakeholders.

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94 However, ownership is a very important right as the basis of the system of civil rights. From the viewpoint of comparative law, Sec. 166 (2) JCC provides that ownership shall not cease to exist by a limitation period. It is interpreted that a claim based on ownership shall not be extinguished by a limitation period.



## Editor's Note

I would like to extend my sincere appreciation on publication for this unique book in which Japanese Civil Law scholars introduces Nepalese civil Code.

Japan has been supporting the process of legislation and development of the Civil Code of Nepal since 2009 within the framework of Official Development Assistance through JICA, upon the request of the Nepalese side that they seeked advice from Japan which developed her own legal system combining two major legal tradition of the civil law and common law. The four authors are those who have supported our discussions from the very beginning.

Since 2009, I also have had the opportunity to be involved in this process intermittently as an advisor at JICA headquarters. Since March 2021, for three years till now, I have been dispatched to work on the dissemination and further reform of this Code as the 5<sup>th</sup> resident advisor to Nepal, succeeding Mr. Katsumune Hirai, Mr. Yosuke Shamoto, Ms. Takako Nagao, and Mr. Akito Ishizaki.

From our office, illustrated leaflets on some topics of the Code are prepared as the joint work with the Ministry of Law, Justice and Parliamentary Affairs. Also, the Resource Material on family law drafted by the Nepalese side and commented on by the Japanese professors will be soon publicized online.

During this period, the four author professors have continued to give advice for these discussions and activities.

In the recent programs held in Nepal in Japan and online, we have discussed various topics, such as the relationship among tortious liability, criminal liability, contractual liability, and liabilities of special laws, obligation of multiple party, the transfer of property and the protection of third parties, several issues in family law, including partition and private property, the prohibition of bigamy and the age of marriage, and the concept of private international law.

Nepalese law has some differences from Japanese law in basic ideas and conceptual understanding. Thus it was often challenging to put the discussion from both sides on the same wavelength, but it was also an intellectually stimulating and enjoyable task. I am sure that the discussions were even more interesting for the authors, who have much deeper knowledge of the subject.

If, in any case, some of the Nepalese readers should feel strange in any part of this book, it might be from the conceptual differences between Nepalese and Japanese law, or such a

feeling might be a hint for the way how the text of the Code could be understood from outside of Nepal.

The idea to publish this book started right after the Civil Code was passed in 2017. I am very happy that it is finally taking shape to be referenced by the people of Nepal and the international community. I hope that this book will help people's understandings on the Civil Code of Nepal and, in turn, contribute to the protection and realization of the rights of Nepalese people.

Finally, in addition to all those involved in the legal technical cooperation between Japan and Nepal, especially those mentioned in the foreword by Professor Hiroshi Matsuo, I would like to personally thank the following people: Mr. Shreekrishna Mulmi, who has paid a great efforts to put this book in shape in a limited schedule as the Director of the NJA, Dr. Diwakar Bhatta, a District Court judge who completed proofreading of the draft in a short time, Mr. Udaya Raj Sapkota, Secretary of the MoLJPA, Mr. Phanindra Gautam, the Secretary of the Truth and Reconciliation Commission, who has been my contact person for many years as the Joint Secretary of the MoLJPA, and Mr. Aman Maharjan, a Nepalese lawyer and JICA national consultant, who has been really instrumental in coordinating all the things and helping Japanese side to further understand the context of the Nepalese law.

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