

Legal Aspects of Professional Engineering in Nepal

(Chapter 4; 9 hours)

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August 2016



Updated: August 12, 2017

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4.1 Introduction to Nepalese legal system

Components of a Legal System

The legal system of a nation includes:

1. acts/laws, court decisions/precedents (*ain, kanun, nirnaya/najir*)
2. rules, regulations, bylaws, directives (*niyam, biniyam, nirdeshika*)
3. treaties, conventions, policies, (*sandhi, prachalan, niti*)
4. formation orders, ordinance, promulgations, (*adesh, adhyadesh, ghoshana*)
5. access to justice, freedom to choose legal advisor,
6. concepts of “innocent until proven guilty”, “equal under law” and
7. implementation aspects, including consistency, of 1 to 6 above.

Nepalese Legal System

- In Nepalese legal system, a person is practically “presumed guilty until proven innocent”. As soon as a person, or an officer, is charged of a crime, he/she is losses his/her official privileges, expected to resign from his/her post or automatically suspended till the case is “closed” by a court of law.
- The Nepalese society normally presumes a person guilty as soon as s/he is charged of a crime. People have very low level of faith on the impartiality of justice/legal system. Many persons found guilty by a court, but with good connection, roam in government offices, while persons with low access to resources waits for years, even decades, for court verdict on cases he/she files.

नेपालको कानून दैवले जानुन् ! सानालाई ऐन ठूलालाई चैन !!

Structure of Nepalese Legal System

- Muluki Ain (Civil Code) promulgated by King Surendra Bir Bikram Shah in 1854 (11th amendment, 2059)
 - Supreme Court (Apex Court)
 - Appellate Court
 - District Court
 - Special Court
 - Arbitration
 - provision to establish special types of courts or tribunals for the purpose of hearing special types of cases by the law: four Revenue Tribunals, one Administrative Court, one Labor Court, one Debt Recovery tribunal and one Debt recovery Appeal Tribunal and one special court.
- (<http://www.supremecourt.gov.np/main.php?d=general&f=preliminaries>)



Acts related to Engineering Professional Practice in Nepal

- The Patent, Design and Trademark Act, 1965
- Labor Act, 1992
- Insurance Act, 1992
- Immigration Act, 1992
- Foreign Investment and Technology Transfer Act, 1992
- Industrial Enterprises Development Institute Act, 1996
- Value Added Tax (VAT) Act, 1997
- Environmental Protection Act 1997
- Contract Act, 1999
- Nepal Engineering Council Act, 1999
- Nepal Arbitration Act 1999
- Local Self Governance Act, 1999
- Construction Business Act, 1999
- Copy Right Act, 2002
- Income Tax Act, 2002 & Regulation
- Company Act, 2006
- Mediation Act, 2011
- Public Procurement Act, 2007 (amendment 2012)
- International laws/ conventions, Bilateral agreements (WTO (23 April 2004), ILO, BIPPA)



4.2 Essentials of a valid contract

- **Offer and acceptance:** An offer is a promise made by a party/person to another party/person with an intention of getting approval over his/her promise. A tender submitted by a contractor is considered as offer. The client, after due consideration and evaluation of the offer, provides acceptance of the offer.
- **Mutual intent to enter into contract:** An agreement between two (or more) parties is not automatically a contract. A contract requires the parties' intention to establish a legal relationship. The parties' intention of entering into contract should be clearly reflected in the agreement.
- **Consideration:** All the concerned parties of the contract should get something of value for fulfilling the terms and conditions of the contract.
- **Capacity to contract:** A party (or person) entering into a contract should be of legal age and should be under his/her own control.
- **Lawful purpose:** The objective of a contract must be lawful to be valid.
- **Free consent:** The parties in a contract should have consented freely to enter into the contract. A contract signed under coercion, undue influence, fraud, misrepresentation etc. are invalid.

4.3 Void and voidable contracts

4.3.1 Void Contracts:

- a) preventing anyone from engaging in any legal occupation, profession or trade.
- b) restraining legal marriages.
- c) preventing any one from enjoying public facilities.
- d) seeking to prevent the legal rights of any person from being enforced by any government office or court.
- e) concluded in matters, contrary to/prohibited by prevailing laws.
- f) concluded for immoral purpose/against public morality or public interest.
- g) which cannot be performed because the parties thereto do not exactly know about the matter in relation to which it has been concluded.
- h) which is considered impossible to fulfill even at the time the contract is concluded.
- i) which is vague (does not provide reasonable meaning thereof).
- j) concluded by an incompetent person.
- k) concluded with an unlawful consideration or objective.



4.3.2 Voidable Contracts

A contract concluded through:

- a) **coercion**: threatens to withhold property, threatens defamation, takes actions against law
- b) **undue influence**: influence exercised by a person upon another who is under his/her influence, like a ward/ subordinate/sick
- c) **fraud**: knowingly leads the other party to believe untrue issue to be true, withholds or suppresses information
- d) **deceit**: Submission of false particulars, falsifying document

The burden of proof rests on the claimant.



4.4 Significance of a contract

- Makes agreement legally enforceable
- Records the terms of agreement (ToR, scope of works)
- Specifies the roles and responsibilities of each party of the contract
- Specifies corrective measures in case of breach of contract
- Specifies quantity & quality of work, work schedule and payment schedule & mode
- Identifies parties of the agreement, and the official agents/representatives of the parties, if any.
- Sets out in advance the course of action to be taken in different foreseeable situations
- Defines words and establish common language
- Defines limitations of the contract
- Defines contract termination procedure
- Defines responsibilities of the contracting parties to the third parties like government, community, workers, sub-contractor, material supplier, labor unions etc.

4.5 Factors to be considered in preparing a contract document

- The contract must be fair to all the parties entering into the contract.
- The language used in the contract must be clear (unambiguous).
- The contract language must be consistent. Same word, phrase or abbreviation should not have different meaning in different locations; like NEA and NEA, PPA and PPA, Bus and Bus,
- There should be no repetitions, as it tends to create confusion
- Contract information must be retrievable by all the parties entering into contract, whenever they need it. So multiple original copies of the contract should be prepared.
- The terms of the contract should not conflict with existing laws.
- All legal provisions to make the contract valid and enforceable should be complied, like witness, immediate stakeholder (in case of land/property ownership transfer).



4.6 Interpretation of contractual clauses

- If the language in the contract is clear, the words and terms are interpreted on the basis of the intention of the parties, which is reflected in the contract.
- If the words and terms are not used to give special (or technical) meaning, the words and terms are explained or understood in their ordinary meaning.
- If the words or terms are ambiguous or vague or used to give special (or technical) meaning, then outside help is taken in the interpretation of the words.
- If the contract is ambiguous, with double meaning, or contains conflicting provisions, such words, terms or contractual clauses are interpreted in favor of the party who has not drafted the contract. This rule of interpretation is called ***contra proferentem (against the offerer)*** rule.



4.9 Conditions for establishment of professional negligence (duty, breach, damage and proximate cause)

- **Duty:** Unless there is a contractual duty to perform a work there is no negligence in the performance of the work.
- **Breach:** Unless there is a breach of the terms and conditions of an agreement, professional negligence cannot be proved.
- **Damages:** Unless there is a specific damage to the claimant, professional negligence cannot be established.
- **Proximate cause:** There should be direct (one-to-one) relation between the specific action of a professional and the loss resulted by the action to the claimant.



समयमै काम पूरा नगरेपछि पप्पु कन्स्ट्रक्सनलाई एडिबीले तिरायो ५ करोड

साउन ६, २०७४ बाँके:

एसियाली विकास बैंक (एडिबी) ले जमुनहा-राँझा सडक खण्ड निर्माणको जिम्मा पाएको पप्पु कन्स्ट्रक्सन जेभीलाई ५ करोडभन्दा बढी रुपैयाँ हर्जाना तिराएको छ। सम्झौता अनुसारको काम समयमा पूरा नगरेपछि एसियाली विकास बैंकले पप्पु कन्स्ट्रक्सन जेभीलाई करिब ५ करोड ५० लाख रुपैयाँ हर्जाना तिराएको मध्यपश्चिम क्षेत्रीय सडक निर्देशनालय डिभिजन कार्यालय नेपालगन्जका डिभिजन प्रमुख अर्जुनकुमार बमले जानकारी दिए। 'हर्जाना लगाउनु भनेको कारबाही नै हो, यसले अन्य योजनाको ठेक्कापट्टामा पनि असर पार्न सक्छ,' उनले भने। उनले पप्पु कन्स्ट्रक्सनको ठेक्का जुलाई, २०१६ सम्म मात्र भएकोले अब पप्पु र एसियाली विकास बैंकबीच कुनै सम्बन्ध नरहेको बताए। पप्पुले ५७ करोड रुपैयाँमा राँझा-जमुनहा सडकखण्ड कालोपत्रे गर्न ठेक्का लिएको थियो। मापदण्डअनुसार निर्माण नगरेको प्रमाणित भएपछि एसियाली विकास बैंकले उसलाई एक करोड रुपैयाँ मात्र दिने निर्णय गरेको थियो। हर्जानाबापतको रकम असुली हर्जाना बापतको रकम एडिबीले असुली गरिसकेको छ। काम गरेबापत उसले पाउने रुपैयाँ हर्जानामा कटाइएको छ। सडक निर्माणका लागि ठेक्का लिने क्रममा जम्मा गरेको रकम पनि राजस्व कार्यालयमा पठाइएको सडक डिभिजन कार्यालय नेपालगन्जले जनाएको छ। बाँकी रकम पिभिसीलगायत पप्पुको बैंक खाताबाट असुली गरिएको डिभिजन प्रमुख बमले बताए।

Read more at: <http://thahakhabar.com/news/20256>



4.10 Types of business enterprises: sole, partnership and limited company)

Three types of business concerns exist: (a) Sole Business Concern, (b) Partnership business organization, and (c) Limited Company.

Characteristics of Sole Business Concern: registered under Private Firm Registration Act 2014

- **Sole ownership, management and control:** A single person establishes, owns, manages and controls all aspects of the business.
- **No separate existence of business and owner:** Owner and business do not have separate identity; the owner represents the business; insolvency of owner dissolves the business.
- **Unlimited liability:** The sole owner is liable to pay debt not only from business property, but also from personal property, if needed.
- **Ownership and risk:** The owner bears sole risk and owns total profit.
- **Individual capital investment:** Capital is invested by owner only from personal property.
- **Freedom of Occupation:** Easy to form and less capital needed. Can choose occupation best suited to situation.
- **Limited area of operation:** Due to limitation of financial and human resources, the area of operation is limited.
- **Less legal formalities:** The requirements to establish and operate sole business concern are much less compared to other forms of business.
- **Voluntary origin and end:** The owner can start and end business, by fulfilling certain legal formalities.

Advantages and Disadvantages of Sole Business Concern

Advantages

- Easy to form or establish
- Effective management and control
- Easy to dissolve
- High flexibility
- Quick decision
- Sole claim on profit
- Secrecy
- Benefit of inherited goodwill
- Credit Standing
- Direct relationship with customer
- Social and National advantage
- Stability and Continuity

Disadvantages

- Unlimited liability
- Limited capital
- Limited management
- Limited expansion
- Chances of wrong decisions
- Lack of specialization
- Loss in the absence of a key person
- Uncertain future



Characteristics of Partnership Business

Organization: registered under the Partnership Act 2020 BS (1964)

- Plurality or association of persons
- Joint ownership
- Unlimited liability
- Sharing of profit and loss
- Established on the basis of agreements and between the persons
- Members do not have separate existence
- Joint management and control
- Joint agentship
- Partnership right cannot be transferred/ No transfer of interest



Advantages of Partnership Business Concern

Easy to form: relatively easy to form and register

Capital and credit: better than Sole Business Concern

Advantages of Division of Labor: each partner can lead in his/her specialization

Integration of Ability and Skill: Knowledge, ability and skill of multiple investors/partners can be utilized.

Quick Decision Making: Relatively quicker decision making process compared to limited company

Incentive to work hard: Since profit is to be shared only among partners, there is incentive to work hard.

Flexible: Can change mode of business based on changes in market situation, without much difficulty.

Safeguard of the interests of minorities: Decisions are normally taken with consent of all, hence smaller partners also have equal say in decision making.

Reduced risk: Risk is reduced, compared to Sole Business Concern, because risk is distributed among partners.

Possibility of Expansion: Partners can be added, which increases possibility of more fund for expansion of works.

Disadvantages of Partnership Business Concern

Unlimited liability: Partners are individually and jointly liable for the full amount of loss.

Uncertain existence: Partnership business can suddenly collapse due to conflict among partners or due to sudden demise of a partner or due to certain action of a partner.

Limited resources (financial and human): Compared to a joint stock company, the resources are limited in partnership business.

Possibility of misunderstanding/disagreement and friction among the partners: Due to different interests of each partner, there is possibility of misunderstanding/disagreement and conflict/friction among partners, which can negatively impact PBO.

Difficulty in transferring ownership: Consent of other partners is required for transfer of ownership, so one partner cannot sell his/her ownership to anyone whom he/she likes.

Slow decision making compared to Sole Business Concern: Decisions are made by consent, so the decision making can be slow.

Less public faith: Financial status statements are not made public, hence there is less public faith in PBO.

Limited Company (Joint Stock Company)

- Limited company is established under the act of the country and has limited liability.
- Finance is collected through issuance of shares.
- A company is considered as an artificial legal person.
- Company Act 2053 regulates the incorporation of a company in Nepal.
- Company can be further divided into two as **private limited company** and **public limited company**. As per Company Act 2053, private limited company shall have up to ~~less than 50~~ 101 share holders and public limited company shall have a minimum of 7 (no upper limit) share holders. Maximum 11 members in Executive Board in private limited company. A public company's paid up capital must be at least NRs.10 million



Characteristics of Limited Company

- Voluntary association of persons: Company is an association of persons for business.
- Legal artificial person: Company is an artificial legal entity (person). It can purchase and sale properties in its own name. It can sue and can be sued.
- Perpetual existence: Action of one particular shareholder does not affect its continuity.
- Limited liability: Shareholders are owners of the company, but their liability is limited only up to the amount of their share.
- Common seal: Company uses a specific seal for all its official business/transactions.
- Capital collected by distributing shares: capital needed for expansion of business is raised by issuing shares
- Transferability of shares: ownership shares can be sold to anyone interested to purchase.
- Management by representatives: management board formed by election of shareholders' representatives, and managed as per stated rules rather than by whims of owners
- Publication of financial statements: Regular publication of audited financial statements, normally made public during Annual General Meeting

Advantages and Disadvantages of Limited Company

Advantages

- Limited liability
- Perpetual existence
- Transfer of shares
- Effective management
- Unlimited capital
- Public faith
- Unlimited business capability

Disadvantages

- Difficulty in formation, lengthy legal and formal process
- Lack of personal interest
- Lack of secrecy
- Possibility of fraud
- Exploitation of share holders
- Groupism for power (Office politics)
- Conflict of interest
- Absence of prompt decision
- Lack of closeness

As a fresh engineering graduate, which type of organization would you prefer to work, and why? Explain in terms of advantages and disadvantages of the type of organization you select.



4.11 Intellectual property right (patent, design and trademark, copyright)

The creations of human mind are considered as intellectual property. It covers patents, designs, trademarks and copy right; the legal rights given to the creators of such properties are called intellectual property rights. The World Intellectual Property Organization has listed the following as intellectual property.

- Literary, artistic and scientific works
- Performances of performing artists, phonograms, and broadcasts
- Inventions in all fields of human endeavor
- Scientific discoveries
- Industrial designs
- Trademarks, service marks, and commercial names and designations
- Protection against unfair competition, and
- All other rights resulting from intellectual activities in industrial, scientific, literary or artistic fields

The laws related to intellectual property rights in Nepal are:

- (a) Patent, Design and Trademark Act 2022 (1965), amended in 1987 and
- (b) Copyright Act 2059 (2002).



Patent

- **Patent:** As per the PDT Act 2022, the patent can be issued to any useful invention based on new principle or formula, or any new way or method of construction, operation or transmission related to substance or a body of substance.
- A patent should be duly registered, by submitting all the required documents, to have the patent right. Once registered, the right over the patent is protected for 7 years (plus two extensions, each of 7 years). The patent right is transferrable. The registered patent should not be used or copied without obtaining specific written permission from the patent holder, until the patent duration expires, within the jurisdiction of the patent provider. The law breaker can be fined up to Rs. 500000 and confiscation of the related items, and up to Rs. 250000 for committing an attempt of an offence.

A patent right cannot be granted if:

- The patent is already registered in another person's name
- The patent was not invented by the applicant and the right to patent has also not been received from the inventor
- The patent is likely to produce adverse effects on health, conduct and morality of the citizen or on national interest
- The patent is against the existing law



Design

- **Design:** The PDT Act 2022 has defined design as a feature, pattern or shape of a substance made by following any means.
- The design should be registered to have design right. A registered design should be used by someone else only with specific written permission of the design right holder, until the design right duration expires (5 years plus two extensions, each of 5 years).

The breach of the design right constitutes a fine of up to Rs. 50000 and confiscation of the related items.

The design right cannot be issued if

- (a) the design was already registered by someone else, and
- (b) the design is likely to have adverse impact on the conduct or morality of a person or institution or on national interest.
- (c) The patent is against the existing law



Trademark

Trademark: The PDT Act 2022 has defined trademark as the use of any word, sign or picture or a combination of them by a firm, company or person to distinguish the product or services from those of others.

The trademark should be registered to have trademark right. A registered trademark, or its close imitation, should not be used by someone else. The right over a trademark can be protected forever subject to renewal (7 years in each renewal).

The trademark will not be registered if

- (a) the trademark has already been registered by someone else and
- (b) the registration will have adverse impact on the conduct or morality of a person or institution or on national interest.

The breach of the trademark right constitutes a fine of up to Rs. 100000 and confiscation of the related items.



Copyright

As per the Copy Right Act 2059, the copy right can be provided to the author of the works that are related to the following.

- Book, pamphlet, article, and research paper
- Drama, opera, dumb-show and similar works prepared for show
- Musical works with or without words
- Audiovisual works
- Architectural design
- Painting, sculpture, wood carving, lithography and architecture related other works
- Photographic works
- Works related to applied art
- Excerpt, maps, plan, three dimensional works related to geography, topography, and scientific writing and articles
- Computer program



- The description or the explanations of the ideas, religion, news, concept, formula, law, court decisions, administrative decisions, folk songs, folk stories, proverbs & general statistics, even if they are included in any works, cannot be copy righted.
- Specific registration is not required to have copy right.
- There are two types of rights granted under the Copy Right Act: Economic and Moral. Moreover, the Act has granted rights to performers, producers of phonograms and to broadcasting institutions. The copy right is effective up to 50 years after the death of the author (or creator) of the copy righted materials.

The copy righted materials can be used without permission in the following circumstances.

- a) A portion of the work for personal use, as long as it does not hamper the economic right of the copy right holder.
 - b) For public cause or academic purpose, portion of a published materials may be used with proper citation of the source, provided that the use does not directly benefit (economically) the user of the copy righted materials.
 - c) Libraries and archives can reproduce the works for general purpose.
- Depending on the degree of infringement of the copy righted material, the penalty can range from Rs. 10,000 to Rs. 100000 or imprisonment up to six months or both for the first offense. The penalty doubles for the second offense. Besides, the offender shall be liable for compensation of the damages caused by his/her act.

Self Test (old question collection)

Legal Aspects, Acts and Regulations

- Why are legal aspects very important in professional practice? Are they integral parts of contract documents? Why and how?
- There are many acts related to engineering profession such as Nepal Engineering Council Act, Industrial Act, Company Act, Business Act, Trademark Act, Copyright Act and Contract Act. Throw light on each.
- Describe the disciplinary action process in detail.

Contract

- What is contract? Describe the essential aspects of a valid contract.
- Briefly discuss the essential requirements of a valid contract.
- Define contract and explain the essential of a valid contract.
- Define contract law. What is the importance of contract documents in the execution of project?
- What are the essentials of a valid contract? Briefly explain valid, void and voidable contract.[15]
- All contracts are agreement but all agreements are not contract. Explain.

Bidding, Tendering

- What are the main features of bidding and contract documents? Elaborate systematically.
- List the information to be provided in a tender notice.
- Write the detailed information to be included on the tender notice.
- Explain what is prequalification of contractor and why it is necessary.



Self Test (old question collection)

Liability, Tort, Negligence

- What do you mean by tort, liability and negligence? How they affect the quality of professional work?
- Define the tort, liability and negligence and how they affect the quality of professional work
- Explain in brief the term liability, tort, negligence and ethics.
- Define liability, negligence & duty. Explain the detailed duties and liabilities of designers.

Business Law, company, firms, Labor Law

- What is business law? Briefly discuss the characteristics and limitations of partnership business organization
- Discuss the characteristic of a limited company
- What are the characteristics of a public limited company?
- Discuss about the partnership firm.
- What is business? Explain the characteristics of Private Limited Company and Public Limited Company?
- What are the types of business enterprises? Explain characteristics of company business organization.
- Labor law works to protect the right of labor force in the construction industry. Explain.

Intellectual Property Right, Patent Right, Design Right, Trademark Right, Copy Right

- What do you mean by intellectual property right? Differentiate between the copy right and patent right.
- What do you mean by copy right? Describe briefly.
- Explain the provisions of patent design and trademarks.

