

A Glance on History of Contract Law of Nepal

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1. Prologue

Law of the contract is one of the important branches of civil law, which governs business or commercial transactions from the beginning of organized society¹. However, it is relatively new branch of law in the world's legal history than other branch of law². In the common law history, it is developed as a separate branch of law after the enactment of Judicature Act of 1873 in England. Before that, law of contract was a subdivision of law of property than an independent branch of law³. Due to the rapid growth of law of trade and business, the law of contract was developed as a distinct branch of private and civil law⁴.

The Indian Contract Act, 1872 was the first codified law in the history of common law⁵. This act attempted to codify the English law of contract, which was developed through the case laws by the English courts. Originally, this Act contained the provisions of general principles of contract and specific contract including contract of sale of goods. Subsequently, due to the development of business relationship, the Indian Contract Act could not address the complexities of sale of goods in the context of growing mercantile transactions, therefore, the necessity of comprehensive and a separate Act

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¹ M. C. SHUKLA, *MERCANTILE LAW (Reprint)*, S. Chanda and Company Ltd., New Delhi: at. 5. (2007).

² BIBEK KUMAR PAUDEL, *LAW OF CONTRACT-I: GENERAL PRINCIPLES & PROVISIONS*, MM Publication: Kathmandu, at. 15. (2069).

³ J. BEATSON, *ANSON'S LAW OF CONTRACT*, Oxford University Press, at 1. (2002).

⁴ PAUDEL, *Supra note 2*.

⁵ *Ibid*.

was felt to cope the emerging problems of sale of goods. Thus, in 1930, The Indian Sale of Goods Act, 1930; as a specific statute, had been enacted and that came into force on 1st July 1930 by repealing the provisions of the original Indian Contract Act, 1872 relating to sale of goods. This Act borrowed the most of the provisions of the Sale of Goods Act 1893 of United Kingdom.

The Sale of Goods Act 1893 of United Kingdom is considered as classic example of a codifying statute of United Kingdom which was based on established judge-made common law principles and converted them into a more accessible statutory form. This Act of Parliament was repealed and reenacted in 1979 as Sale of Goods Act 1979.

The Indian Sale of Goods Act, 1930 had been amended on 23 September 1963, and was renamed to the Sale of Goods Act, 1930. It is still in force in India. Before 1930, the Indian Contract Act relating to the sale of goods in India followed the principles of the English Common Law, including the Law Merchant. However, the Indian Contract Act is the oldest form of statute regarding sale of goods in the commonwealth countries. Then after, Sale of Goods Act, 1930 governs the transactions relating to sale of goods. Therefore, the Indian Contract Act, 1972 is considered as the first codified statute however, it is based on the principles of common law contracts.

This was, subsequently, introduced in East Africa and other African countries like Kenya and Uganda which now rely in substance on the English common law⁶. Likewise, Contract (Rights of Third Parties) Act 1999 was enacted in England.

In continental legal system, *standard terms* in contract or *general conditions of business* are a byproduct of the industrial revolution of the nineteenth century⁷. Thus, contract law of continental Europe is not so old.

American Contract Law is predominantly Common Law. The development of the Common Law was interpolated by occasional Royal edicts and legislative enactments. But most significantly, the Common Law was influenced by judicial procedures. During the Nineteenth Century, the Common Law shifted away from a procedure-driven system based on Forms of Action to a body of legal principles and rules which is popularly known as substantive law. And

⁶ BEATSON, *Supra note 3*, p. 18.

⁷ KONRAD ZWEIGERT & HEIN KOTZ, *AN INTRODUCTION TO COMPARATIVE LAW*, (Second Edition), Oxford: Clarendon Press, at. 356. (1992).

yet the substantive Law of Contracts is deeply rooted in the English Common Law Forms of Action.

American Contract Law can be divided into Pre-Modern era and Modern era. The Post-Modern world exists in law school classrooms, law review articles, and monographs on Contract Law. American contract law developed over centuries⁸. Pre-Modern American Contract Law evolved from English property law, specifically real property law. In earlier days, sustenance derived from the land, and wealth derived directly or indirectly from owning that land. ...Pre-Modern Contract Law was the legal framework that developed, to deal with the new economy, by adapting the law of immovable real property to movable chattels⁹.

Modern Contract Law has specific rules regarding rights and duties of contracting parties as well as the consequences and remedies for breaching contractual duties like: who can create contract rights and duties, how contract rights and duties come into being, how contract rights can be assigned, how contract rights can be enforced, when contract duties are relieved, and who gets what when contract duties are breached and contract rights are impaired. Another aspect of Modern Contract Law is the effort to standardize and universalize contractual rights and duties, so that contracting parties, wherever they may be, know at the time of contracting what each is expected to do, and the consequences of not doing it¹⁰.

United States of America has framed an Uniform Commercial Code (UCC), which was published in 1952 for the first time, is one of a number of Uniform Acts that have been established as law with the goal of harmonizing the laws of sales and other commercial transactions across the United States of America (U.S.) through UCC adoption by all 50 states, the District of Columbia, and the Territories of the United States. The Code, as the product of private organizations, is not itself the law, but only a recommendation of the laws that should be adopted in the states. Once enacted by a state, the UCC is codified into the state's code of statutes. A state may adopt the UCC as it is or a state may adopt the UCC with specific changes. Unless such changes are minor, they can seriously obstruct the Code's express

⁸ RICHARD R. ORSINGER, *THE RISE OF MODERN AMERICAN CONTRACT LAW*, <<http://www.orsinger.com/PDFFiles/the-Rise-of-American-Contract-Law.pdf>>. (accessed on 02 August 02 2019.)

⁹ *Ibid.*

¹⁰ *Ibid.*

objective of promoting uniformity of law among the various states. Thus, persons doing business in different states must check local law. Although the substantive content is largely similar, some states have made structural modifications to conform to local customs.

2. History of Nepalese Contract Law

In Nepalese legal history, the history of contract law is very short in comparison to other branches of law. Nepalese legal history started from the *Kirat* period, however, the history of contract law of unified Nepal started with the promulgation of The *Muluki Ain* of 1910 BS (Code of 1854 AD). This is the first written law of modern unified Nepal containing few provisions of contract law. However, Mahindra Malla, Jayasthiti Malla, Ram Shah, Prithvi Narayan Shah, Ran Bahadur Shah and Ujir Singh Thapa had also promulgated the written laws which had some provisions of business transactions but they are not considered as laws of modern Nepal.¹¹ It should be noted that the laws of Mahindra Malla, Jayasthiti Malla and Ram Shah prevailed only in small territories they ruled whereas the *Muluki Ain* of 1910 BS prevailed all over unified Nepal for approximately 110 years with some considerable major and minor modifications. Rewati Raman Khanal mentions that this Code was based on the Code of Prithvi Narayan Shah.¹² However, the manuscript of the Code of Prithvi Narayan Shah is not available yet.¹³

The history of Nepalese contract law can roughly be divided into the following four phases.

- Pre Codification Period
- Period of *Muluki Ain* (1910 BS to 2023 BS)
- Period of Special Statute (2023 BS to 2075 BS)
- Period of General Code (2074 BS onward)

2. a. Pre-codification Period

Before codification of *Muluki Ain* of 1910 BS, business transactions were, generally, governed by the traditional customary rules and practices along with some limited scattered laws of the then time issued by then rulers. Though, there was no integrated law to deal with business transactions, however, some limited provisions relating to business transactions were not absent in the then laws which were based on *Smritis* popularly known as

¹¹ Bibek Kumar Paudel, "An Account of History of Nepalese Criminal Law before Codification of 1910 BS", *NEPAL LAW REVIEW*, Year 37, Vol. 24, No. 1 & 2, 2012. print.

¹² REWATI RAMAN KHANAL, *NEPAL KO KANOONI ITIHASKO RUPREKAHA*, Saraswati Khanal, Kathmandu, at 76, (2059).

¹³ *Ibid.*

Dharmashastra. Rest of the business transactions were governed by Hindu customary law. Law relating to bailment, pledge, mortgage etc were regulated by Hindu law. However, Hindu law of contract was not developed as it was developed in most of other system of ancient law¹⁴. Therefore, Nepal had no any specific law regarding contract as such in the modern sense before 1910 BS.

During the reign of Jayasthiti Malla, the code was created that is popularly known as *Manavnyayasastra*. This law had some provisions relating to business transactions including some principles of contract. A few principles of sale goods were incorporated and some of them were equivalent to the modern principle of sale of goods developed in the west. Among them *caveat emptor* i.e. 'let the buyer beware' is of worth mentioning here¹⁵. However, that law had not provided the exceptions of this rule. Generally, business practices were largely based on the then traditional customs and usages. Though, *Manavnyayasastra* had some provisions relating to business activities like: Chapter on Debt Transaction (*Rinadana*), Chapter on deposit (*Upanidhi*) relating to *naso*, Chapter on Joint Venture, Chapter on Redemption of Gift, Chapter on Breach of Contract of Service, Chapter on Non-payment of Remuneration, Chapter on Sale Without Ownership, Chapter on Non-delivery of Property, Chapter on *Kritanushaya* (Reneging on a Purchases).

Mahindra Malla, the then King of Kathmandu, had issued rule that had some provisions relating to business activities like: continuous use of *Dhiki* (indigenous wooden equipment used as rice mill), *Janto* (an indigenous stone made hand grinder), and Handloom were required. Weaving *Patasi*, *Gharbuna*, *Khadi*, *Kora* (types of cloths) in the same fashion was also an obligation for people. Using Pine trees available in the forest for *Pala*, *Sandani* and *Chirakh* was also encouraged by that rule. Continuous weaving the cloths was also supported and this rule said that such products could be sold to the other villagers and *Madhesi* Kings for getting rich. This provision impliedly incorporated the terms relating to sale of goods. If we have to sell the product, obviously there could be implied contract of sale of goods¹⁶. However, such contract of sale of goods might not necessarily like the contract of sale of goods of the modern times.

¹⁴ PRIYA NATH SEN, *GENERAL PRINCIPLE OF HINDU JURISPRUDENCE*, Allahabad Law Agency, Allahabad, at 302-3, (1984).

¹⁵ Dineshraj Pant (ed.), *Nyayabikashini (Manbnyayasastra)*, Kathmandu: LAWYERS CLUB, at 1 (2065).

¹⁶ *Rules Framed and Issued by King Mahindra Malla* (King of Kathmandu since about 1554-1568), Rule 2.

Ram Shah (1666BS -1693BS), a popular King of the then Gorkha Kingdom, had issued the rules to govern the country that had some provisions regarding business transactions. He had abolished unscientific articles for measurement, exchange or transact commodities made up by the bamboo materials like *Dhungra*, *Dala*, *Aarhi* or similar articles and had developed the relatively fair system for measurement like: *Muthi*, *Manu*, *Pathi* and *Muri*¹⁷. In case of transactions of goods and commodities, there could obviously exist the implied terms of sale of goods.

The third Rule had developed more appropriate weighing system called: *Tulo* and *Dhak* (popularly known as weighing machine); the weighing system had to be done by *Lal*, *Masa*, *Tola*, *Bodi*, *Bisauli*, and *Dharni*¹⁸. While doing business transaction, implied contract could exist there.

King Ram Shah had developed a system of interest for a cash transaction; the interest for a cash transaction shall be ten percent *per anum*, which will be not more than double including the principal amount in ten years. If a borrower could not pay the principal and interest, lenders will not charge the interest more than the double including the principal amount at any cost¹⁹. This provision also dealt about loan transaction impliedly relating to contract.

Prithivi Narayan Shah, the King of Gorkha Kingdom and subsequently became the King of unified Nepal, had issued directives, which is known as *Divya Upadesh*, that read as: “*export our products and other herbs to the foreign countries and earn cash out of such commodities. Always try to earn money from external trade*”²⁰. This provision is also related to business transactions. Business transaction obviously creates contractual rights and obligations. Such contractual rights and duties require a contract even if it is implied.

The Rules issued by King Ran Bahadur Shah in 1863 B.S. has the provision of house rent and lease contract²¹. This rule has also some implied provisions relating to service contract²².

¹⁷ *Rules framed and issued by His Majesty King Ram Shah* (King of Gorkha since 1666 B.S.-1693B.S.), Second Rule. print.

¹⁸ *Ibid*, Third Rule.

¹⁹ *Rules framed and issued by His Majesty King Ram Shah* (King of Gorkha since 1666 B.S.-1693B.S.), Third Rule. print.

²⁰ *Divya-Upadesh*, Prithivi Narayan Shah, The (then) Great King of Nepal. print.

²¹ *Rules Issued by King Rana Bahadur Shah* on 1863 B.S.- Done on 1863 B.S., Baisakh Badi 3, Sunday, Rule 2. print.

²² *Ibid*, Rule 7.

In the rules on Military and Civil Service issued by Ujir Singh Thapa, had some provisions of service contract²³. All these provisions of contract were not complete contract as such but those provisions are mention worthy as the provisions of business transactions in our scattered and un-codified law before the Muluki Ain of 1910 BS. The business transactions uncovered by the then law were governed by the Dharmasastra.

2. b. Period of Muluki Ain (1910 BS to 2023 BS)

During this period, two general codes were framed and prevailed in the name of Muluki Ain of 1910 BS and 2020 BS respectively. Business transactions of this period were governed under these two general codes of 1910 BS and 2020 BS unless the Contract Act, 2023 BS had been enacted as a special statute.

The Muluki Ain of 1910 BS is the first written modern law applied to the whole part of Modern Unified Nepal. Originally, it was proclaimed in the name of *Aain -cfOg_*; later it was renamed as "*Muluki Ain*"²⁴ when it was published in 2009 BS.²⁵ It was also published in 2012 BS in the name of *Muluki Ain* again.²⁶ This *Muluki Ain* was again published on 29th day of the month of Jestha 2022 BS by the then HMG, Ministry of Law and Justice in the name of "*Shree Panch Surendra Bikram Shah Devka Shasan Kalma Baneko Muluki Ain*".²⁷ This was the first general law which had some limited provisions regarding business transactions.

But this code was dominated by the Hindu psyche. Most of the provisions were incorporated on the basis of rules of *Dharmasastra*. This code had some provisions regarding business transactions under some chapters like: 'Of Creditor and Debtor', 'Of General Transaction'. By the amendment of 1992 BS, the chapter on registration was inserted and it made compulsory to make written agreement and their registration. The agreements of adoption, agreement of sale of immovable property etc had to be made in written form and compulsorily had to be registered under the authority for their legal validity.

²³ *Rules on Military and Civil Service 1879 (BS)* Issued by Ujir Singh Thapa First Rule, Rule 6 and 7. print.

²⁴ PRAKASH OSTI, *HAMRO KANOONI ITIHASKA KEHI JHANKIHARU*, Pairavi Book House, Kathamndu, at 5 (2063)

²⁵ Khanal, *Supra note 12*, p. 295.

²⁶ Gorakhapatra Press, *Muluki Ain*, 2012. print.

²⁷ HMG, Ministry of Law and Justice, *Shree Panch Surendra Shah Devka Shasan Kalama Baneko Muluki Ain*, Kathmandu: 2022. print.

With the changed context, the Muluki Ain of 2020 BS, which is popularly known as *new Muluki Ain* and officially cited as *Muluki Ain*²⁸; was framed on 30th day of the month of chaitra 2019 BS (12 April 1963) and it came into force on the 1st day of the month of Bhadra 2020 BS (17 August 1963)²⁹.

When the *Muluki Ain* of 2020 BS came into force, it made some provisions concerning the agreements. *Muluki Ain* of 2020 BS had provided that if any agreement other than money lending exists not covered by this act, which is not inconsistent with the existing law, would be valid. However, this provision was repelled by the Contract Act, 2023 BS. Some provisions of this *Muluki Ain* of 2020 BS concerning contract like bailment and pledge applied up to 2056 BS were repelled by the Contract Act, 2056.

Thus, during the period of 1910 BS to 2023 BS, the business transactions and contractual matters were governed by these two *Muluki Ain* of 1910 BS and 2020 BS as general code i.e. general law of the country.

2. c. Period of Special Statute (2023 BS to 2075 BS)

The year of 2023 BS is the milestone in Nepalese legal history concerning law of contract. The Contract Act, 2023 BS was enacted and came into force with some modern principles of law of contract. The Contract Act, 2023 BS is the modern legislation of Nepal which had only 19 sections. It contained the general provisions of law of contract but specific contracts were not incorporated like: carriage of goods, sale of goods, guarantee and indemnity, agency, bailment and pledge etc. Therefore, this act needed to be drastically reformed.

By considering the flaws of Contract Act, 2023; Contract Act, 2056 BS was enacted in the year of 2056 BS with modern concept of law of contract and came into force in 2057 BS. This law repelled the Contract Act, 2023 BS and the chapter of bailment and pledge of *Muluki Ain* of 2020 BS. Some eminent jurists are of opinion that the provisions of this act were equivalent to the Indian Contract Act, 1872³⁰.

This law incorporated not only general principles of contract law but also provisions of specific contracts. This act, containing 90 sections with one amendment in 2064 BS, prevailed till the last day of the Srawan 2075 BS

²⁸ *Muluki Ain of 2020*, Chapter on Preliminary Matters, no. 1. print.

²⁹ *Ibid*, no. 2.

³⁰ BHARAT RAJ UPRETI, *LAW OF CONTRACT*, Legal Research and Development Forum (FREEDEAL), Kathmandu, at 47 (2066).

unless Muluki Civil Code, 2074 BS came into force. The basic features of Contract Act, 2056 BS have already been dealt by the same author somewhere else³¹.

2. d. Period of General Code (2075 BS onward)

Nepalese Parliament has framed the general code of the country originally in name of Muluki Civil (Code) Ain, 2074 that has got assent of the President of Nepal on the 30th day of the Month of Asoj 2074 BS (16 October 2017). This general code came into force on the 1st day of Bhadra 2075 BS (17 August 2018). It has contained most of the provisions of modern contract law as general code including general provisions and specific contracts. Side by side, another repealing and amending law has been framed and came into force on same date that repealed the then Contract Act, 2056. On the 2nd day of the month of Baishakh, 2076 BS (15 Apr 2019), the Civil Code has been amended and renamed as Muluki Civil Code, 2074. This amendment has some minor amendments in law of contract.

The Civil Code has borrowed so many provisions of the then Contract Act, 2056 as it is. It has also modified some provisions of that Act. Likewise: it has incorporated some provisions which were explicitly absent in that Act. This Code has some new provisions which were unknown in the Contract Act, 2056. Some of mentionable modified and newly incorporated provisions are as follows:

- Provisions relating to legally enforceable contract
- Provisions relating to standard form of contract
- Provisions relating to counter offer
- Provisions relating to common intention of the parties
- Provisions relating to application of Interpretation of Laws Act
- Provisions relating to definition of void contract
- Provisions relating to imaginary contract
- Provisions relating to contract by mistake
- Provisions relating to definition of voidable contract
- Provisions relating to definition and validity of unenforceable contract
- Provisions relating to delay performance of contract in case of contract with government

³¹ PAUDEL, *Supra note 2*, at 17-23.

- Provisions relating to time as the essence of contract
- Provisions relating to inalienable right to rescind the contract
- Provisions relating to determination of monetary compensation
- Provisions relating to the things to be taken into consideration by the Court while fixing the compensation
- Provisions relating to continuous guarantee
- Provisions relating to lease contract
- Provisions relating to hire purchase
- Provisions relating to employment and wages
- Provisions relating to quasi-contract

3. Epilogue

In the past, Nepalese contract law primarily guided and governed by the then Hindu *Dharmasastra*. A law of Manu is one of the important Hindu Law that governed business activities in the ancient society. Even when some scattered laws were made, rest of the business activities were governed by the Hindu law. Some of the modern principles of contract law exist in our Medieval Nepal for example the provision of *caveat emptor* in *Manavnyayasatra*. After the unification of Nepal around 113 year since 1910 BS to 2023 BS is the period of general code. For removing the flaws of general code, Nepal had made special statutes that governed only around 52 year i.e. the period of Specific Statute. Then again Nepal has consolidated so many aspects of modern contract law in the Muluki Civil Code, 2074; which came into force only on 2075 BS, by receiving foreign laws. It has tried to remove the flaws of the contract law which Nepal has faced before 2075 BS with support of harmonization of foreign laws. New flaws will also be encountered in future and will be removed either by amendments or by judicial interpretation as required by the time. This general Code consolidated so many aspects of the contract law of the time in simple and crystal clear legal language to great extent.

The promulgation of the Civil Code is the paradigm shift of contract law in the history of Contract Law of Nepal. This Code has repealed the specific statute and all issues of contract law are incorporated in general civil code. The era of specific statue has been ended and new era of general code started when this Code came into force. Thus, it is a turning point of law of

contract in the history of contract law of Nepal because it has received and harmonized most of the principles of the modern contract law and consolidated in a general Civil Code unlike India and England. India has separate laws governing issues relating to contract like: the Indian Contract Act, 1872 and the Sale of Goods Act, 1930. England has not made such uniform law since English contract law is governed by court practices i.e. common law.

