

Chapter 4

Definition of law



- Law is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force. That which must be obeyed and followed by citizens subject to sanctions or legal consequence.

- Black's Law Dictionary

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.

Functions of the law



- Peace keeping
- Shaping/responding to moral standards
- Promote social justice
- Facilitate planning
- Maximize individual freedom

Sources of law

1. Legislation
2. Precedents
3. Customs
4. Religion
5. Professional opinion
6. Equity
7. Decision of the foreign courts



Legal Aspects and Regulatory Environment of Professional Engineering in Nepal

Nepal Engineering Council Act

Labor Law

Contract Law

Public Procurement Act

Intellectual Property Right

Company Registration Procedures

Relationship to foreign firms working in Nepal

Labor Law

Labor law is concerned over the rights, interests, facilities and safety of workers and employees working in the enterprises of various sectors.

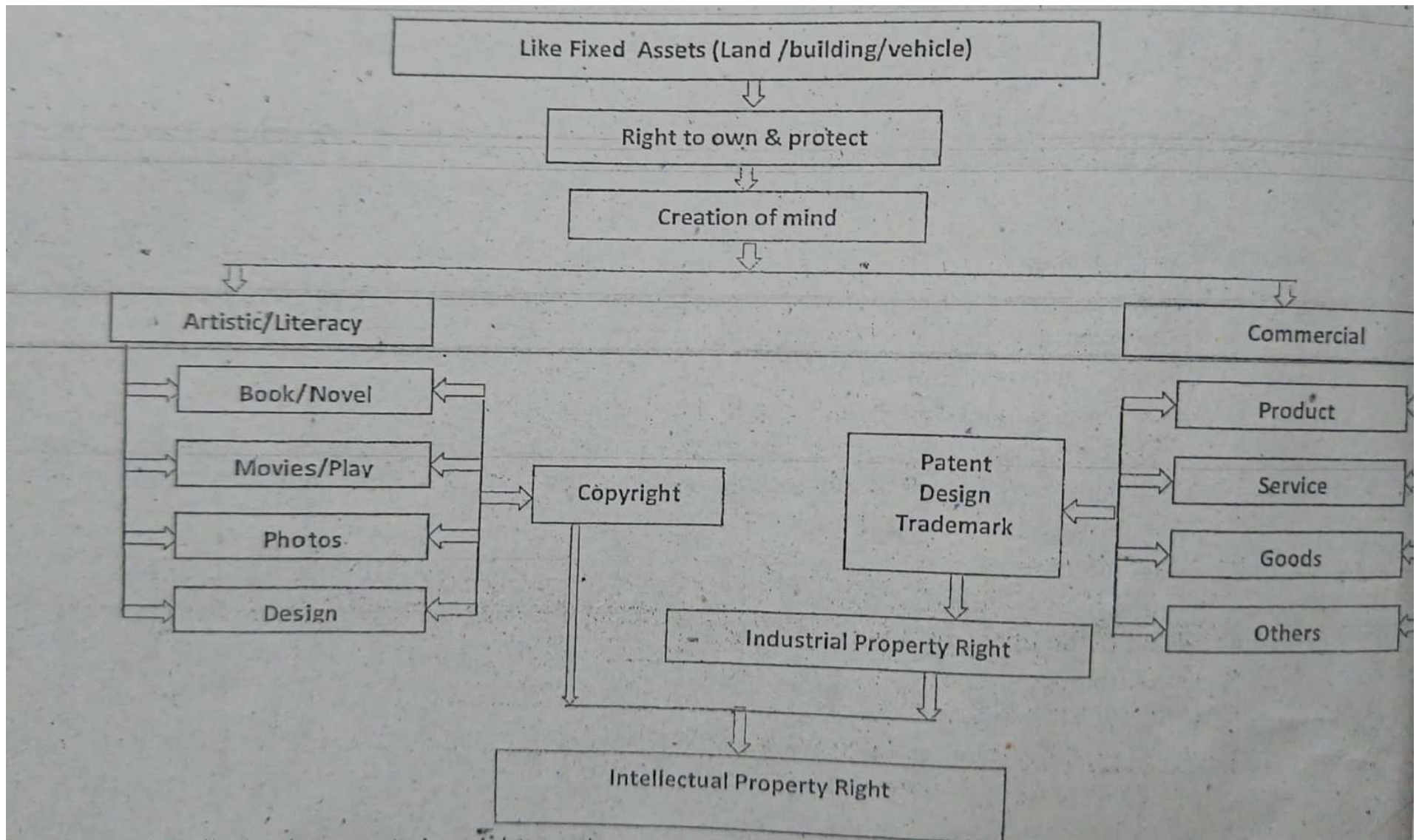
Labor- meaning & importance

- It is the aggregate of all human physical and mental effort used in the creation of goods and services
- It is a productive activity
- Anything that shapes its form from abstract to concrete
- It acts as a means of changing external nature
- It is a fundamental element that brought out human from animal world
- Without labor, nothing is possible no machine function, no rupees work
- Significant role played by labor can easily be seen everywhere in construction work/factories
- Engineer should be able to work with workers(labor)
- Engineer should be able to inspire workers and should get maximum output
- Engineer should understand the welfare activities that influence the efficiency of the workers

Labor Law

Some Provisions Regarding Labor

- Remuneration
- Health and Safety
- Employment and security of service
- Working Hours
- Provision of welfare: welfare fund, provident fund, quarter etc.



Intellectual Property

- Intellectual property refers to creations of the mind: inventions; literary and inventive works; and symbols, names, and pictures used in commerce.
- These rights are made public in Article 27 of the Universal Declaration of Human Rights that provides for the proper to profit from the protection of ethical and material interests ensuing from authorship of scientific, literary or inventive productions.
- Intellectual property is divided into 2 categories:
 - a. Industrial Property includes patents for inventions, trademarks, industrial styles and geographical indications.
 - b. Copyright covers literary works (such as novels, poems, and plays), films, music, inventive works (e.g., drawings, paintings, photographs and sculptures) and beaux arts style.

Trademark

- A trademark could be a word, phrase, symbol, and/or style that identifies and distinguishes the supply of the products of one party from those of others.
- Some examples include complete names, slogans, and logos.
- The term "trademark" is commonly utilized in a general sense to see each logo and repair marks.
- Unlike patents and copyrights, logos don't expire once a collection term of years. Trademark rights come back from actual “use”. Therefore, a trademark will last forever.
- A trade mark will add price to your business as a result of it are often accustomed defend your market share, you'll license it to 3rd parties like a franchisee, otherwise you will sell it outright for a such that price. You'll con jointly use a trade mark to assist you to lift equity for the event of your business.

Design Right

- Design rights are also the intellectual rights which protect the visual design of objects that are not purely utilitarian but have an aesthetic or ornamental value.
- It refers to the creation of shape, color, pattern or a combination of all these things.
- It can be an industrial commodity or a handicraft.
- The person who has an industrial design right has the exclusive right to make or sell any objects in which the design is applicable. This right is conferred for a period of 10 to 25 years.

Patent

- Patents are rights related to any new inventions.
- The right is conferred on persons who invent any new machine, process, article of manufacture or composition of matter, biological discoveries etc.
- In order to grant a patent, the invention should fit into the following criteria which may differ from country to country.
- The person who has a patent right for his invention has an exclusive right to control others from making, using, selling or distributing the patented invention without permission.

Copyrights

- Copyright generally means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever.
- Subject to provision of copyright act, copyright exists in every original literary, drama, musical and artistic work.
- The basic principle of copyright is that a person or group of people has the sole right of physical and intellectual ownership to any work that is in it a “unique work of art” created by the person or group of people.

P.S : Study the comparison chart between copyright, patent, design and trademark

SN	Particular	Copy Right	Patent	Design	Trademark
1	Subject Matter/ Coverage	Rights related to work authorship/ literary work, artistic work: music, book, movies, painting, photos	Rights related to new inventions/theory/ principles, process, formula	Rights related to shape, pattern, color of commodities, product	Rights related to word, symbol, picture, figure or combination of all these to recognize goods or products
2	Validity	a) Life time + 50 years b) 50 years from death of last surviving author c) For anonymous or pseudonym work: 50 years from first date of publication d) For applied art & photograph: 25 years from preparation of such work e) 50 years for posthumous publication	7 years and two times renewable (21 years maximum)	5 years and two times renewable (15 years maximum)	7 years and indefinite period as long as timely renewed
3	Infringement	Person other than owner comes up with same work, there is no infringement; can be copied and used without permission for academic, public welfare purpose, with source cited	Confers statutory monopoly that prevents anyone other than patent holder from making, using or selling	Confers statutory monopoly that prevents anyone other than design holder from making, using or selling	Confers statutory monopoly that prevents anyone other than trademark holder from making, using or selling
4	Punishment on infringement	a) 10,000 to 100,000 or 6 months imprisonment, or both + confiscation b) 20,000 to 200,000 or one year imprisonment or both + confiscation	Rs. 250,000 to 500,000 + confiscation of product	Up to R. 50,000 + confiscation of product	Up to Rs. 100,000 + confiscation of product
5	Start of protection	As soon as work is created (registration is optional)	From patent application registration date	From design application registration date	From trademark application registration date
6	Requirement	Original	Novel/non-obvious, useful	New and different	New and different
7	Application, registration and renew fee		Rs. 100; 1000; 300	Rs. 100; 700; 200	Rs. 100; 400; 150
8	Governing Act	Copy Right Act 2059	PDTA 2022	PDTA 2022	PDTA 2022

Company Registration Procedures

- Application with following documents:
 - Filled application form, format as per Annex 1
 - Two copies of Prabandha Patra (Article of Association), and Niyamawali (Article of Memorandum) – Citizenship certificates of all the founder shareholders
 - In case of a public company, a copy of the agreement made among the founder members before the establishment of the company.
 - In case of a private company, a copy of the mutual agreement (if any). (Additional documents needed for foreigner registering a company.) Other considerations:
 - Max 50 founders in private company; minimum 7 founders in public company
 - Prabandha Patra and Niyamawali to be in Nepali
 - Each founder should sign on each page of Prabandha Patra and Niyamawali
 - Last page should have
 - full name, full signature, address, number of share of each founder,
 - full name, full signature, address of witness (one witness per founder)
 - full name, full signature, registration number of legal-professional or chartered accountant preparing the document, and date of document preparation



- The OCR checks the documents and if found OK, notifies the applicant(s) to pay registration fee and collect certificate. If the Registered Capital is up to Rs. 5000, the charge can be paid at the OCR; else required fee to be deposited in NRB or other authorized banks in 'RAJASWA' account number 1-1-05-10.
 - Two copies of the voucher to be submitted in the OCR's A/C section, and then presented in the registration section.
 - After this, the company registration certificate (according to the index 5) and one copy of each (approved and signed by CRO Officer) of the 'PRABHANDA PATRA' and the
 - 'NIYAMAWALI' presented by the founders are provided to the founders.
 - Only electronic registration, from Baisakh 2074, as per first amendment in 2074
- <http://www.ocr.gov.np/index.php/en/component/content/category/87-registration-process-information>

Business Organizations

Business law:

- **Business:** It is the human activities that are related with production of goods and services or sales and purchase of goods and services or exchange of goods and services with profit making objectives.
- **Law:** It is the norms that are drafted and enforces by a state or local government in order to regulate the activities within the state or locality. All the laws that regulate the business are known as business law. Ignorance of law will not be excused.

Types of Business Enterprises:

- Sole business concern
- Partnership business organization
- Company: a) Private b) Public

Sole business: In this type of business organization, single person establishes, manages, organizes and control the whole business and also singly liable towards the profit and loss of the business. It is registered under private registration act 2014.

Characteristics of sole business:

- Sole ownership
- Sole management and control
- Unlimited liability
- limited areas of Operation
- Less legal formalities
- Voluntary origin and end

Limitations of sole Business

- Unlimited liability
- Limited capital
- Uncertain future
- Absence of Legal status
- Chances of impractical decisions
- Lack of specialization
- Loss in absence of a key person

Partnership business organization : this type of business organization hands to earn profit by investing collectively. This type of business organization is registered under partnership Act 2020.

Characteristics of partnership business:

- Joint ownership
- Unlimited liability
- Sharing of profit and loss
- Established on the basis of agreement between persons
- Members do not have separate existence
- Joint management and control
- Joint agent slip
- Partnership right cannot be transferred.

Limitation of partnership business:

- o Unlimited liability
- Uncertain existence
- Possibility of misunderstanding and friction between the partner
- Limited capital
- Difficulty in transferring ownership
- Lack of prompt decision
- Lack of public faith

Company business organization:

- In this type of business organization, Company is established under the Act of the country and has limited liability.
- Finance is collected through issuance of shares.
- Company is considered as an artificial legal person.
- Company can be further divided into two as private limited Company and public limited company as per company Act 2053,
- private limited company has less than 50 shareholders and public limited company shall have minimum 7 shareholders and no upper limit.

Characteristics of company business organization:

- Legal artificial person
- Perpetual existence
- Limited liability
- Common seal
- Voluntary associations of persons
- Capital collected by issuing shares
- Transferability of shares
- Management by representatives/effective management
- Unlimited Capital Public faith
- Unlimited business capability

Limitation of company business organization:

- Difficulty in formation
- Lack of personal interest
- Lack of secrecy
- Possibility of fraud
- Exploitation of shareholders
- Group formation for power
- Conflict of interest
- Absence of prompt decision
- Lack of closeness

S.N	Subject Matters	Private Company	Public Company
1	No of share holders	2<Share Holders<50	7<Share holders < ∞
2	No. of Directors	2	Minimum 3
3	Company Naming Pattern	Pvt. Ltd.	Limited
4	Transfer of share	Cannot Transfer	Transfer Easily
5	Legal Formalities	Less	More
6	Financial Strength	Financially Strong	Financially Less Strong
7	Publication of Financial Statement of trimester of each fiscal year	Not required	Must Publish

5.3 Public Private Partnership (PPP)

- **Definition:** Funded and operated through a partnership of government and one or more private sector companies
- Private party provides a public service or project
- **Assumption:** substantial financial, technical and operational risk in the project
- Enable public sector to harness expertise and experience
- **Fundamental principle of PPP:** Public service provision can be linked with profit making business, which makes the operation of the public service provision sustainable and efficient. Public gets the service at lower price due to risk sharing, business gets profit, efficiency increases, government can invest tax in other areas rather than in inefficient projects.
- **Conditions for successful implementation of PPP:**
 - Government's willingness, confidence & institutional capacity to adopt PPP
 - Clear policy and clear legal provisions (acts, laws, rules, regulations)
 - Society ready to accept reasonable profit as a justified

5.4 Development versus Environmental Degradation

- Fair and transparent business environment
 - Technical, financial and management capacity of private parties
- **Status of PPP policies and programs in Nepal**
 - White paper on PPP, PPP Policy
- **Reasons for low level of PPP implementation in Nepal**
- Infrastructure construction and economic growth are not synonymous with development.
- Development activities need to be sustainable.
- Development which results in environmental degradation is unsustainable, and generates conflict.
- Development without environmental degradation is possible.
- Guidelines for project designs by considering environment prepared
- Many government agencies now has environment section

- Globalization, food security policy, energy and climate change and sustainable economic integration concepts are needed for development with environmental sustainability
- Frontier thinking in sustainable development and human wellbeing needed
- Ecological health and the positive relation between social and economic wellbeing is maintained.
- The Environment Protection Act 2053 (Clause 7): nobody shall create pollution in such manner as to cause significant adverse impacts on the environment or likely to be hazardous to public life and People's Health Protection Rules 2054 while practicing engineering profession.

- Two important examinations are to be carried out before initiating infrastructure projects: IEE and/or EIA
- **initial Environmental Examination (IEE)**
 - A report on analytical study or evaluation to be prepared to ascertain as to whether, in implementing a proposal, the proposal does have significant adverse impacts on the environment or not, whether such impacts could be avoided or mitigated by any means or not
- **Environmental Impact assessment (EIA)**
 - it is a report on detailed study and evaluation to be prepared to ascertain as to whether, in implementing a proposal does have significant adverse impact on the environment or not whether such

Negligence and Liabilities

Negligence in duty (dereliction of duty) results in liabilities to stakeholder whose life, health or property is damaged. Conditions for establishment of professional negligence:

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 damage resulted by the action to the claimant.

Liabilities of engineers in project design,
construction and implementation

- a. Liabilities due to contract:** liable to fulfill all terms of contract; if there is no contract, legally, there is no liability under this category. An engineer is liable for loss of damage due to breach of contract clauses. Contract law imposes liability on a party for promises that the first has made to another party; liability related to loss of a single person's life/property.
- b. Liabilities due to criminal law:** liable to follow all prevailing laws of nation, breach of law related to design, construction and implementation of design can result in criminal case, whether there is damage or not. Criminal law imposes liability on a party due to illegal/ criminal acts; defendant has a liability to the government/state.
- c. Liabilities due to tort:** liable to prevent customers/users of products and services from loss or damage; even if there is no specific contract and no laws have been breached, an engineers can be held liable for loss or damage to the customer due to the use of services and products designed, constructed, or implemented by the engineer. Pre-information or pre-warning or disclaimer can prevent an engineer from liability due to tort. Tort provision is a legal mechanism for compensating individuals injured by others, whether deliberate or not; directed toward the compensation of individuals, rather than the public.

Liabilities of an engineer in project design

- **Fitness for purpose:** The design of a project (overall and component-wise) should be proper to serve the purpose of the project.
- **Negligent misstatement:** The designers and professionals are expected not to make any negligent or unsubstantiated misstatements.
- **Statutes, bylaws and building regulations/codes:** It is the duty of the designers and professionals to make themselves fully aware of the statutes, bylaws and codes related to their professional practice.
- **Examination of site above and below the ground:** Before finalizing a design, a designer should know the conditions of the site above and below the ground.
- **Public and private rights:** The design of a project should not contradict with the public and private rights of the client and others who may be affected by the design implementation.
- **Plans, drawings and specifications:** The design should include detailed plan, drawing, and specification of each component of the project and equipment
- **Materials (quantity, quality and availability):** The details of the quantity and quality of materials to be used in a project should be specifically mentioned. The availability of the materials should be kept in mind while selecting the material types.
- **Novel, risky design and employers' interference in design:** A designer may choose to use novel and risky design, and may decide to incorporate employer/client's idea in the design. However, the designer is ultimately responsible for the safety & fitness for purpose of the design implementation.

Liabilities of engineers in project construction and implementation

- Completion of project in time, within budget
- With quality: material, workmanship, method of construction
- Consistency: in quality, form
- Safety and welfare of project workers, people living in and around project area, and people travelling through or visiting the project area
- Follow applicable laws, rules, regulations, guidelines, conventions, codes and bylaws
- Meet social obligations