

Judicial Committees in Nepal

A Closer Look

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Message of Best Wishes

Access to justice is a fundamental human right and a basic state service enshrined within Nepali Constitution. Therefore, it is a matter of pleasure to have the opportunity to introduce "Judicial Committees in Nepal: A Closer Look" produced at the initiative of Nepal Law Society in cooperation with sub-national governance program.

Established through Art. 217 of Constitution of Nepal 2015, judicial committees today hold a crucial position in the Nepali governance structure acting as a bridge between formal courts and alternative dispute resolution mechanisms such as mediation. As Nepal transitions to federalism, judicial committees are uniquely positioned to assist in the delicate work of reconciliation, recovery, and rebuilding of respect and cooperative relationships. The newly designed structure attempts to address a critical need for access to justice modalities in Nepal, including community mediation, to strengthen the systems and processes that can promote gender equality and social inclusion, and by doing so, contribute to equity among all those seeking justice within Nepal's justice systems.

Other objectives of judicial committees, as discussed in the book, include democratization of justice; increased access to justice at the local level; promotion of judicial leadership at sub-national level and enhanced public participation in federal system of governance. The book discusses many salient features such as the judicial rights of the local level, structural composition of the judicial committees and its procedures, opportunities offered by local exercise of judicial rights, emerging challenges faced by judicial committees in the exercise of their functions, things to consider in use of judicial rights and (policy and practice based) strategies to be adopted in its exercise. These things are discussed in simple and clear language. More importantly, the message caters to judicial committees as well as federal policymakers along with other relevant stakeholders. Therefore, I have no doubt that publications like these would serve as an invaluable resource for policy makers and practitioners alike.

The success of judicial committees will bring justice administration closer to individual communities and make it more responsive to the time, cost, and efficiency needs of citizens. Further, in the context that 91 percent in the leadership position of judicial committees are women, I am confident that the committees can play important role in allaying concerns of lack of confidence among women and marginalized community, raise awareness on objectives and roles of committees, increase public participation in local level dispute resolution mechanism, and help concerned authorities to formulate plans and procedures to increase accountability. The key is to continue to invest in further research deepening the understanding of Nepali approaches to judicial committees and shifting the emphasis to institutionalize a model that harmonizes and sustains high-quality services in a federal context.

Finally, I would like to extend heartfelt thanks to the Nepal Law Society, The Asia Foundation and all others who have contributed to the study and publication of this study. I would like to extend my best wishes for the success of this publication.

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The findings and any views expressed in this study do not reflect the views of the Australian Government or that of The Asia Foundation.

Nepal Law Society is profoundly grateful to the locally elected representatives and people who took the time to participate in this study and share their views.





RESEARCH METHODOLOGY

The study draws upon primary and secondary data to take a closer look at the emerging needs of judicial committees. The primary data is based on qualitative and quantitative data collected from three local governments in Nepal (Dhulikhel municipality, Siddhalek rural municipality and Rupani rural municipality) through focus group discussions, in-depth interviews and policy dialogues conducted between August and December 2018. The data is cross-referenced through numerous field visits and one-on-one interviews with judicial committee members from other six municipalities and one submetropolitan city throughout 2019 (Damak, Kalaiya, Bhimeswor, Tansen, Waling, Birendranagar and Tikapur). The secondary data is based on a review of existing laws/policies and journal articles. The study went through numerous rounds of deliberations and discussions at the municipal, provincial and federal level involving federal parliamentarians, academicians, legal experts, local government associations and most importantly, judicial committee members, to triangulate these preliminary findings. Further research and policy dialogues on this issue is recommended.



ABBREVIATIONS

CAO	Chief Administrative Officer
CEDAW	The Convention on the Elimination of all Forms of Discrimination Against Women
CSO	Civil Society Organization
DV	Domestic Violence
GBV	Gender Based Violence
GESI	Gender Equity and Social Inclusion
GoN	Government of Nepal
JC	Judicial Committee
LDTA	Local Development Training Academy
LGOA	Local Government Operations Act
LSGA	Local Self Governance Act
MC	Municipality
MoFAGA	Ministry of Federal Affairs and General Administration
MoLJPA	Ministry of Law Justice and Parliamentary Affairs
MUAN	Municipal Association of Nepal
NARMIN	National Association of Rural Municipalities in Nepal
NGO	Non-Governmental Organization
NJA	National Judicial Academy
PSA	Public Service Announcement
RM	Rural Municipality
UNDP	United Nations Development Program
VDC	Village Development Committee



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EXECUTIVE SUMMARY

2017 was a historic year in Nepal’s winding path towards democracy, with the country hosting its first subnational and local elections in 20 years.¹ Premised upon an ambitious decentralization initiative under the new Constitution of 2015, the country has since been slowly transitioning from a unitary to a federal government structure, under which substantive governance authority and functions are devolving from central authorities to newly-elected subnational actors. These profound changes to Nepal’s political system involve a substantial restructuring of many public institutions, including the establishment of new judicial committees (JCs) at the municipal and rural-municipal level, propelled by the vision of increased access to justice.

The Constitution mandates the establishment of one judicial committee in each of the country’s 753 municipalities and rural municipalities to mitigate the inefficiencies of the formal legal system and bridge the formal/informal justice divide. Judicial committees are envisioned as the first line of justice that can link individuals to various justice providers like mediation centers at the ward level, the lowest level court at the district level, the police, government legal departments, and other relevant justice/social service providers. As per Article 217 of the Constitution, each judicial committee consists of three members and is headed by the deputy mayor or deputy chairperson. Operating under the supervision of the district courts², as per Clause 47 (1) and (2) of Local Government Operations Act (LGOA), judicial committees are mandated to settle certain types of disputes, and to refer others to either the district court for formal adjudication or to community mediation centers for mediation.

This new model for a tiered, locally-driven justice delivery system has the potential to bring justice administration closer to individual communities and make it more responsive to the needs of citizens in terms of time, cost, and efficiency. However, it needs to operate on the basis of a sound policy

1 The 2017 Nepalese local elections were held in three phases on May 14, June 28 and September 18. Provincial and Federal elections were held in two phases on November 26 and December 7, 2017.

2 Art. 148 (2) Constitution of Nepal, 2015.

framework, impartial, competent and independent judicial practices; informed citizen participation, and good faith and good working relations between judicial committee members and other justice delivery mechanisms including community mediation centers and district courts. If these conditions are met, the benefits of the local justice system will be significant, especially for the poor, women, and other marginalized groups.

At present, this vision of improving access to justice is hindered by constraints in capacity, coordination, policy, practical implementation guidelines, and public understanding. One of the most obvious issues is a lack of clarity in policy and a coherent understanding of the role of judicial committees. In the absence of clear policies, distinct guidelines and operating procedures, justice delivery at the local level faces numerous inconsistencies. Based on their interpretations of the Constitution and LGOA, judicial committees are assuming inconsistent roles and operating anywhere along a spectrum of least four possible formats: a) as a formal local court; b) as a mediation or other alternative dispute resolution center; c) as a clearing house or referral station and d) as a combination of any of the above.

In addition to this conceptual confusion, legislation (such as the LGOA) lack sufficient guidelines to support judicial committees through financial, administrative and technical assistance. For example, there is a dearth of human resources like legal officers and office assistants to screen cases, register disputes, draft settlement agreements, and keep records. Another policy gap is the lack of a holistic framework and procedures at the interface between judicial committees and other justice and social service providers. It remains ambiguous how judicial committees will link vertically with district and higher courts; and, horizontally with justice and social service providers like mediation centers, quasi-judicial bodies, the police, civil service organizations and women's shelters at the local level.

Compounding issues related to inconsistent/unclear policy is a severe lack of capacity among elected representatives to act as justice administrators. Two decades of political disruption, the influx of inexperienced newly-elected representatives³, and the transition to federalism have led to large gaps in judicial capacity at the local level. This has led to some judicial committees refraining from taking applications; failing to refer cases to either mediation committees or district courts;

3 Especially women and members of disadvantaged communities, through affirmative action.

failing to uphold basic standards of confidentiality and non-judgment; and violating the duty of fairness, promptness and procedural compliance.⁴

While efforts have been made to introduce training programs for judicial committee members, a lack of coordination between key stakeholders has resulted in the duplication of trainings and fueled confusion. A close study of the disparate curricula reveals a serious need for refinement to create synergy, maximize efficiency, and support key actors to work together strategically. Along with the question of competence, a weak separation of powers also raises issues of fairness and equality before the law. The deputy mayor's or deputy chairperson's status as an elected official blurs the separation of powers and may cause conflicts of interest and other ethical repercussions in their ability to administer justice impartially. For example, a deputy mayor is also in charge of coordinating the local tax deliberation committee, monitoring Non-Governmental Organization (NGO) activities, coordinating the protection of consumer rights, facilitating the work of mediation committees, and providing oversight to plans and programs etc.

Without further structural protections that separate adjudicative and executive functions, it is likely that judicial committee members will face political and other pressures to decide cases based on considerations other than the law. Already, due to their political affiliations, reports highlighting the politicization of the dispute resolution process at the local level have started to emerge. This can have a negative effect not only on the efficiency, credibility and political careers of emerging local leaders, but also on individuals seeking justice. Most deputy mayor or deputy chairperson positions are held by female representatives,⁵ Nepali women's participation in leadership roles is littered with substantial challenges, which we talk about later in the report, that compromise their judicial ability.⁶

An already complex situation is exacerbated by a range of challenges that pre-date the federalization process. These include a lack of public trust and confidence in the justice system, especially among women and marginalized communities that have been poorly served and routinely taken advantage of,

4 Republica. August 2018. Fear of breaching laws prevents judicial committees from deciding cases. Available from <<https://myrepublica.nagariknetwork.com/news/fear-of-breaching-law-prevents-judicial-committees-from-deciding-cases/>>.

5 As per Election Commission of Nepal, 91% of the deputy positions – deputy mayors in municipalities and vice chairpersons in rural municipalities – were won by women.

6 Nepal's Locally Elected Women Representatives: Exploratory Study of Needs and Capacity, 2018. The Asia Foundation.

widespread corruption, impunity, poor service delivery, lack of budgetary resources, and increasing politicization of the sector at the local level. Finally, genuine community access to justice is compromised and potentially harmed by a lack of community engagement and knowledge of legal rights.

The purpose of this study is to take a closer look at the emerging needs of judicial committees. The report explores challenges faced by judicial committees and provides insights into potential opportunities for reform that would enable them to fulfill their constitutionally mandated functions and satisfy burgeoning public expectations of a better administered judicial system.

Some notable recommendations are highlighted below and discussed in detail later:

- **Initiate Policy Dialogue**

In the immediate term, due to the current ambiguous and uncoordinated state of affairs, it is critical to host policy dialogues on two critical issues:

1. Develop conceptual clarity on judicial committees – their roles, responsibilities and working procedures. Most importantly, there needs to be a common understanding on the conceptual and procedural framework of judicial committees. This needs to happen through a multi-stakeholder joint forum with relevant stakeholders from all spheres of government, including judicial committee members at the local level. Ideally, this should be led by a federal agency in collaboration with local government associations like the National Association of Rural Municipalities in Nepal (NARMIN) and Municipal Association of Nepal (MUAN).⁷

⁷ NARMIN and MUAN are representative bodies of municipalities and rural municipalities across Nepal.

Differing Viewpoints

On the one hand, it is argued that framers of the Constitution clearly did not envision judicial committees to be courts. If they had, they would have called them “local courts.”⁸ Similarly, judicial committees aren’t part of an integrated judicial system (i.e. district, appellate and Supreme Court) as they aren’t governed by a judicial council and elected representatives are members of these committees as opposed to judicial officers and judges. In addition to this, if we look at the traditional history of our justice system, we practiced the settling of disputes at the local level through panchayat led judicial committees as per the *Village Panchayat Act, 1961*. They were not considered courts, rather an extension of the integrated judicial system that supplemented access to justice. All of this suggests, judicial committees were envisioned as an alternative dispute resolution mechanism that provides access to justice to local citizens at the municipal and rural municipal level.⁹

On the other hand, it is argued that Article 127 (2) and Schedule 8 of the Constitution state that a judicial body or court may be set up at the local level. But, it is not clear whether these provisions envisage the establishment of a separate court or just point to judicial committees. Similarly, the provision for closed door proceedings (*Banda Ijlaas*), within Clause 54 of the Model Law¹⁰ has seen the proliferation of structures resembling formal courts complete with witness stands to adjudicate cases across various municipalities and rural municipalities. In various instances, the model law drafted by MoFAGA (and later adopted by many municipalities/rural municipalities) suggests that judicial committee processes mirror that of district courts or other formal judicial systems.¹¹ This has further added weight to the belief that judicial committees are to be considered the “judiciary” at the local level.

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- 8 As per Schedule 8 of Constitution of Nepal, 2015 – local courts are envisioned to be ad-hoc bodies that can be established based on the needs of local governments.
 - 9 Wagley, Namit. 2018. The Conundrum. Kathmandu Post. Available from <<https://kathmandupost.com/opinion/2018/07/17/the-conundrum>>.
 - 10 Clause 54. Model Law on Judicial Committee Proceedings. MoFAGA. Available from <<http://mofaga.gov.np/ne/node/124>>.
 - 11 For example, Clause 49 (2) of the LGOA says that as far as possible the committee should try to settle disputes through mutual understanding/mediation and should initiate proceedings and settle disputes only after such attempts fail. But the phrase used in Clause 25 of the model law has been interpreted to mean that the committees should first decide/settle the case. The Clause 49 (3) of the LGOA says that the committee should arrange mediation through mediators but Clause 57 (2) of the model law allows members of the committee to conduct mediation themselves.

2. Create clarity, understanding, and agreement among key Government of Nepal (GoN) stakeholders such as the Ministry of Federal Affairs and General Administration (MoFAGA), Ministry of Law, Justice and Parliamentary Affairs (MoLJPA), Supreme Court, Mediation Council and district courts on their roles and responsibilities in the implementation of the justice system at the local level. Agreement between these actors beyond their current legislative and programmatic mandates will create synergy, maximize efficiency, and support them to work strategically together around access to justice issues. While doing so, it is imperative that they include judicial committee members in the discussions to ensure practice-based experiences inform policy.

- **Promote Policy Reform**

Based on a consensus reached through policy dialogues, analyze and map relevant policies that impact judicial committees and the larger judicial ecosystem across the three spheres of government. Establish conceptual and procedural clarity through the enactment of appropriate laws, guidelines, code of conduct etc. For example: amend the LGOA, 2017 to remove ambiguities; enact procedural laws and guidelines. Enact community mediation legislation as per the exclusive rights granted by Schedule 8 of the Constitution. Promote the development and enforcement of a minimum guideline (at the district court level) regarding the hearing of appeals against decisions made by judicial committees. Build strong procedural guidelines to offset separation of power issues.

- **Develop a Comprehensive Training Package**

The challenges to developing a comprehensive training strategy is well documented. Citing UNDP's experiences in Bihar, "Not only does the system have to respond to the herculean task of training millions of elected representatives every five years, they have to be sensitive to the different competencies that they have."¹² Given a similar context in Nepal, there is a critical need to develop a comprehensive training package, supplemented by advanced trainings, and periodic knowledge and practice sharing exercises to enhance the existent skills and competencies of judicial committee members. This will promote fairness and equality before the law and bridge the gap between the state

12 UNDP. 2012. Capacity Assessment and Capacity Development Strategy Report for Strengthening Panchayati Raj Institutions in Bihar. Ministry of Panchayati Raj, India.

and its citizens. These should be designed, giving due consideration to the principles of gender equity and social inclusion (GESI), to limit the overburdening of judicial work and ensure the meaningful participation of judicial committee members across various tiers of local government (i.e. legislative, executive and judiciary).

1. First, it will be important to conduct a holistic training needs assessment using training needs assessment tools like brainstorming sessions, focus group discussions, in depth interviews with select key informants from each provinces.¹³
2. Second, it will be important to map current training efforts by stakeholder, location and content, providing a foundation upon which to harmonize trainings and develop a comprehensive curriculum.
3. Third, it will be important to reach a consensus on institutions authorized to roll out trainings nationwide which can be integrated with ongoing training efforts and are sustainable through the ownership of institutional partners.
4. Fourth, it will be important to ensure participation of judicial committees (the entire panel) along with the Chair/Chief, Chief Administrative Officer and support staff (such as legal officers/assistants) in the trainings.

In the long term, computer-based self-learning modules can be created and made available online, for easy, cost-free access of all judicial committee members and exposure visits can be initiated to promote experiential learning. Looking beyond the current crop of elected representatives, mechanisms to develop competencies of future elected representatives needs to be considered. For this, on the job trainings and peer learning mode of trainings employing elected representatives as trainers is recommended. The advantage of involving experienced and effective elected representative and officials as trainers is not only in their becoming inspiring role-models for new judicial committee members, but also of increased receptivity and acceptability of their own peer group among elected representatives. This mode of training has been used to great advantage by local governments of Nilokheri, Haryana and Rajasthan in India.¹⁴

13 Including the representation of judicial committees from each province.

14 National Capability Building Framework. 2014. Ministry of Panchayati Raj, Government of India.

Re-thinking Separation of Powers

Separation of powers is a genuine concern and needs to be offset with a series of targeted interventions starting with strong policy mechanisms that ensure accountability, monitoring the quality of services, and assuring an adherence to due process. The advantage of the current judicial committee setup is that disputants can elect representatives who will resolve disputes at the local level. This creates direct accountability between judicial committee members and their constituencies, making the dispute resolution process more democratic. Additionally, judicial committees should be encouraged to make the appointment of members inclusive of class, caste, ethnicity, gender and political representation. For example, while electing judicial committee members at the rural/municipal level, stipulating that members of judicial committees should not represent the same political party, gender or ethnicity could be one possible way of ensuring diversity within panels. This diversity can potentially give the composition more balance and help to mitigate anxieties relating to the separation of powers. While this alone won't solve the separation of powers issue, this framework needs to be bolstered through coherent policies and ethical practice (process) standards based on the values of impartiality, due process and justice.

Similarly, procedural guidelines could be setup allowing disputants to choose from a panel of committee members. This would lessen the perception of bias and politicization of the process. For this, it is recommended that the judicial committee panels be expanded to five members or even seven members rather than three.¹⁵ Judicial committees can then display the roster at the municipal/rural municipal offices and request disputants to choose a member from the panel. Experiences from Bihar and Philippines, as noted below, demonstrate that it can be an effective mechanism to lessen the workload, perception of procedural bias and politicization of the process. This has also been demonstrated to be an effective practice under community mediation, as directed by Mediation Act, 2011 and Mediation Regulation, 2014. This allows for increased participation of citizens in the dispute resolution process at the local level. Further, data from mediation programs suggest that there is a direct correlation between the diversity of mediators and diversity of beneficiaries at the local level.¹⁶

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- 15 However, policymakers are recommended to initiate a thorough cost-benefit analysis of potentially duplicating a similar structure at the municipal/rural municipal level especially as community mediation, at the ward level, already employs this methodology.
- 16 M. Khanal and P. Thapa, 2014 Community Mediation and Social Harmony in Nepal, The Asia Foundation.

- **Foster Inter-Agency Linkages at the National and Sub-national Levels**

At the national level, inter-agency linkages could be crucial in policy dialogue, policy reform, curriculum refinement and training roll out. At the provincial level, establishment of a peer support network can help members gain collective strength and solidarity, a common platform to share experiences, increased recognition and voice and enable dialogue and the sharing of experiences. For eg. Peer support groups can collectively persuade political parties to take a more proactive and long-term approach to developing competencies of their political party members. (*A recommended structure of provincial level peer support network is provided in Annex III.*) At the local level, judicial committees are part of an eco-system and need to work in tandem with other justice providers such as district courts, mediation centers, quasi-judicial bodies¹⁷, local police etc. Clear referral and inter-agency coordination frameworks need to be established to help cater to the holistic access to justice needs of disputants. For example, JCs require external support for certain cases, such as Gender Based Violence (GBV) or Domestic Violence (DV), that go beyond legal assistance and requires coordination with other government, judicial or social agencies.¹⁸ Local level networking mechanisms will build awareness among service providers on their respective roles, responsibilities and jurisdictions. This will help service providers refer disputants to a range of services available based on their need.

- **Ensure Quality Control**

To ensure access to justice is not compromised, quality control mechanisms need to be established. The formation of an institution like the Mediation Council can help establish a comprehensive standard for trainings, enhance policy engagement, establish standard procedures, and build a robust body of knowledge for monitoring the training standards of judicial committees. However, the roles,

17 Many government officials, such as the chief district officers, revenue officers, customs officers, land administration officers, forest officers and the wardens of national parks, have some judicial powers. They hear and decide cases of violations of rules or executive orders.

18 Examples include disputes involving gender-based violence (GBV) or domestic violence (DV) which require JCs to have referral access to a whole range of social support services, including legal aid, health care, psychosocial counselling, shelter and livelihood support, and human rights advocacy and protection.

responsibilities and jurisdictions of this institution needs to be clearly outlined to avoid jurisdictional overlap and confusion. Another option could be to leverage the National Judicial Academy (NJA) and Local Development Training Academy (LDTA)¹⁹ to fulfill the contemporary demands of capacity development and quality control.

▪ **Provide Adequate Resources**

There is a serious dearth of physical and human resources in some municipalities and rural municipalities, limiting the ability of judicial committees to provide adequate judicial services. First, adequate qualifications for judicial officers designated to support judicial committees must be ensured. Further, it is recommended that local governments be given the autonomy to recruit personnel. Simultaneously, the establishment of separate hearing rooms for judicial committees need to be expedited, mediators need to be trained and mediation centers need to be established at the ward level to ease the burden on judicial committees.²⁰ Mechanisms to organize the police force to enforce decisions is also recommended. Building of shelter homes and safe houses, for disputants who are at risk, needs to be considered.

19 LDTA, established through the LDTA Act 1992, serves as a training wing under MoFAGA and is mandated to work for the capacity development of local bodies.

20 Although the Constitution and the LGOA envision mediation centers to be available at the ward level, they have not been established in about 80% of all locations due to lack of resources. Once setup, judicial committees will be able to refer suitable cases for mediation as per LGOA 47 (2). This will alleviate some of the dispute resolution responsibilities of local government.

The Philippine Local Justice System

In the Philippine local justice system, known as “Lupon tagapamayapa”, an elected representative heading the Lupon is supported by ten to twenty members appointed every three years from among the municipality (barangay) residents. Like the judicial committee setup, co-incidentally, the Lupon system mandates mediation/conciliation as a first option to resolve disputes and allows for arbitration and adjudication to higher courts in cases mediation fails to yield an agreement. For each dispute, a conciliation panel consisting of three members is created. This panel is chosen by the parties involved in the dispute among the list of members of the Lupon. Further, a secretary is appointed for the Lupon to record the mediation and conciliation proceedings, and to submit a report of the cases settled to the proper city or municipal courts.²¹

Based on the 10-year report of the Department of the Interior and Local Government, the types of cases brought before the Lupon are as follows:

A. Criminal cases:

- (1) Physical injuries; (2) Slander; (3) Threats; (4) Robbery; (5) Theft; (6) Drug Abuse; (7) Damage to property; (8) Swindling (Estafa); (9) Trespassing; (10) Coercion; and (11) Unjust vexation.

B. Civil cases:

- (1) Ejectment; (2) Family or marital problems; (3) Collections of Debts or Rentals; (4) Breach of contract; (5) Damages; (6) Demand for specific performance of obligation arising from contracts.²²

Unlike the Nepal system, it is the elected representative “Punong Barangay” that initiates mediation at the municipal level. Once the complaint is received, the Punong barangay calls both the respondent(s) and complainant(s), with their respective witnesses, to appear before him/her for a mediation of their conflicting interests. If he/she fails, he/she sets a date for the constitution of a conciliation panel that will hear both parties and their witnesses, simplify issues, and explore all possibilities for amicable settlement.

²¹ Clause 399 to 422, Local Government Code 1991. The Philippines.

²² Gregoria Austral. 2012. A GUIDE TO THE KATARUNGANG PAMBARANGAY SYSTEM. Philippine Center for Civic Education and Democracy. Pg.22

▪ Re-think Women’s Agency and Social Inclusion

The transition to federalism will allow key actors (at all levels but focusing at the local level) to maneuver and reposition their interests and powers in the transforming landscape. This will create both opportunities and constraints for re-configuring women’s agency and social inclusion. Scholars have highlighted that although the political, economic, and social rights for women and disadvantaged people may be introduced with policy and legal reforms, real change is unlikely to occur without attention to broader social dynamics and the effects of reforms on those dynamics.²³ This has been evidenced in our May 2017 local elections which witnessed an increase in political representation of women and members representing marginalized communities at the local level. However, upon a closer look, hardly any of them are in decision making roles. Therefore, introspection into our existing policies and re-evaluation of our policy making approach needs to happen. For example, supporting the revision of existing laws to make them more gender-sensitive and responsive to GBV, such as by the introduction of civil remedies, repeal of discriminatory laws, and harmonization of domestic legislation with international standards.

This needs to be informed by a holistic understanding of barriers to women’s agency and social inclusion (For e.g., issues such as shortcomings in the law itself, inefficiencies and biases in justice institutions, and attributes of women and marginalized communities such as their lack of financial resources and distrust of formal institutions). Empowerment and capacity building initiatives need to be supplemented by long term efforts to understand and transform social norms and values. Legal experts and development reform practitioners argue that “legal empowerment may be most effective where promising dynamics (e.g., signs of judicial activism) are already observable, and when combined with other advocacy approaches in civil society or the political sphere.”²⁴ Peer support networks for judicial committees and community members can be another effective means to organize people (e.g., to identify, set and promote access

23 Sage, Caroline and Woolcock, Michael, —Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries, 2005.

24 Cox, Marcus (2008) Security and justice: Measuring the development returns. A review of knowledge. Report prepared for DFID. London, Agulhas Development Consultants Ltd.

to justice priorities, gain influence and negotiation power, promote dissemination of general legal information, share knowledge, or teach practical skills).²⁵ More specifically, as an example, the provision of legal aid services to women and marginalized groups including removal of all impediments that women and disadvantaged communities may encounter in accessing justice must be mainstreamed across all targeted interventions recommended (i.e. from policy reform, curriculum refinement, and inter-agency collaboration mechanism to resource re-allocation, community engagement and others).

- **Promote Community Engagement**

In 2017, Nepal's citizens elected three tiers of the federal government. The transition to federalism is a complicated undertaking involving multiple interests. A successful political transition and sustainable peace will require significant public participation in the process. Otherwise, the result could be a shortsighted deal rather than a durable political and structural arrangement. Local governments can play a crucial role in educating people on the meaning and purpose of judicial committees and facilitate greater public participation in local dispute resolution mechanisms. This can avoid the placing of unrealistic expectations on judicial committees. Usage of TV/community radios, local practice sharing forums and social media are some cost-effective mechanisms local governments could employ to promote community engagement with judicial committees. This needs to be informed by existing context-specific barriers to knowledge dissemination and provide opportunities for citizen action. Supplementing these, traditional methods such as posters, newspapers, and street dramas as well as newer and more innovative methods such as social media, creative competitions (such as Nepal's 'Integrity Idol' conducted by Accountability Lab Nepal)²⁶ can be leveraged for increased civic engagement. The creation of local 'Access-to-Justice' community groups which will link up with provincial level 'Access-To-Justice' groups proposed by the Supreme Court could be another avenue for

25 Commission on Legal Empowerment of the Poor, —Making the law work for everyone, Vol. II Working Group Reports, 2008.

26 Integrity Icon is a global campaign by Accountability Lab, including in Nepal, that is powered by citizens in search of honest government officials. It aims to generate debate around the idea of integrity and demonstrate the importance of honesty and personal responsibility. See <http://www.integrityidol.org/countries/nepal/>

establishing vertical linkages and promoting networks between service providers to amplify and include the voices of practitioners in policy making.

This study also provides additional international experiences, at different points in the report to facilitate further discourse and deliberation.

1

BACKGROUND

Human progress is neither automatic nor inevitable... Every step toward the goal of justice requires sacrifice, suffering, and struggle; the tireless exertions and passionate concern of dedicated individuals.

Martin Luther King, Jr.

Justice administration is one of the primary functions of a state. One cannot imagine peace without justice, development without peace and a state without development. Democratic systems are dependent on the norms and values of justice and can only be justified based on the dynamism of justice. The acceptance of the supremacy of people is a basic tenet of democracy, and the people's supremacy can only be ensured through the means of justice. Due to the importance of justice, it is recognized as an integral part of human rights and in every nation, special arrangements are made to ensure the effective dispensation of justice.

Nepal's case is no exception. Following the advent of democracy in 1990, Nepal made steady progress in ensuring the judiciary remains independent and serves as one of the core pillars of a functioning democracy. The new Constitution (2015) mandates the principle of separation of powers, dividing the state into three branches – executive, legislature and judiciary – each with separate and independent powers and areas of responsibility so that the powers of one branch are not in conflict with the powers associated with the other branches. Being a parliamentary system, however, there is a close relationship between the executive and legislative branches, even though they are functionally two distinct organs of the state. The judiciary keeps the constitutional division of government responsibilities in its distinctive branches intact and limits any one branch from exercising the core functions of another. This is intended to prevent the concentration of power and provide

for checks and balances. The separation of powers operates at the provincial and local level as well.²⁷

Powers relating to justice can be exercised by courts and other judicial bodies established by the Constitution.²⁸ The Constitution recognizes three types of courts: Supreme Court, High Courts (Appellate Courts) and District Courts as part of an integrated judicial system. These are supplemented by local judicial bodies – judicial committees, local courts, quasi-judicial bodies and mediation centers – with varying mandates to either settle disputes or apply alternative dispute settlement methods.²⁹ District courts and subsequent higher courts hold the right to hear appeals emanating from local judicial bodies thus establishing linkages between the integrated judicial system and local judicial bodies.³⁰

Looking at the local level, Nepal has a long history of traditional dispute resolution mechanisms. There are 123 different castes and ethnicities and 126 different languages spoken in Nepal.³¹ This rich diversity extends to dispute resolution mechanisms with many ethnicities and groups having their own dispute resolution systems and mechanisms. In the past, most disputes were settled locally, usually by informal institutions or village heads, who had authority granted to them by the state but could choose to settle disputes using either local laws or state laws. Disputes were resolved through the *subba*, *mukhiya*, *mahato* and other village heads or local notables (often known as *bhaladmi* among the Nepali-speaking communities), and during the Panchayat period, through the Village Panchayat Council and Ward committees.³² Quite often, this method of dispute settlement was a combination of negotiation, mediation, arbitration and sometimes even adjudication.

Historically, the formal justice system was not designed to deal with individuals and communities on a fair and equal basis. Since the first Jana Andolan (people's revolt) and new Constitution of 1990, successive efforts and significant investment have had little impact in correcting this pattern

27 Dr. Bipin Adhikari, Salient Features of the Constitution of Nepal 2015.

28 Art. 126 Constitution of Nepal, 2015.

29 Art. 127 (2) Constitution of Nepal, 2015.

30 Art. 151 Constitution of Nepal, 2015.

31 National Population and Housing Census 2011. Nepal

32 See M. Khanal and P. Thapa, 2014 Community Mediation and Social Harmony in Nepal, The Asia Foundation for further reference.

of exclusion and unfairness.³³ In the past, formal justice institutions raised suspicions among many ethnic minority groups, who saw them as a high caste instrument to reduce the power of autonomous communities.³⁴ In addition to high entry barriers, experts note that the growing influence of political parties and corruption in the formal system leaves many Nepalis to question the quality of justice.³⁵ However, indigenously evolved customs and traditional dispute resolution mechanisms came with their fair share of shortcomings: they catered to limited homogenous groups and were centered on powerful actors who were able to benefit from the system at the expense of the powerless and relied largely on the wisdom and impartiality of community leaders. The resolution process in these systems was not drawn from legal doctrines, rather from a combination of religious faith, historical considerations, and practical realities.³⁶ The inadequacies of the formal justice system, coupled with a lack of awareness of laws and legal rights among many Nepalis, resulted in a heavy reliance on alternative dispute resolution mechanisms.³⁷ This trend continues to persist in the current context. The Survey of Nepali People³⁸ research indicates Nepalis are more likely to approach the police, traditional justice mechanisms and ward members as their avenues for dispute resolution rather than the courts.

There are several reasons why most disputes were processed at the local level and not in courts. First, courts are inaccessible to most people, due to various reasons including distance, time, costs, language, etc. Additionally, court proceedings often require disputants to present written evidence and

33 Local Self Governance Act, 1999 (LSGA) provisioned, relating to a range of matters including land disputes, forced labour, trespassing, and paupers, that such cases would be heard and settled either by mediation or 3-person arbitration boards, appointed by the then VDC “as agreed upon between the parties to a case.” Unfortunately, clauses of LSGA that gave judicial power to the VDCs were never implemented.

34 Caplan, L. (1995). ‘The milieu of disputation: Managing quarrels in East Nepal’. In P. Caplan (Ed.), *Understanding Disputes: The Politics of Argument*. Oxford: Berg Publishers, p155

35 Stein, D. 2013. *Community Mediation and Social Harmony in Nepal*. Theories in Practice Series. The Justice and Security Research Program.

36 Upreti, B.R. (2008). ‘Dispute Settlement at the Local Level: Observations and Lessons from Nepal’. *Local democracy in South Asia*

37 Upreti, B.R. 2004. ‘Resource Conflicts and Conflict Resolution in Nepal’. *Mountain Resource and Development*, 24(1), pp.60-66.

38 Survey of the Nepali People in 2018 (based on a nationally representative sample of 7,056) and its previous edition of 2017 were designed to fathom the current political mood, the impact of political transition on social relations and the economy, changes in the status of access to justice under the system of governance, the broader functioning of a newly restructured state, the prospects of Nepali economy, the state of service delivery mechanisms, and access to social and financial services. Most recently updated in April 2019, see www.asiafoundation.org/publication/a-survey-of-the-nepali-people-in-2017/

read and write documents, putting the processes largely out of reach for the 33.1 percent of Nepal's adult population that is illiterate.³⁹ In contrast, local forums, especially traditional ones, are considered easily accessible, relatively cheap and quick in settling disputes. Moreover, disputes are processed at the local level, especially in traditional institutions, in a language the disputants understand and with reference to norms and values they know, even if they contest them. Second, local communities emphasize harmony, consensus and reconciliation and people have to settle their differences by compromising if necessary, in order to give continuity to their many stranded relationships in their community. Third, many communities use social coercion, backed by threats of social ostracism, which compels the disputants to settle their differences and prevents them from taking their disputes outside the village or community. Fourth, because of local power relationships and norms (law), many grievances may never be voiced (named) in public and even if some are, they may not be allowed to escalate to the dispute stage. And finally, disputes are often resolved under duress by local elites to the disadvantage of the weaker party, who may not have the opportunity or be allowed to seek justice in formal institutions.

The drafters of the 2015 Constitution envisioned the establishment of one judicial committee in each of the country's 293 municipalities and 460 rural municipalities to mitigate the inefficiencies of the formal legal system and bridge the formal/informal justice divide. Similarly, the Local Government Operations Act, 2017 (LGOA) was enacted to implement provisions related to the powers of local level governments as per the Constitution of Nepal to promote cooperativeness, co-existence and coordination between the federal, provincial and local levels. It aims to institutionalize legislative, executive and judicial practices at the local level and deliver efficient quality service by ensuring participation, accountability and transparency.

As per section 47 (1) of LGOA, judicial committees have been empowered to settle disputes related to 13 specific matters. Likewise, as per Article 47 (2) in 11 other matters, judicial committees have the right to refer cases for mediation. Decisions can be appealed to in district courts and subsequently be appealed to higher courts. In the case of dispute settlement, judicial committees collectively exercise their jurisdiction and the opinion of the majority is regarded as the decision of the committee. In cases of mediation,

39 World Bank Data. Literacy rate, adult total (% of people ages 15 and above) – Nepal. Available from <<https://data.worldbank.org/indicator/SE.ADT.LITR.ZS?locations=NP>>

judicial committees keep a roster of mediators and refer parties to mediation centers at the ward level.

In theory, a basic structure is in place to ease the pursuit of justice for all Nepalis. However, given the lack of conceptual clarity, absence of guidelines and operating procedures, justice delivery mechanisms at the local level are suffering from inconsistencies and confusions. The following sections take a closer look at some of these inconsistencies and confusions, and provides recommendations.

NEPAL'S PATH TOWARD ACCESS TO JUSTICE AT THE LOCAL LEVEL:

Pre-democracy (Pre-1990)

- Mix of traditional and formal dispute resolution mechanisms at the local level.
- In 1961, the Village Panchayat Act granted judicial right to the Village Panchayat (a group of influential local leaders) to proceed and settle certain kinds of disputes.

Constitution of Nepal 1990

- The 1990 constitution defined and delineated the structure of the formal court system, making it a more independent branch of government. However, it lacked clarity on linking formal and alternative dispute resolution mechanism at the local level.
- The Village Development Committee Act 1991 provided local bodies with the right to settle certain disputes.

**Local Self
Governance
Act 1999**

- Local Self-Governance Act (LSGA) strengthened and defined the judicial role of the Village Development Committees (VDCs). VDCs were formally authorized to hear and decide cases relating to a range of matters including land disputes, forced labor, trespassing, and paupers.
- Most importantly, the LSGA provisioned that such cases would be heard and settled either by mediation or a 3-person arbitration boards, appointed by the VDC, “as agreed upon between the parties to a case.”
- Unfortunately, the clauses of LSGA that gave judicial power to the VDCs were never implemented.

**Mediation Act
& Regulation
2011 & 2014**

- Established a strong legislative foundation to implement mediation at the local level.
- Established the Mediation Council to provide oversight on mediation affairs at the national and sub-national level.

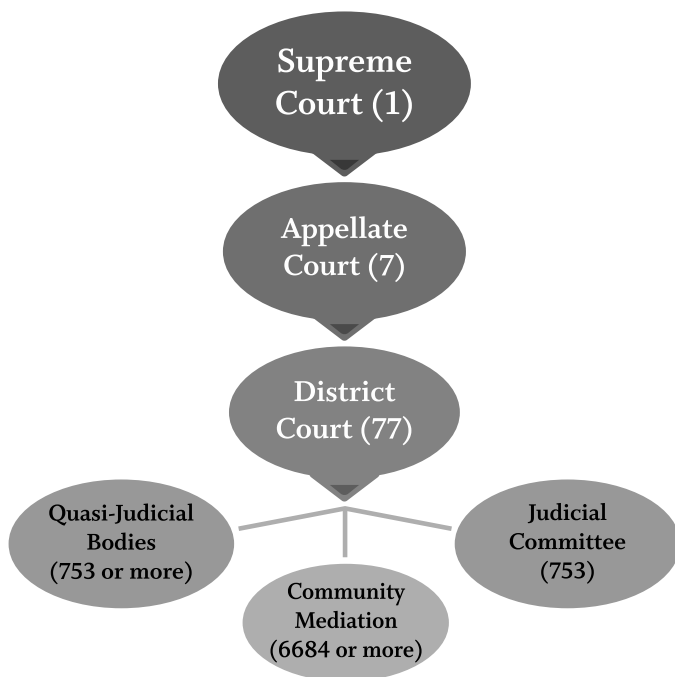
**Constitution
of Nepal 2015**

- Article 217 establishes judicial committees at the municipal and rural municipal level with the mandate to settle disputes.
- Schedule 8 provided local governments the exclusive authority to establish policies to regulate mediation, arbitration and local courts at the local level.

**Local
Government
Operations
Act 2017**

- LGOA, Chapter 8 provides the legislative framework for the operation of judicial committees at the local level - as per the spirit of the 2015 Constitution.
- Establishes guidelines on the interlinkage between judicial committees at the municipal and rural municipal level, mediation centers at the ward level, and district courts at the district level.

Nepal's access to justice structure



2

JUDICIAL RIGHTS AT THE LOCAL LEVEL

A study of the Local Government Operations Act (LGOA), 2017 reveals that the local levels are provided with the following three types of judicial rights:

1. Judicial rights of the Chief Administrative Officer (CAO)

Clause 33 (2) of the LGOA, 2017 is related to the judicial rights of the CAO. As per Clause 27 of the LGOA, 2017, nobody may build a house without getting their building's structural design approved by the rural municipality or municipality. If anybody wishes to build a house, he or she must submit the proposed design to the concerned rural municipality or municipality. After receiving such an application, the rural municipality or municipality is required to issue a notice asking if any neighbor with a contiguous border with the applicant wishes to raise any objection. If any objection is registered, then as per the Clause 33 (2) of the LGOA, 2017, the CAO shall decide upon such objections other than the ones related to property rights.

2. Judicial rights of the Chair or Chief

Clauses 37, 39 (4) and (5) and Clause 45 (3) of the LGOA, 2017 are related to the judicial rights of the chair or the chief. The rights granted in these clauses are as given below:

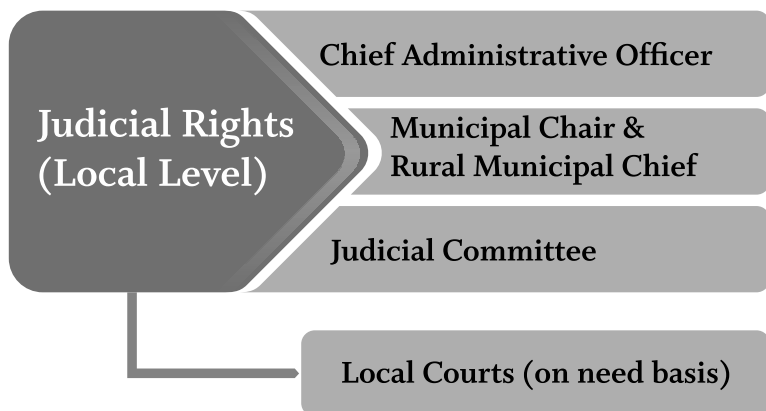
Concerned	
Clause	Subjects of Judicial Rights
Clause 37	To investigate and decide on complaints regarding the failure to receive approval for building construction, or failure to receive such approval within time, and to issue instructions to the CAO.

Concerned Clause	Subjects of Judicial Rights
Clause 39 (4)	<p>To conduct an investigation on the following subjects and give the order, as per the investigation report, to demolish an under construction building or any of its part:</p> <ul style="list-style-type: none"> ▪ Construction of a building without seeking approval as per the guidelines of the Government of Nepal ▪ Construction in violation of the approved design ▪ Construction of a building by encroaching upon public land, road, canal, temple, courtyard, sanitation, ditch, pond etc.
Clause 39 (5)	<p>To impose fines on the following subjects and give the order to demolish:</p> <ul style="list-style-type: none"> ▪ If a building is constructed without design approval, fine up to NRs. 5 lakh and the order to demolish the building or any of its part ▪ If unapproved changes have been made to the approved building design, fine up to NRs 2 lakh and the order to demolish the building or any of its part
Clause 45 (3)	<p>Issue an order to remove or demolish structures built in the area designated for local roads within the rural municipality or municipality</p>

3. Judicial rights of the Judicial Committee

The LGOA, 2017, grants judicial committees at the local level two types of judicial rights: right to justice dispensation, and right to justice facilitation. The rights to justice dispensation are provided for in Clause 47 (1) of the LGOA, 2017 and the rights to justice facilitation (mediation) are provided for in Clause 47 (2) of the Act. The subjects that fall under the rights to mediation are such that any concerned party may directly approach the court for justice. Simultaneously, under Clause 47 (2), judicial committees may refer cases to ward mediation centers. For this, they can create and regulate a roster of mediators at

the ward level. Details on the rights of judicial committees is given in Annex 1.



4. Judicial rights of Local Courts

If we take a closer look at Schedule 8 of the Constitution of Nepal 2015, local governments have exclusive rights to establish local courts on the basis of need, extending another judicial right to the local level. These local courts are meant to supplement existing structures at the local level when needed. An example of a local court could be the establishment of traffic courts at the municipal or rural municipal level.

3

STRUCTURAL ARRANGEMENT AND PROCEDURE OF THE JUDICIAL COMMITTEE

a. Structural Arrangement of the Judicial Committee

Article 217 of the Constitution of Nepal states that in each rural municipality and municipality, there shall be a three-member judicial committee for dispute settlement. In rural municipalities such committees shall be headed by the deputy chair and in a municipality by the deputy mayor. The other two members are elected by rural municipal or municipal assemblies from among their members.

b. Procedure of the Judicial Committee

Clause 48 of the LGOA, 2017 provides the jurisdiction of the committee whereas Clause 49 provides the processes for justice dispensation by the committee.

Clause 48 of the LGOA, 2017 has the following provisions related to the jurisdiction of the committee:



- The rights of the judicial committee to be collectively exercised by its chief and members, and that the majority's decision will be recognized as the committee decision.
- If all three member of the committee cannot be present, then the chair and one other member can also hear the dispute and settle it, but decision-making cannot proceed if the chair himself or herself is absent.
- If only two members other than the chief are present, they may proceed with other processes of dispute settlement but cannot make a decision to settle it.
- If the position of the chief is vacant, then the two members can decide on the settlement of the dispute, provided there is a consensus between them.
- If the chief or a member cannot hear the case (due to a conflict of interest), then the hearing and settlement of the case can be conducted by the remaining members other than the chief or member.
- If, in a particular case, all three committee members cannot hear the case, then for the purpose of hearing that particular case alone, the rural municipal or municipal assembly can appoint a three-member panel from within the municipal or rural municipal assembly. The senior most member of the panel will act as its chief or coordinator

Clause 49 of the LGOA, 2017 has the following provisions on the process of justice dispensation by the committee:

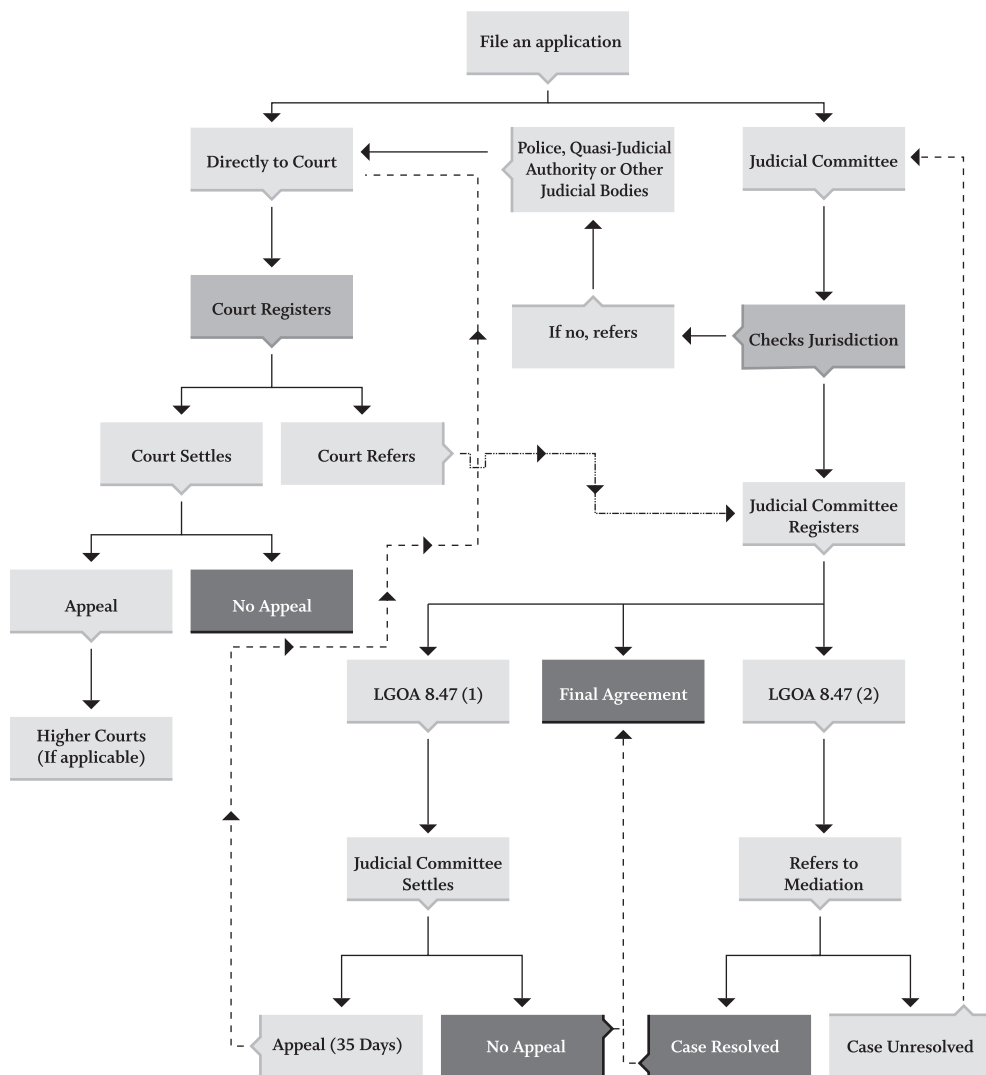
- To register a case submitted before the committee and provide the concerned party with a Nissa (receipt).
- While conducting a hearing or settling a case, work, as far as possible, to arrive at a mediated settlement by encouraging both parties to reach an understanding.
- In case of failure to mediate and relating to cases under Clause 47 (1), settle the case as per the law.
- Conduct mediation through listed mediators.
- For cases under Clause 47 (2), settle them through mediation within 3 months from when the defendant appears. If it cannot

be settled through mediation during that period, refer the case along with concerned documents and papers to the concerned court.

- Can impose restriction, as necessary, on bank accounts, or payments or transfers of property rights.
- In disputes between a husband and wife or in cases involving senior citizens, the committee may issue an interim protection order.
- The defendant, or his/her agent, must present himself/herself before the committee within a time fixed by the law or if no time is fixed by the law then within 15 days (except the time taken to travel).
- For the purpose of mediation, the committee can set up mediation centers in each ward.
- If there are more than one mediation centers in a ward, the parties of the dispute may choose any one, or if they do not choose then the committee may designate one for them.
- Matters such as action on petition, implementation of date and period for settlement and procedural issues shall be as governed by local law.

Likewise, Clause 50 says that the committee will have to make an authenticated copy of the decision available to the concerned party within 35 days of the decision. Clause 53 says that the concerned rural municipality or municipality shall keep a proper archive of documents, mediation agreement papers or decisions related to disputes.

Simple Illustration of the Dispute Resolution Process at the local level as envisioned by the 2015 Constitution and LGOA 2017.⁴⁰



40 This is the author's interpretation of what the current judicial structure at the local level looks like based on current policies and legislations.

4

OPPORTUNITIES IN THE EXERCISE OF JUDICIAL RIGHTS

In Nepal, the practice of settling disputes locally is not new. Historically, the Panchayat Court Act 1949 and the Village Panchayat Act 1961 granted judicial right to the Village Panchayat to settle certain kinds of disputes. The Village Development Committee Act 1991 and Local Self Governance Act 1999 also provided local bodies the right to settle certain kinds of disputes. However, these rights were never fully exercised in practice. The current Constitution embraces the concept of federalism and the right to self-govern and access justice. Therefore, the Local Government Operations Act, 2017 grants many judicial rights to the local level to resolve particular kinds of disputes. Based on this, these are some of the opportunities available at the local level:

1) The Opportunity of Access to Justice

In Nepal's patriarchal, class and caste dominated society, access to the justice system is often mediated by powerful actors who are able to benefit from the system more so than the powerless.⁴¹ For example, urban residents, the politically influential, males, the educated, and the economically advantaged have more leverage over the formal justice system. In contrast, women, the elderly, Dalits, and other vulnerable and marginalized groups have limited or no access to the formal justice system because of their status and position at the bottom of the social power structure and the lack of awareness among them on the state's legal and policy provisions for accessing the formal justice system. The inadequacies of the formal justice system,⁴² coupled with a lack of alternatives, have resulted in a heavy reliance on traditional and alternative dispute resolution mechanisms as the predominant

41 Jeannine Suurmond & Prakash Mani Sharma (2012) Like Yeast That Leavens the Dough? Community Mediation as Local Infrastructure for Peace in Nepal, *Journal of Peacebuilding & Development*, 7:3, 81-86, DOI: 10.1080/15423166.2013.767648

42 As per UNDP report in 2013, Court processes in Nepal are mired by debilitating delays; perpetual underfunding; frequent and long adjournments; delays in issuing initial notices and in passing execution of final orders; and persistent allegations of irregularities. See UNDP Program Document on Strengthening the Rule of Law and Human Rights Protection System in Nepal (2013-2017). Available from <<https://info.undp.org/docs/pdc/Documents/NPL/Revised%20prodod%20Nov.%202013.pdf>>

means to access justice.⁴³ They have endured due to the sociocultural significance of traditional institutions and their ability to provide relief in a quick and inexpensive manner.

A study by UNDP about the performance of Village Courts in Bangladesh showed that from 2010, the courts received 85,000 cases out of which they settled 78 percent of them, and 70 percent of service recipients (both complainant and defendant) expressed satisfaction. The average time taken to settle a case was around 28 days.⁴⁴

Similar to the Bangladesh experience, this new structure attempts to avoid situations where poor, disadvantaged and marginalized communities are forced to move out of their villages to seek justice even on relatively minor civil disputes. It envisions ending situations where they have to spend hard-earned money unnecessarily, spend years waiting for justice, and becoming victims of exploitation by middle-men. This kind of judicial system is simple and people-friendly because it ensures geographic proximity, ease of access, allows for the use of local languages, recognizes local social contexts, and avoids the usage of complex court procedures.

2) The Opportunity to Exercise a Democratic Local Governance System

Mahatma Gandhi used the slogan of self-rule when fighting against British colonialists while American President Abraham Lincoln called democracy a system for the people, by the people and of the people. Self-governance is the basic character of democratic systems. The election system is used to translate the principles and values of self-governance into practice. In other words, democracy expects people to take part in a system of governance. Local government units are the closest to the people. Hence, they are key vehicles for the exercise of

43 L Schirch, D Mancini-Griffoli. 2015. Local ownership in security: case studies of peacebuilding approaches. Alliance for Peacebuilding.

44 UNDP. Through village courts, justice for all in Bangladesh. 2019 Available from <<https://www.undp.org/content/undp/en/home/ourwork/ourstories/through-village-courts-justice-for-all-in-bangladesh.html>>

self-governance. Although self-governance largely means the exercise of political rights, the constitutional permission to exercise certain judicial rights through local governments provides an opportunity for judicial self-governance as well. In the case of judicial committees, first, these members are elected through the local electorate and are directly accountable to the people. Second, the elected representatives have the authority to frame rules, structure and regulate local dispute resolution mechanisms. Third, they have the constitutional mandate to use certain judicial rights. All three combined make up the elements of local self-governance.

3) The Opportunity to Exercise Federalism

In his famous essay on ‘What do we want from Federalism,’ Martin Diamond says, “Federalism is a political system permitting a large measure of regional self-rule. (It) presumably gives the rulers and the ruled a school of their citizenship, a preserver of their liberties, and a vehicle for flexible response to their problems.”⁴⁵ Federalism prevents the centralization of the rights of governance to one level and facilitates their devolution to the local level. The Constitution of Nepal aims to consolidate a federal democratic republican system of governance. In order to attain this constitutional goal, it is necessary to provide opportunities to exercise federalism at the local level and develop a feeling of ownership among people. Apart from executive and legislative rights, granting judicial rights to the local level provides real opportunities to exercise federalism.

4) Opportunities to Transform Conflicts and Disputes into Peace and Cordiality

Maintaining public security and order is a big challenge for every developing country. It is even more important for a country like Nepal that is transitioning from conflict towards peace. The establishment of a strong justice system is necessary to protect and promote social stability. In the absence of a strong justice system and access to justice, people suffering from violence and illegal activities will be denied justice. If the number of such sufferers keeps on increasing, it will lead to a loss of trust in the justice system. People will lose faith in the system. Consequently, they might resort to violent means to settle scores instead of approaching the formal justice system.

45 Diamond, Martin. “The Ends of Federalism.” *Publius*, vol. 3, no. 2, 1973. Pg. 129–152.

In many countries, studies have been undertaken to find the root cause of violent conflicts. A study conducted in Indonesia showed that the accumulation of petty disputes that were not resolved on time resulted in a sudden explosion of violent reactions.⁴⁶ Hence, the granting of judicial rights to the local level provides an opportunity to settle such disputes on time and reduces the chances of developing distrust and a lack of faith in the state mechanism. The attempt to resolve disputes at the local level can be recognized as an attempt to establish peace at a regional level. It can be argued that the exercise of judicial rights at the local level creates a situation where instead of focusing on complex procedures and the formality of court systems, one can promote social values and traditional customs through the justice system.⁴⁷ By emphasizing the settlement of disputes through mediation, an opportunity is available to transform conflicts and disputes into peace and cordiality. Further, mediation promotes a paradigm shift from traditional hierarchical dispute resolution practices by providing an accessible arena for communities to respond to and address the underlying causes of local disputes. It prevents disputes escalating into larger conflicts through an emphasis on discovering, understanding, and respecting needs and recognizing the interdependency between the disputing parties. The process is often flexible, catered to the disputant's needs, and parties have the opportunity to engage constructively to resolve disputes with the help of trained facilitators.

The resolution of disputes through the formal court system invites situations of a total win or loss whereas most circumstances may not be so black and white. Mediation, as discussed above, allows for a flexible method and a win-win approach to accessing and ensuring justice.⁴⁸

5) Opportunities for Leadership Development at the Local Level

Judicial rights granted to the local level will ensure the development of judicial leadership apart from political and legislative ones. It will provide an all-round leadership opportunity to local level leaders.

46 Barron P, Kaiser K, Pradhan M. Local conflict in Indonesia: Measuring incidence and identifying patterns. Policy Research Working Paper Series 3384. The World Bank. 2004.

47 M. Khanal and P.Thapa. Community Mediation and Social Harmony in Nepal. The Asia Foundation. 2014.

48 Win/win refers to agreements or solutions that are mutually beneficial, mutually satisfying. With a win/win solution, all parties feel good about the decision and feel committed to the agreement.

Accountability in the course of exercising political, economic, social and judicial matters means that local leaders get the opportunity to develop their leadership capacity.

The influx of newly elected representatives (especially women and people from disadvantaged communities through affirmative action)⁴⁹ and the transition to federalism (a previously unchartered governance structure) within an almost two-decade old political vacuum has led to confusions on how to conduct the affairs of judicial committees. This local level judicial exercise, over a sustained period of time, will provide an opportunity for the empowerment of women and economically disadvantaged and marginalized people. In fact, democratic systems and the guarantee of rights also means the enhancement of skills to protect one's rights and make decisions on social issues. By increasing access to justice, the local justice structure can improve people's understanding of their rights and their capacity to utilize such rights. It can become a vehicle for their empowerment.⁵⁰

6) The Opportunity to Provide Holistic Justice Delivery

The Constitution mandates the establishment of one judicial committee in each of the country's 753 local governments to mitigate the inefficiencies of the formal legal system and bridge the formal/informal justice divide. While formal courts have co-existed with mediation centers for close to two decades, poor and marginalized populations have limited access to them. Judicial committees were envisioned as the first line of justice to link individuals to various justice providers – mediation centers at the ward level, the lowest level court at the district level, the police, government legal departments, and other relevant justice/social service providers.

The current structure can foster relationships between judicial committees, the local police, district courts, and other local government bodies. For example, judicial committees require external support for certain cases, such as Gender Based Violence (GBV) or Domestic Violence (DV), that go beyond legal assistance and requires coordination with other government, judicial or social

49 As per Election Commission of Nepal, 91% of the deputy positions – deputy mayors in municipalities and vice chairpersons in rural municipalities – were won by women. (Cited above on footnote 3.)

50 Benjamin van Rooij, *Bring Justice to the Poor: Bottom Legal Development Cooperation*. Available at <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/VanRooijBringingJusticetothePoor.pdf>

agencies. Networking will build awareness among service providers on their respective roles, responsibilities, and jurisdictions helping them to refer disputants to a range of services available based on their need. Such linkages will maximize the reach and impact of justice, build connections between the formal and informal justice systems (e.g. referring criminal cases from judicial committees to the courts or referring mediation-appropriate court cases to judicial committees and community mediators) and ensure services meet the multifaceted needs of disputants.

7) Opportunities to Enhance Public Participation, Inclusion and Ownership

This new model for a locally-driven justice delivery system has the potential to enhance public participation, inclusion and ownership. Staying true to the spirit of the Constitution, it promotes inclusion in terms of the composition of judicial committee members and makes it accessible for disputants. Empowering disputants to come to a settlement based on mutual interest ensures the effectiveness and durability of settlements. Community members can rely on elected judicial committees and mediation rather than on traditionally influential people to make decisions. This relatively unsophisticated and facilitative process was envisioned to provide equitable participation, representation, and access to information and services for women and socially and economically marginalized groups.

5

SOME ISSUES TO CONSIDER IN THE EXERCISE OF JUDICIAL RIGHTS

The establishment of judicial committees at the municipal level is a milestone in governance reform. In theory, a basic structure is in place to ensure ease of access and the pursuit of justice for all Nepalis. However, the promise of this reform is being hindered by multiple constraints involving capacity, coordination, policy and implementation guidelines, along with limited public understanding. Upon a closer look, some of the prevalent issues that need serious consideration are highlighted below:

The Question of Conceptual Clarity and Policy Coherence

One of the most obvious issues is a lack of clarity in policy and a coherent understanding of the role of judicial committees. In the absence of clear policies, distinct guidelines and operating procedures, the roles and responsibilities of judicial committees are questionable. Based on interpretations of the Constitution and LGOA, judicial committees are assuming inconsistent roles and operating anywhere along a spectrum of least four possible formats: a) as a formal local court; b) as a mediation or other alternative dispute resolution center; c) as a clearing house or referral station and d) as a combination of any of the above.

Some judicial committees simply referred cases for mediation, especially in locations with a strong community mediation presence; some conducted mediation themselves using non-standard techniques; some used a variety of informal practices to try to settle cases; while some have even created structures resembling formal courts complete with witness stands to adjudicate cases. To underscore the gravity of the confusion, a writ has been filed by Nepali lawyers at the Supreme Court earlier this year challenging the legal authority of judicial committees to adjudicate cases.⁵¹

51 [Kathmandu Post kathmandupost.ekantipur.com.np/printedition/news/2019-01-01/writ-against-local-judicial-committees.html](http://kathmandupost.ekantipur.com.np/printedition/news/2019-01-01/writ-against-local-judicial-committees.html)

- Constitution of Nepal, 2015

As mentioned before, Article 217 of the Constitution grants judicial committees the power to settle disputes under their respective jurisdiction in accordance with the law. As mentioned above, the interpretation of what “settle” means and the processes adopted to achieve this goal are contentious.

Differing Viewpoints

On the one hand, it is argued that those who framed the Constitution did not envision judicial committees to be courts, because if they had, they would have called them “local courts.”⁵² Judicial committees aren’t part of an integrated judicial system (i.e. district, appellate and Supreme Court) as they aren’t governed by a judicial council and are composed of elected representatives. If we look at the history of our justice systems, we settled disputes at the local level through panchayat led judicial committees as per the Village Panchayat Act, 1961. They were not considered courts, rather they were an extension of the integrated judicial system that supplemented access to justice. All of this suggests that judicial committees were envisioned as an alternative dispute resolution mechanism that provides access to justice to citizens at the municipal and rural municipal level.⁵³ The LGOA mandates that in the classification of cases under 47 (1) and 47 (2), priority should be given to mediation. This adds further weight to the argument that judicial committees were envisioned to uphold justice through a facilitative alternative dispute resolution mechanism.

On the other hand, it is argued that Article 127 (2) and Schedule 8 of the Constitution state that a judicial body or court may be set up at the local level. But, it is not clear whether these provisions envisage the establishment of a separate court or just point to judicial committees. Similarly, the provision for closed door proceedings (Banda Ijlaas), within Clause of the Model Law⁵⁴ has seen the proliferation of structures resembling formal courts complete with witness stands to adjudicate cases across various municipalities and rural municipalities. In various instances, the model law drafted by MoFAGA (and later adopted by many municipalities/rural municipalities) suggests that judicial committee processes mirror that of district courts or other formal judicial systems.⁵⁵ This has further added weight to the belief that judicial committees are to be considered the “judiciary” at the local level.

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- 52 Art. 217 of Constitution of Nepal expressly denotes the bodies as judicial committees and not courts.
- 53 Wagley, Namit. 2018. The Conundrum. Kathmandu Post. Available from <<https://kathmandupost.com/opinion/2018/07/17/the-conundrum>>
- 54 Clause 54. Model Law on Judicial Committee Proceedings. MoFAGA. Available from <<http://mofaga.gov.np/ne/node/124>>
- 55 For example, Clause 49 (2) of the LGOA says that as far as possible the committee should try to settle disputes through mutual understanding/mediation and should initiate proceedings and settle disputes only after such attempts fail. But the phrase used in Clause 25 of the model law has been interpreted to mean that the committees should first decide/settle the case. The Clause 49 (3) of the LGOA says that the committee should arrange mediation through mediators but Clause 57 (2) of the model law allows members of the committee to conduct mediation themselves.

Even if we decide one way or another in conceptualizing judicial committees, what is not up for debate is the need for coherence, adequate oversight, support and guidance mechanisms in policy and practice. It is imperative that the local dispute resolution process rids itself of the complexities and procedural hassles inherent in the formal justice sector without compromising on due process and thereby, justice at the local level. Once there is clarity on this fundamental question, we can move ahead with strategizing appropriate measures to supplement the justice delivery mechanism.

- Local Government Operations Act, 2017

The judicial rights granted to the judicial committee by the Local Government Operations Act, 2017 have already been discussed above. A study of Clause 47 of the Act makes it clear that judicial committees are not only provided with the rights to mediate disputes but also have the right to initiate proceedings and settle disputes. The initiation of proceedings and the settlement of disputes mandatorily require sticking to a few basic principles and procedures of justice. Even when settling disputes through mediation, judicial committees must abide by certain fundamental principles regarding mediation. Between these basic principles and the exercise of judicial rights by judicial committees, one can see the following problems:

- Coordination problems may emerge since judicial rights have been divided between the chair or chief, chief administrative officer, and the judicial committee.
- There is confusion on what happens or who exercises judicial rights if the judicial committee is not formed or is dissolved. Likewise, if members of the committee have to take part in an election campaigning, it is unclear whether they have to recuse themselves from their responsibilities. Currently, the Constitution and the LGOA, 2017 fail to address: the conflict of interest in politicized issues, balancing the separation of powers, maintaining synergy between judicial committees and mediation, and demonstrating transparency and accountability.
- There is confusion whether the right to freeze assets or bank accounts is applicable only on disputes related to Clause 47 (1), or 47 (2) as well.

- Clause 49 of the LGOA, 2017 has provisions related to the processes of justice dispensation, but they are not adequate. For instance, it does not give clear directions on the design of applications, the process of registration, the process of serving notice to defendants, the design of responses by defendants, the process if defendant fails to appear on set date and so on.
- Provisions relating to Mediation (Constitution, LGOA and Mediation Act)
 - Schedule 8 of the Constitution of Nepal grants local governments exclusive rights to enact laws to regulate mediation and arbitration related activities. However, how these will interface with the Mediation Act 2011 and subsequent regulations is currently up for debate. Don't exclusive rights granted by the Constitution override federal legislation? There seems to be some confusion among local government representatives in the understanding of exclusive rights. This may have implications in the exercise of local self-governance as local governments may be pressured to align with the Mediation Act even if some of its policies does not suit their local context. As an example of this confusion, local governments, through local mediation legislation, are requiring local mediators to at least have a bachelor's degree to be eligible to be enlisted for mediation at the ward level.⁵⁶ This is problematic because it is difficult to find enough people with the necessary credentials at the local level. Ironically, the Mediation Act 2011, in its section on community mediation, allows registration of mediators without such stringent criteria.⁵⁷

Legal experts argue that the right to frame rules on mediation is not an exclusive right (of local government) but rather a concurrent right due to the fact that the federal government regulates mediation at all levels through supreme, appellate (high court) and district courts. Therefore, any legislation drafted at the local level will have to comply with the provisions of the federal Mediation Act 2011 and its subsequent regulations.

⁵⁶ This is based on the recommendation from Clause 59 of the Model Law on Judicial Committee Proceedings by MoFAGA.

⁵⁷ See Chapter 6 Mediation Act 2011 for further reference.

- Under subjects that are marked for mediation in the LGOA such as divorce, there is confusion on which hearing should get priority if one party approaches the local level and the other party directly approaches the court.
- There is confusion on what happens to a case registered in a judicial committee within the statute of limitation but is not settled through mediation, and when subsequently, a party wants to approach the court, the statute of limitation has already past. There is no provision that allows for deducting the time taken for mediation attempts. It is also not clear when a case should be taken to the courts if mediation attempts fail.
- There is confusion on whether office bearers of judicial committee can act as mediators even on subjects under the jurisdiction of mediation. Even if judicial committee members have mediation training, would there be a conflict of interest?
- Once the parties to a dispute register their case in a judicial committee, they are referred to ward level mediators. If the ward level mediators facilitate the settlement of their disputes, they will have to, again, approach the committee for a final settlement. This creates hardship as parties will first have to travel from their ward to the municipality/rural municipality only to be referred back to the ward and will then have to go back to the municipality/rural municipality to validate their agreement. This is against the spirit of access to justice envisioned by the Constitution.
- In the Mediation Act, there are provisions that require the confidentiality of mediation proceedings so that they are not revealed in any subsequent adjudication related to the same case. However, LGOA, Clause 49 (4) provides for the disclosure of mediation proceedings to district courts. Inconsistencies like these need to be reconciled. There is confusion on which process judicial committees and mediation centers should follow.
- When dealing with cases under Clause 47 (2), many judicial committees have followed traditional processes⁵⁸ instead of following the procedures set by Clause 49 (3). In granting

58 Traditional processes refers to various traditional dispute resolution practices that existed in Nepal prior to this system such as the Mukhiya, Badghar systems.

judicial rights, the LGOA expects judicial committees to be mindful about established procedures. It is necessary to educate committee members on the differences between the traditional process and the process laid down by the Act.

- Need for policy consistency, additional policies and guidelines
 - MoFAGA has provided a model procedural law for judicial committees, but the legitimacy of the model law itself is being questioned. Additionally, as discussed above, some of its provisions contradict provisions in the LGOA. There is room for improving policy coherence between federal legislations, model laws and local laws.
 - Most local level governments have not formulated laws on the procedure for the settlement of disputes by judicial committees. For example, Clause 49 (12) of the LGOA mandates that on matters related to the investigation of disputes, the process of bringing both parties together, mediating between them, and setting the time for the settlement of dispute etc. shall follow local laws. Therefore, to facilitate this process, local procedural laws are imperative.
 - There is a lack of implementation guidelines to address systemic challenges that affect women's participation in governance and judicial matters. Women's participation in leadership roles is fraught with challenges, reflecting stubborn gender biases in Nepali society. Female judicial committee heads have complained that policies do not protect them against their exclusion from decision-making.
 - The lack of adequate guidelines and directions for district courts on how to monitor, mentor and provide oversight to judicial committees is hindering their ability to support these newly formed institutions.
 - Existing provisions on mediated settlements and the implementation of decisions is inadequate. The Clause 52 (2) of the LGOA, 2017 states that matters related to mediated settlements and the implementation of decisions shall be as provided for in local laws. Simultaneously, Schedule 8 of the Constitution provides local governments the autonomy to draft legislation on mediation. When drafting local laws on mediation,

consistency with federal laws (such as LGOA, mentioned above) and linkages with federal regulatory bodies such as the Mediation Council need to be considered.

- The LGOA needs to consider spelling out the responsibilities of judicial committees to establish mediation centers at the ward level. At the moment, the Act is unclear as to whether mediation centers need to be established and regulated by judicial committees at the ward level. The Act currently only stipulates the need to come to mediation agreements via enlisted mediators.
- There are inconsistencies between LGOA and the Civil Code 2019, citing one example: Article 47 (1) of LGOA, 2017 authorizes judicial committees to look into matters relating to divorces. However, Clause 96 of the Civil Code 2019 states that matters relating to a divorce needs to be settled by courts. This poses the problem of jurisdictional overlap.
- The current prevailing laws on mediation are federal laws, and local governments may need to formulate local laws suitable to their context.
- A policy framework giving local governments the autonomy to recruit specific personnel as per their need is missing.

The Question of Political Economy in Policy Making

According to Collinson, “Political economy analysis is concerned with the interaction of political and economic processes within a society: the distribution of power and wealth between different groups and individuals, and the processes that create, sustain and transform these relationships over time.”⁵⁹ Against this backdrop, at a macro level, Nepal’s struggle to develop its legal system may lead to unforeseen consequences. In principle, the new federal structure entails a radical change from previous top-down governance practices, nonetheless, the state of law-making remains archaic and in need of serious re-examination. Nepal’s 2015 Constitution presents an intention to strengthen sub-national governments, but it was also written with significant ambiguity regarding the powers and responsibilities of each level of

59 S. Collinson. 2003. Power, livelihoods and conflict: case studies in political economy analysis for humanitarian action. Humanitarian Policy Group.

government. Further, there hasn't been significant progress on the legislative and policy framework for handing over responsibilities to local governments, including the transitional mechanisms needed to manage the transition of certain roles from the center down to the local level. To date, provincial and local governments have enacted dozens of new laws. However, there have been instances where provincial and local laws were found to be either inconsistent with federal laws and/or against the spirit of the Constitution. Some have already been deemed void by the Constitutional Bench of the Supreme Court.⁶⁰

The lack of federal legislation to guide corresponding sub-national legislation is one of the prime reasons for this debacle. Compounding this is the tendency of the federal government to draft laws without input from either provincial or local government representatives/officials, thus, reflecting the centralizing inclinations of the country's federal political and administrative forces. This is an accurate reflection of the uncertainty around a federal Nepal and the limited transparency of decisions being made mostly by the bureaucracy. At the micro level, in-fighting and contestation within and among elected representatives at the sub-national level is another cause for concern. A lack of coordination and collaboration is not just limited vertically across the governance structure but also horizontally. This is compounded by the fiduciary risks of law-making in federal Nepal. More precisely, fears of a backlash and marginalization from central authorities is refraining a majority of sub-national governments from law making process altogether or they are simply co-opting template legislations (forwarded by federal ministries) into sub-national laws. The adoption of centrally introduced Model Laws in Judicial Committee Proceedings by local governments is a prime example of this debacle. On the other hand, given the urgency to enact new laws at the sub-national level, it has become an increasingly uphill battle to uphold due process. The lack of inclusive and participatory law-making processes is rampant across all three spheres of government but is especially amplified at the sub-national level.

60 For example, see Himalayan Times. 2018. Supreme Court annuls law that supports monthly facilities for local people's reps. Available from <<https://thehimalayantimes.com/nepal/supreme-court-annuls-law-that-supports-monthly-facilities-for-local-peoples-reps/>>

The Question on the Skill of Judicial Workers

Compounding issues related to inconsistency/unclear policy is a severe lack of capacity among elected representatives to act as justice administrators. Being new and inexperienced, they lack the skills and experience in not only judicial but also administrative and governance processes. Our research and interviews with judicial committee members indicate that a lack of capacity is seriously affecting their ability to discharge their constitutionally mandated functions and satisfy burgeoning public expectations for an increase in justice provision. Examples include judicial committees refraining from taking applications; failing to refer cases to either mediation committees or district courts; failing to uphold basic standards of confidentiality and non-judgement; and violations of the duty of fairness, promptness and procedural compliance. If not addressed promptly, the worst-case scenario for the future of judicial committees is a pattern of arbitrary decisions that lack legal justification and rulings that disproportionately affect the rights of vulnerable group.

A study of some appeals that have been registered at district courts⁶¹ against the decisions of judicial committees show that in some instances committees made decisions before the set date of the hearing, or they had included people other than office bearers during the hearing in the committee. This reveals an urgent need to provide knowledge on the basic nature of judicial work, the basic principles of justice, and on the general integrity and character expected of justice dispensers.

Even though the task of dispensing justice may seem to be a simple and easy one, it is very tough. The real legitimacy of the judicial system does not just spring from laws but from the trust and faith people have in it. The importance of legal authority to decide on something is only one of the pre-conditions. The trust and faith of people rests upon the skill and capacity of office bearers. Judicial workers need to declare things right or wrong based on a thorough examination from the perspective of prevailing legal provisions. He/she is expected to be knowledgeable about the law and have an understanding of the judicial spirit. A single error or a lack of sensitivity can generate mistrust towards the whole system. There have been numerous reports in the media about the lack of adequate educational qualification among members of

61 Especially looking at Saptari District Court and Rupandehi District Court.

judicial committees at the local level.⁶² However, since the law not only provides the right of mediation but also of settlement to judicial committees, it is essential that committees have legal knowledge on the concerned subject.

Clause 47 (1) of the LGOA, 2017 grants judicial committees with the right to settle disputes and Clause 47 (2) grants it the right to settle dispute through mediation. However, office bearers in the committees do not have a clear understanding on the differences between the two rights. Interviews with judicial committee members have shown that most of the cases settled by judicial committees belong to Clause 47 (2). Nominal cases under Clause 47 (1) have also been settled. One reason for this situation is a lack of understanding regarding the exercise of jurisdiction under Clause 47 (1).

Simultaneously, there is a lack of clarity on the implications of the Civil and Criminal Code that came into effect on August 2018. Under 47 (1) of the LGOA, judicial committees have the mandate to investigate “other civil case in which the prevailing laws provide for mediation, and criminal case in which there could be maximum one-year imprisonment.”⁶³

Likewise, it is essential for committee office bearers to have a fair understanding of procedures, systems of mediation, and the universal norms and values of justice. Therefore, the capacity development of office bearers in judicial committees at the local level is a major challenge. Even when such opportunities are available, they have been limited to judicial committee chairs/chiefs, ignoring the relevance and role other judicial committee members play in ensuring access to justice. Most importantly, as discussed above, looking beyond the current crop of elected representatives, mechanisms to develop competencies of future elected representatives needs to be considered.

62 The Himalayan Times. 2019. Judicial Committees have failed to function properly. Available from: <<https://thehimalayantimes.com/nepal/judicial-committees-have-failed-to-function-properly-says-report/>>

63 Section 47(1). Local Government Operations Act. 2017.

Examples of some cases where state is not a party with imprisonment not exceeding one year, The National Penal (Code) Act, 2017⁶⁴

- Sentence for causing hurt or grievous hurt by grave provocation or in heat of passion - Section 194
- Make unconscious with the intention to commit an offence - Section 197
- Obstruct or cause to obstruct movement of any person - Section 200(3) - Section 194
- Enter anyone's residence with an intention of intimidating or insulting - Section 284 (3)(b)
- Commit larceny - Section 286
- Clicking or disfiguring photograph of any person without his/her consent - Section 295
- Writing letters with an intention to annoy - Section 300
- Infuriate or tease anyone - Section 300
- Person except the one competent as per law, searches another person's body, vehicle or personal belonging - Section 301
- Committing slander - Section 305

The Question of Inter-Agency Coordination

- At the Federal Level

While some effort has been made to introduce training programs for JC members, a lack of coordination between key stakeholders has resulted in the duplication of training efforts and fueled confusion. Currently, the Ministry of Federal Affairs and General Administration (MoFAGA), Supreme Court, civil society organizations and donor agencies have been providing capacity building trainings to judicial committee members.⁶⁵ These trainings are largely ad-hoc and sectoral with limited coordination across agencies and in need of serious reconsideration.

64 The National Penal (Code) Act, 2017. Available from <<http://www.moljpa.gov.np/en/wp-content/uploads/2018/12/Penal-Code-English-Revised-1.pdf>>

65 For example, the Supreme Court provides a 3-day training for JC chairpersons in Kathmandu, while MOFAGA offers another 3-day training for all three members within their subnational locations. While both sets of curricula are currently undergoing modification in a response to participant feedback on training gaps, they are not coordinated or harmonized, with the result that JC members are being trained inadequately and inconsistently.

A related point to this is the lack of clarity around “who” is authorized to regulate training standards, the quality of trainers, and provide standardized trainings. Currently, the judicial committee training space is crowded with multiple actors with limited inter-agency coordination and collaboration, fueling further chaos and confusion.

To make matters worse, in most locations, these trainings are one off and limited to deputy heads, ignoring the relevance and role other judicial committee members play in ensuring access to justice (as noted above). Moreover, although National Judicial Academy (NJA), as the country’s leading judicial training provider, was recommended by the Committee on the Elimination of Discrimination against Women (CEDAW)⁶⁶ in 2018 to conduct judicial committee trainings, our research reveals that it is not involved in any judicial committee training efforts, even those currently conducted by the Supreme Court.

Further, in our interviews, judicial committee members highlighted the inadequacies of limited trainings – leaving aside political and other pressures – to enable them to settle all civil matters within their jurisdiction. They have also cited the need to expand these trainings to municipal heads and civil legal officers/assistants delegated to support judicial committees. Further, a closer study of various curriculums reveals a serious need to create synergy, maximize efficiency, and support actors to work together more strategically. Without a comprehensive training approach that integrates judicial committee trainings with the larger access to justice service providers and supplements this with periodic practice sharing sessions for committee members, the sectoral approach will continue to foster an environment of contestation and confusion.

- At the Sub-national Level

Judicial committees are part of an eco-system and need to work in tandem with other justice providers such as district courts, mediation centers, quasi-judicial bodies, local police etc. Without clear referral and inter-agency coordination frameworks, meeting the multi-faceted needs of citizens seeking justice will be extremely challenging. A well-coordinated, multi-institutional local justice delivery mechanism

66 Concluding observations on the sixth periodic report of Nepal, 2018 CEDAW.

that promotes pluralism and interagency cooperation requires a clear collaborative framework. In the current situation, it remains ambiguous how judicial committees will interface and work in tandem with other justice and social service providers at the local level like mediation centers, other quasi-judicial bodies, the police, and social service providers such as CSOs and women's shelters.

The Constitution and LGOA establishes judicial committees and other access to justice service providers with varying and sometimes overlapping mandates,⁶⁷ but there is nothing concrete in the Constitution or in any subsequent statutes or regulations formalizing their interrelationship. In this situation, judicial committees may be tempted to leverage their constitutional status to secure more autonomy and power, but their overlapping mandates could reduce their effectiveness by wasting institutional resources through a duplication of effort. Judicial committees cannot operate on a stand-alone access to justice model because it is neither appropriate nor a legally acceptable solution for criminal cases, including for domestic violence, the resolution of such cases requires referral to district courts.

Field studies and observations at the local level reveal that some people approached judicial committee with cases or cases were registered in judicial committees that were beyond its jurisdiction as defined in Clause 47 of the LGOA, 2017. Lack of clear referral and inter-agency collaboration not only increases the risk of overburdening judicial committees with cases they could have easily referred to appropriate agencies, it also risks venturing beyond the normative standards of justice. In either case, there is a heightened risk of complicating access to justice pathways for disputants.

Similarly, disputes involving gender-based violence, domestic violence, or social justice require complex and comprehensive solutions outside the scope of a judicial committee's skills to fully address the needs of victims and disputants. These victims and disputants, many of whom are women and people from marginalized groups, require access to a whole range of social support services, including legal aid, health care,

67 For example, disputes relating to slander, trespassing, usage of public property can fall under the jurisdiction of local police and judicial committees.

psychosocial counselling, shelter and livelihood support, and human rights advocacy and protection.

Further, evidence generated from decades of experience implementing access to justice programs in Nepal has demonstrated that discrimination and violence are often exacerbated, and access to justice is further complicated by factors such as caste, ethnicity, and class.⁶⁸ Therefore, there is a critical gap in ensuring that judicial committees are integrated into the eco-system of justice and social service delivery.

The Question on the Adequacy of Finances, Human Resources and Infrastructure

Even though justice dispensation is one of the primary responsibilities of any state, studies suggest that most governments fail to provide adequate human resources and physical facilities necessary to do so. There are some general tendencies such as a failure to timely enact necessary laws and rules, an inadequate allocation of financial resources to build necessary physical facilities, or a lack of priority given to the formation of mechanisms to implement decisions. In the present context of Nepal where the federal government itself is struggling with resource constraints and where even regular courts suffer from a lack of physical and human resources, it is almost certain that judicial committees at the local level face the same problem. Annual reports from the Auditor General suggest that while Nepal has policies and laws in place to ensure proper use of public funds, they are often ignored in practice. Similarly, mechanisms intended to reflect local aspirations and exploit local knowledge by involving local bodies in the planning process have remained largely ineffective.⁶⁹

Exacerbating this issue further, the Constitution and current legislative frameworks fail to establish adequate linkages, support and quality control mechanisms to sustain high quality dispute resolution at the local level. Reports have highlighted a serious dearth in human resources such as legal officers and legal assistants to provide administrative and technical support (i.e. screening cases, registering disputes, drafting agreement papers, record

68 United Nations Human Rights Office of the High Commissioner. 2011. Opening the door to equality: Access to justice for Dalits in Nepal. Available from <https://nepal.ohchr.org/en/resources/Documents/English/reports/HCR/2011_12_07_Opening_the_Door_to_Equality_E.pdf>

69 A Guide to Government in Nepal: Structures, Functions, Practices. 2012. The Asia Foundation.

keeping etc.) for committee members at the local level. Even when human resources have been delegated from the line ministry i.e. MoFAGA, there have been issues of a lack of legal qualifications and conflicts with elected representatives limiting their ability to provide adequate support. The availability of a dispute settlement room, the human resources necessary for carrying out procedural matters, and related acts and rules are all crucial for the exercise of judicial rights. While resource limitations have made it difficult for judicial committees to function effectively, the lack of human resources with legal knowledge has been cited as the biggest impediment.

Lessons from India:

In the state of Bihar, the Bihar Panchayat Raj Act, 2006 is currently in enforcement. As per this Act, for the exercise of judicial rights granted to Gram Panchayats (Village Councils), they can form a Gram Kachahari (Village Court) headed by a Sarpanch (elected head) who is directly elected by voters from the Gram Panchayat. The Kachahari then elects a deputy Sarpanch (deputy head). The Act expressly provisions for a 'friend of Kachahari' called Nyay Mitra (legal friend), who is at least a law graduate and who helps the Gram Kachahari. The Gram Kachahari consists of a total of five members including two members chosen by each disputing party, and two chosen by the Sarpanch (Elected head). In general, it attempts to reach a mediated settlement. If a settlement cannot be reached, then only does the Kachahari initiate a decision process.⁷⁰

While the case of India and its local judicial structure is not identical to the Nepali context and structure, there are some insights from Bihar's triumph that can be studied:

- a) Rival parties nominate one member each of their choice in the bench of the Gram Kacheri so that there is little possibility of any element of favoritism or partiality or bias.
- b) The relevance of technical legal support is recognized to enable local dispute resolution mechanisms headed by elected representatives to function effectively.
- c) Emphasis is given to reconciliation and mediation prior to diving into dispute settlement.

There is a lack of hearing rooms and mediation rooms in a fair number of municipalities and rural municipalities. Hearing rooms are not only important

70 Bihar Panchayat Raj Act, 2006

for keeping proceedings confidential and impartial, they can also serve as an archive to keep a record of the number of cases registered, number of cases settled, nature of decisions taken, and the implementation status of decisions. Keeping a record of decisions is not only important to provide evidence for future cases but critical files may need to be submitted to district courts if a petition appealing against the committee's decision is filed.

In terms of mediation, some judicial committee members expressed concerns that despite training mediators, they have remained inactive in their respective wards since little or no remuneration is provided for their services. This has created problems of balancing regular work and judicial work at the local level. The Clause 47 (2) of the LGOA, 2017 allows judicial committees to mediate in cases that can be settled through mediation. Problems may arise when dealing with such cases, but due to a lack of active mediators and mediation centers, even if judicial committees wanted to refer cases, they simply don't have any avenues to do so.

The lack of a police force to enforce decisions and a lack of follow-ups on settlements reached through judicial committees has also been cited as a notable challenge. If any agency is given the right to decide, then the real importance of such a right is seen only if its decisions are enforced or implemented. Judicial committees are given the right to decide, but they lack mechanisms to enforce their decision. Although Clause 52 of the LGOA, 2017 says that the responsibility for enforcing the decision or mediated settlement by the judicial committee lies with the executive, the committees themselves also need separate facilities to keep an archive of decisions, proposals for implementation, records of implementation and so on. Another limitation to consider is the lack of safe houses and shelter homes for disputants at risk. Simultaneously, since the executive is usually engaged in numerous activities, it is necessary to have a separate section dedicated to ensuring the enforcement of decisions. Otherwise, it runs the risk of not getting prioritized.

The Question of Impartiality, Independence and Following Human Rights Standards

Elected officials may carry conflicts of interest and other ethical repercussions in their ability to administer justice impartially by blurring the separation of powers between the judiciary and executive branches. As with the question of competence, a weak separation of powers raises issues of fairness and equality before the law. Currently, the Constitution and LGOA, 2017 fail to address the

risk that judicial committee members may also be involved in executive roles in related matters. Without structural protections that separate adjudicative and executive functions, it is likely that in practice judicial committee members will face political and other pressures to decide cases based on considerations other than the law.

The effective functioning of judicial committees is complicated by power dynamics, political maneuvering and a lack of trust between the Mayor and Deputy Mayor, Rural Municipality Chairperson and Deputy Chairperson, and Deputy Mayor and Chief Administrative Officer. During our interviews, suspicions were expressed that it would be difficult to enforce decisions if the chair and deputy chair belonged to different parties. Even when the chair and deputy belonged to the same political party, issues of political hierarchy and coercion proved to be an impediment to justice delivery. There were also comments about judicial committees conducting hearings and settling disputes in the absence of the chair or chief.

Due to their political affiliations, reports have started to emerge highlighting the politicization of the dispute resolution process at the local level. This can have a negative effect on the efficiency, credibility and political careers of emerging local leaders, and also on individuals seeking justice. In our interviews with judicial committee members, a key complaint was on the complexities of managing various executive and judicial responsibilities without much technical and ethical “know-how” and support. In other areas, as an exertion of power, judicial committees were not cooperating with mediation centers or were handling disputes outside their jurisdiction. This raises fears that the poor and marginalized will continue to be ostracized, politicization and corruption will continue to persist, and access to justice will continue to be elusive even in the new federal setup.

During our interviews, local citizens revealed that people from different political ideologies feared approaching the committee. Likewise, some people shared that political pressure was applied in some cases and that there were difficulties in settling disputes brought by individuals belonging to different political ideologies.

Impartiality and independence are regarded as pre-conditions for justice dispensation. An individual may tolerate decisions against him/her but cannot tolerate partiality. The office bearers in judicial committees are elected on a partisan basis. They are also affiliated to a political party. At the local level, there may be representatives elected from different parties, but there is no provision that calls for a mixture of representatives from different parties in the judicial committee. Given this scenario, serious attempts must be made to prepare the ground for impartial and independent justice dispensation through judicial committees. This can be achieved through robust working procedures for judicial committees, coherent guidelines on issues related to conflicts of interest, and a collaborative monitoring and oversight mechanism.

A study conducted in Bangladesh on the local justice system found that many chiefs and members of the local justice structure not only lacked legal knowledge but were found to be corrupt and prejudiced towards certain political views. To ensure that judicial rights granted to the local level are exercised impartially and independently, a few countries have authorized people other than representatives elected party-wise, or allow disputing sides themselves to choose their “judges”.⁷¹

Issues such as discrimination and indifference towards the norms and values of minority communities are a major challenge. A few sporadic studies show that local level bodies might not be as sensitive to human rights instruments and the right to equality, right to a fair trial, right to protection against self-incrimination, and right to legal representation guaranteed by the Constitution. The United Nations Development Program (UNDP) finds that traditional and indigenous justice systems are susceptible to elite capture and may serve to reinforce existing hierarchies and social structures at the expense of disadvantaged groups. If local justice systems are not reinforced by the norms and values of justice and human rights, one cannot deny that they may subject justice to distress.⁷²

The Question of Fulfilling Basic Standards for a Fair Trial

The issue of a fair trial in the judicial process is a matter of human rights. This norm is based on the dictum that it is not enough to merely provide justice, but one should also be able to see that justice has been done. Even

71 Sumaiya Khair. *Alternative Approaches to Justice: A Review of ADR Initiatives, under the Democracy Partnership*. Report prepared for The Asia Foundation. Dhaka. May, 2001.

72 *Customary Justice: Challenges, Innovations and the Role of the UN*. Available from <http://worldjusticeproject.org/sites/default/files/customary_justice_idlo.pdf>

though decisions may be correct, if the process of the trial is erroneous, then it will render the decision unacceptable. Therefore, procedural matters like service notice to the other side, ensuring that such notice has been served, the response of defendants, the collection of evidence, and the objective assessment of evidence are very important.

Although it is stated that the procedure for initiating proceedings and settlements shall be as provided for in local laws, most local level procedural laws are yet to be formulated. In addition to this, there is a question on how formal or informal procedural laws should be (for example, how formal should the process of serving the date be or how formal should the complaint form be or whether filling up a template is enough etc.) Weak archiving of decisions taken is another problem gripping judicial committees. While some cite a lack of adequate resources (human and financial), others simply don't have the physical infrastructure to do so effectively. There are also instances where ambitious judicial committees are trying to digitize their archives.⁷³ However, these are either in their infancy and too few and far between to make a significant impact. In some locations, set procedures were not followed. Matters like serving notice and conducting mediation were all done verbally. Instead of taking disputes through a lawful process, chairs or chiefs alone have settled them.

In the context of significant ambiguity regarding the powers and responsibilities of judicial committees, given the opportunity to choose between adjudication and mediation - elected representatives might prefer adjudication as it provides a platform to exert influence, power and authority. This is validated, during our interviews, by the lack of incentive to promote mediators and mediation at the local level. Judicial committee members often cited the view that adopting facilitative approaches such as mediation (or referring cases that are addressed to them) might be considered shying away from responsibilities – as they put an emphasis on disputing parties (rather than judicial committees) to come up with a durable resolution. Moreover, asking politicians to refrain from exerting their judicial discretion, albeit in the limited classification of cases, is not an easy task – especially as it has direct consequences in showcasing their work to their constituencies and exerting influence within their constituencies. In the larger context, policy reform efforts could be labelled as a move to re-enforce the centralized

73 In Dhangadhi, for example, judicial committees have started experimenting with a digital case management system to track and record disputes.

tendencies of the past by undermining the work of judicial committees and the roles and responsibilities of elected representatives. Contrastingly, an overemphasis on judicial committee work might hamper some of the other tasks judicial committees are entrusted to execute diligently. This can have a negative effect on the efficiency, credibility and political careers of emerging local leaders. The question is how to raise awareness and incentivize judicial committees to work in tandem with mediation centers and other access to justice service providers.

The Question of Women’s Agency and Social Inclusion

A cursory analysis of the 2017 local elections results clearly show that Nepali women’s participation in leadership and decision-making roles is littered with substantial challenges. Patriarchy remains entrenched in the public psyche, inhibiting women from effectively operating in leadership roles – including heading judicial committees. The lack of meaningful participation impacts the ability of locally elected officials to engage with the daily business of governance and challenge decisions made by civil servants and central political leaders.

“Women elected to local governments in 2017 consist of seven mayors, 274 deputy mayors in municipalities; 11 chairpersons and 419 deputy chairpersons in rural municipalities. With 41 percent of all elected positions in local bodies filled by women, this is an historically unprecedented presence of women at any level of government. However, nearly all of them (95 percent) are ward members (elected in the women-only, Dalit women-only and open categories), and thus not in decision making roles.”⁷⁴

Deputy heads – often women with only high school education – are heavily dependent on bureaucrats in technical matters in the local government’s legal unit.⁷⁵ Public and civil service perception towards elected women representatives remains clouded by the normative construct of gender roles and responsibilities. Judicial committee heads, particularly women, have complained that training initiatives have failed to prepare them for their judicial committee roles. They also continue to get excluded from participation in local executive decision-making and related law and policy deliberations.

74 Thapa. D. 2019. The Politics of Change. Social Science Baha and The Asia Foundation.

75 Diagnostic Study of Local Governance in Federal Nepal, The Asia Foundation. 2017.

Marcus Cox on Justice Institutions and Discrimination

“There is some reason to be skeptical that the justice system is the best starting point for addressing discrimination, compared to other possible methods like public education, mobilization of women’s groups or political campaigning. There is evidence that, even if laws are reformed to address gender discrimination, women tend to be poorly equipped to use the legal system to assert their rights, and justice officials may block implementation of the reforms. This was the experience in Tunisia following changes to family law to abolish traditional Islamic divorce and prevent the abandonment of women. There are limits to the extent to which legal institutions are willing and able to move ahead of broader social trends.”⁷⁶

However, he notes, there may be conditions in which courts or other justice institutions are willing and able to take the lead in addressing discrimination. He cites the Indian public litigation example in formally eliminating a range of discriminatory laws. Nepal’s Supreme Court has also made attempts to interpret the Constitution liberally and provide landmark judgements on same sex marriage, gender justice and other areas.⁷⁷ While there is little reason to believe that improvements to the efficiency of the justice system in general will help to address gender discrimination, there are nonetheless circumstances in which a legal empowerment approach can offer a credible strategy, particularly when combined with other measures such as advocacy approaches in civil society or the political sphere.

In the case of women’s access to justice at the local level, legal experts note “financial constraints, fear of re-victimization by the perpetrators, family prestige, lengthy and complex court procedures, lack of knowledge about available legal remedies, lack of trust in the justice system, geographical distance from service providers and language barriers”⁷⁸ as the main hindrances. Citing research undertaken by NJA in 2016, the same study notes that only 27.6 percent of women victims of violence and discrimination were found to be seeking support from justice sector institutions.⁷⁹

76 Cox, Marcus. 2008. *Security and Justice: Measuring the development returns – A review of knowledge*. Report prepared for DFID. London, Agulhas Development Consultants Ltd.

77 Bhatrai. A.M. 2012. *The Landmark decisions of the Supreme Court on Gender Justice*. National Judicial Academy.

78 Ghimire, B., Subedi, P., Devkota, A., Sangroula, Y., & Kisan, Y. B. INDEPENDENCE OF THE JUDICIARY IN NEPAL: CONCEPT, CONTEXT AND CONCERNS. SOUTH ASIA JUDICIAL BAROMETER, 201.

79 Ibid.

The Question of Community Awareness and Engagement

In Nepal's hierarchical society, benefits from the bureaucracy and judicial system are more accessible to powerful actors as compared to those who lack voice and authority. People from disadvantaged and marginalized communities, are the most vulnerable. With limited access to the formal court systems and the inadequate coverage of mediation services in the country,⁸⁰ the judicial committee increases the risk of perpetuating a power divide within local communities. Even if coherent policies and standardized training initiatives are implemented, the lack of community knowledge on how to access justice needs serious consideration. For example, The Asia Foundations' Survey of the Nepali People⁸¹ indicates that women, especially those from marginalized communities, are less aware than men of services provided by their local government. Similarly, the elderly, Dalits, and other vulnerable and marginalized groups have limited or no access to the justice system. Civic engagement on their rights and access to justice is required to increase awareness among vulnerable communities. On the flip side, urban residents, the politically influential, males, the educated, and the economically well-off have significant leverage over the justice system, especially the courts.

Ambiguities and confusion surrounding the transition into a federal structure have limited inclusion and civic engagement. At stake for local individuals and communities are legal rights related to land tenure, labor contracts, road and water access, and other matters that affect local livelihoods. An inability to engage and respond to the needs of women, minorities, low caste communities and other marginalized groups is limiting progress on citizen's desire for a stable, professional and holistic framework to access justice. This is caused by social structures and norms but exacerbated by decision making approaches at all levels of government that are not accountable and concentrated in the hands of the few.

80 Although the Constitution and the LGOA envision mediation centers to be available at the ward level, they have not been established in about 80% of all locations due to a lack of resources.

81 Most recently updated in April 2019, see www.asiafoundation.org/publication/a-survey-of-the-nepali-people-in-2017/

6

STRATEGIES TO BE ADOPTED IN THE EXERCISE OF JUDICIAL RIGHTS

The history of exercising judicial rights at the local level suggests that there is no need to jump to conclusions. However, if attention is not given to preparations and to addressing problems, things will not move in the right direction. The operating environment and public demand for justice provisions in Nepal vary with geography, demography, economic realities, politics, and other factors.

“Inadequate theory and prior social research – rather than misguided intentions, a surfeit of ‘political will’, or insufficient resources – have undermined the capacity of practitioners to implement legitimate and sustainable legal reforms in low-income countries.”⁸²

It is critical to monitor judicial committees and community needs within each local context for an evidence-based approach to inform policy decisions and maximize impact. Hence, the following strategies are recommended to ensure effectiveness in the exercise of judicial rights at the local level:

1. Initiate Policy Dialogue.

Currently, due to the ambiguous and un-coordinated state of affairs, it is critical to host policy dialogues on two critical issues:

- Develop conceptual clarity on judicial committees – their roles, responsibilities and working procedures. This needs to happen through a multi-stakeholder joint forum with relevant stakeholders from all spheres of government, including judicial committee members at the local level. Ideally, this should be led by a federal agency in collaboration with local government associations like National Association of Rural

82 Ibid. Sage, Caroline and Woolcock, Michael. Pg. 14

Municipalities in Nepal (NARMIN) and Municipal Association of Nepal (MUAN).⁸³

- Establish clarity, understanding, and agreement among key Government of Nepal (GoN) stakeholders such as the Ministry of Federal Affairs and General Administration (MoFAGA), Ministry of Law Justice and Parliamentary Affairs (MoLJPA), Supreme Court, Mediation Council, and district courts on their roles and responsibilities in implementing access to justice at the local level. Moving these actors beyond their current legislative and programmatic morass around their access to justice mandates will create synergy, maximize efficiency, and support them to work together more strategically.

It is imperative that judicial committee members are included in discussions so that policy is informed by practice-based experiences. By sharing practices, judicial committee members build capacity and can advocate for effective implementation and policy reforms. This can be operationalized through the establishment of an advisory committee at the national level represented by the Supreme Court (through the Mediation Council/Access to Justice Commission and other relevant departments), MoFAGA, NARMIN, MUAN and Ministry of Law, Justice and Parliamentary Affairs (MoLJPA) and other relevant agencies involved in this area. The advisory committee could take the lead on:

83 NARMIN and MUAN are representative bodies of municipalities and rural municipalities across Nepal.

- Enhancing policy discussions to establish conceptual and procedural clarity surrounding JCs and engage in policy reform, including on the role and authority of JCs;
- Facilitating a comprehensive training package development process that is participatory and inclusive, avoids duplication and is owned by all stakeholders;
- Addressing gender, ethnic, class and other power imbalances, especially in light of the fact that most JC chairs are female and that most communities are rural, poor or otherwise marginalized;
- Being sensitive to local customs and cultures in each target location, and informing policy decisions with practice-based experiences from target locations;
- Promoting coordination through horizontal and vertical linkages among access to justice service providers across the tiers of government and other stakeholders; and
- Establishing a framework for a collaborative and sustainable roll-out of future capacity building initiatives

As Nepal transitions into a federal state, evidence and information will provide a clear understanding of these complex changes and how they affect realities on the ground and will influence and inform the discourse at and between the local, provincial, and national level. It is recommended that sound evidence and analysis be used to influence discourse to avoid making decisions purely based on individual or institutional incentives and power, and to combat non-transparent policy making that undermines the goals of the Constitution.

2. Promote Policy Reform

Once a consensus is reached on the conceptual and procedural framework for judicial committees through policy dialogues, it will be important to analyze and map relevant policies that impact judicial committees and the larger judicial eco-system across the three spheres of government. This will have to take into account existent policies and prioritize additional legislations, guidelines and procedures to support the institutional frameworks. Some of the crucial policies that need revision are highlighted below:

- Constitution of Nepal, 2015

The starting point of contention emanates from variant interpretations of the word “settle” within Article 217 of the Constitution. Therefore, it is recommended that a guidance note on the interpretation of the

Constitution (in relation to judicial committees) be forwarded by the Constitutional Bench⁸⁴ housed in the Supreme Court of Nepal. As noted above, a writ has been filed questioning the jurisdiction of judicial committees. Perhaps, the Supreme Court will come out with an interpretation and set future precedence. If this does not suffice, a guidance note on the conceptual and procedural framework of judicial committees could be a starting point. This would help supplement federal, provincial and local legislation in framing (or revising) policies accordingly.

In the recent case of Dilli Prasad Neupane v Office of the Prime Minister and Council of Ministers, a writ was filed requesting the dismissal of judicial committees as a dispute resolution body at the local level. The Constitutional Bench dismissed the writ in favor of judicial committees on Friday, January 18, 2019.⁸⁵ While the Constitutional Bench dismissed the challenge on the validity of judicial committees, it does not provide additional guidance on the conceptual and procedural framework as suggested above.

- Local Government Operations Act, 2017 and Local Government Procedures

As discussed before, there are a lot of ambiguities and inconsistencies within provisions related to judicial committees in the LGOA. Therefore, an amendment to the LGOA should be seriously considered. This should be followed by the enactment of the LGOA procedural law. After the formulation of local procedural laws, procedural guidelines and directives should be formulated to ensure ease of use.

- Mediation Act 2011 and Regulations 2014 and the enactment of the Local Government Mediation Act

As discussed before, existing provisions on mediation management and regulation is inadequate. Clause 52 (2) of the LGOA, 2017 states that matters related to mediated settlements and the implementation of decisions shall be as provided for in local law. Simultaneously, Schedule

84 As per Art. 137 (2) of Constitution of Nepal, the Constitutional Bench is entrusted with the responsibility of interpreting the provisions of the Constitution.

85 Writ No. 075-wc-0021 Dilli Prasad Neupane v Office of the Prime Minister and Council of Ministers. Supreme Court of Nepal. January 18, 2019.

8 of the Constitution provides local governments the autonomy to draft legislation on mediation management. When drafting local laws on mediation, consistency with federal laws (such as LGOA, mentioned above) and linkages with federal regulatory bodies such as the Mediation Council needs to be considered.

- Administration of Justice Act 2016 and District Court Guidelines and Procedures.

The oversight of the judicial functions of the state, wherever those may be located, is a key strategic metric of performance of the judicial branch.⁸⁶ Prevailing laws allow for monitoring and hearing appeals in district court against decisions by judicial committees. Therefore, to promote uniformity and reduce the volume of arbitrary practices, it is recommended that a minimum guideline (at the district court level) regarding the hearing of appeals against decisions made by judicial committees is developed and enforced. Additionally, district court judges need to be incentivized to provide adequate oversight and support to judicial committees. One way to initiate this could be by allowing judicial committees within a particular district to evaluate the performance of district court judges (within the same jurisdiction) in terms of the quality of their engagement and oversight of judicial committees and submit recommendations to the judicial council and judicial service commission.⁸⁷

- Specific policy recommendations:

Develop a policy framework to offset the separation of power issues through the development of robust working procedures for judicial committees, coherent guidelines on conflict of interest related issues, and a collaborative monitoring and oversight mechanism.

86 George Varughese and Iain Payne. Devolving the Judiciary: New and old structural challenges remain in federalism and access to justice. *The Nepali Times*. 2019. Available from <<https://www.nepalitimes.com/opinion/devolving-the-judiciary/>>

87 The Judicial Council is a five-member independent body headed by the Chief Justice along with the Minister of Law and Justice, the senior most justice of the Supreme Court, and two distinguished jurists representing the Prime Minister and Nepal Bar Association. As per Art. 153 of the Constitution of Nepal, the Judicial Council makes recommendations and plays an advisory role in the appointment, transfer, taking of disciplinary action and dismissal of judges and in other matters relating to the administration of justice. Similarly, as per Art. 153 of the Constitution of Nepal, the Judicial Service Commission is responsible for forwarding recommendations related to the appointment, transfer or promotion of gazetted officers of the Federal Judicial Service or taking departmental action concerning such officers in accordance with the law.

- Procedural guidelines could be setup allowing disputants to choose from a panel of committee members. This would lessen the perception of bias and politicization of the process. For this, it is recommended that the judicial committee panels should be expanded to five members or even seven members rather than three. Judicial committees can then display the roster at the municipality/rural municipality offices and request disputants to choose a member from the panel.

The Philippine System

The Philippine system, as discussed above, employs a methodology wherein the local conciliation panels (Lupon) are comprised of ten to twenty members appointed every three years from among community (barangay) residents. Each elected head of the municipality (Punong), within the first fifteen days from the start of his/her term of office, prepares a list of proposed people who want to serve as Lupon members for the administration of community justice. The conciliation panel consists of three members who must be chosen by the parties involved in the dispute among the list of members of the Lupon. In case no agreement is reached on the panel membership, the Punong will determine its composition.

Unlike the Nepal system, it is the elected representative that initiates mediation at the municipal level. Once the complaint is received, the Punong calls both the respondent(s) and complainant(s), with their respective witnesses, to appear before him/her for a mediation of their conflicting interests. If he/she fails, he/she sets a date for the constitution of the conciliation panel that will hear both parties and their witnesses, simplify issues, and explore all possibilities for an amicable settlement.

- Additionally, judicial committees (including municipal/rural municipal assemblies responsible for electing judicial committee members) can make the appointment of members more inclusive of class, caste, ethnicity, gender and political representation. This diversity can potentially give the composition more balance and help to mitigate anxieties related to the separation of powers. For this, when electing judicial committee members at the rural/municipal level, stipulating that members of judicial committees

should not represent the same political party, gender or ethnicity could be one example on how to ensure diversity within panels.

- Currently, a policy framework giving local governments the autonomy to recruit specific personnel as per their need is missing. Therefore, it is recommended that local governments be given the autonomy to recruit personnel.

Overall, it is recommended that policy reform or new policy enactment is informed by contextual and systemic barriers to gender equality and social inclusion. The scale of necessary changes may seem daunting (considering there might be other laws that will need revision or enactment), however, incremental steps towards policy reform can help strengthen the platform for additional institutional reform.

3. Formulate and Implement an Integrated and Comprehensive Training/ Capacity Building Program

Office bearers in judicial committees (including support staff) should be given capacity development opportunities on issues they feel are important and necessary. The trainings need to prepare judicial committees to recognize the pull of partiality towards disputants; uphold non-negotiable values such as freedom, justice, dignity, respect and fundamental human rights; and be cognizant of the need to work as a team to strike a balance between harmony and rights. Therefore, capacity development programs should be designed and implemented in consultation with the office bearers of judicial committees giving special consideration to the following aspects:

- Ensuring a high degree of sensitivity for facilitating a holistic training needs assessment, wherein apart from ensuring stakeholder participation in terms of numbers, special efforts are made to draw them out to articulate their problems, concerns and aspirations. Training needs assessment tools like brainstorming sessions, focus group discussions, in depth interviews with select key informants from each provinces may be used for culling out their training needs.
- Ensuring the curriculum is based on the minimum standards for community dispute resolution methods with special consideration given to applicable Nepali laws. In particular, the training curriculum should address issues related to gender, caste, class, and ethnic identities; and topics prioritized according to the LGOA and community needs (such as GBV and DV issues, mediation, natural resource allocation, land boundary and other areas of local livelihood).

- Moving beyond the current top-down lecture pedagogy and promoting interactive skills training through case studies, tutorial videos, and simulated judicial committee sessions. Integrating manuals, workbooks, posters, and checklists to supplement the training process.
- Ensuring that the training approach, delivery, and material used takes into account the differing needs of elected representatives. The differential exists due to power, availability of information, gender and functional literacy, women, youth, first-time elected representatives and multi-termers. For example, if women elected representatives find it difficult to leave their homes for a length of time, various distance education modes, or on-site training, may be better suited to them.
- Ensuring that the trainings recognize that supporting female elected representatives, in their leadership role, requires approaches that address persistent stereotypes against women, gender-based violence, and other systemic challenges that women face.
- Ensuring that the training is able to cater to illiterate JC chairs, members and other participants.
- Ensuring that the curriculum defines clear processes for JCs operations such as client pre-screening/risk assessment, systemic analysis of cases within the context of gender norms and ethics, and referral mechanisms.
- Promoting expanded investments in applied research and longitudinal studies looking at pathways to justice for local citizens.

Unlike existing training activities that are ad hoc and generally premised on institutional or sectoral interests which fail to take into account other stakeholders,⁸⁸ it is recommended that a comprehensive, integrated, and adaptive capacity building curriculum that integrates with ongoing training efforts and is sustainable through the ownership of institutional partners is promoted. For this, leveraging the multi-stakeholder network of advisory committees (mentioned above) in the design and roll out of the trainings will be crucial.

In the long term, as discussed above, computer-based self-learning modules can be created and made available online, for easy, cost-free access

⁸⁸ For example, JC training efforts by the Supreme Court (which was initially funded by UNDP), and those of MOFAGA (which are government funded with some support from external sources such as USAID).

of all judicial committee members. This mode of training holds immense potential for promoting self-learning at the learner's own pace, time and space. However, presently, it is constrained by the fact that e-literacy among elected representatives is very limited. This can be supplemented by exposure visits to best practice municipalities/rural municipalities to promote experiential learning and direct exposure. Similarly, as discussed above, looking beyond the current crop of elected representatives, mechanisms to develop competencies of future elected representatives needs to be considered. For this, peer learning mode of training employing elected representatives as trainers is recommended as one potential initiative. The advantage of involving experienced and effective elected representative and officials as trainers is not only in their becoming inspiring role-models for new judicial committee members, but also of increased receptivity and acceptability of their own peer group among elected representatives. The most crucial aspect related to peer learning mode is the development and promotion of local resource persons and local expertise.

UNDP's Capacity Development Strategy Report for Bihar Panchayat

Besides providing information and building knowledge, holistic capacity development of elected representatives also needs to address skill building and attitudinal changes. Moving from providing information and building knowledge to skill building will require an additional component of on the job training. Examples include on-ground facilitation support by mentors/CSOs to Panchayats for holding their first meetings, forming standing committees, and holding the first village assembly meetings etc.⁸⁹

4. Promote Inter-Agency Collaboration and Ensure Quality Control

Agencies like the NJA and LDTA could be mandated to work in collaboration with line ministries (MoFAGA), Supreme Court and local associations such as NARMIN and MUAN to conduct country-wide roll out of trainings. Ideally, the formation of an institution like the Mediation Council can help foster inter-agency collaboration and establish a comprehensive standard for trainings, enhance policy engagement, establish standard procedures, and build a robust body of knowledge for monitoring the training standards of

89 UNDP. 2012. Capacity Assessment and Capacity Development Strategy Report for Strengthening Panchayati Raj Institutions in Bihar. Ministry of Panchayati Raj, India.

judicial committees. However, the roles, responsibilities and jurisdiction of this institution needs to be clearly outlined to avoid jurisdictional overlap and confusion.

At the provincial level, as discussed above, establishment of a peer support network can help members gain collective strength and solidarity, a common platform to share experiences, increased recognition and voice and enable dialogue and the sharing of experiences. For e.g. As per LGOA, jurisdiction of judicial committees can be expanded through provincial laws. Provincial peer networks can work with provincial assemblies to reconsider and potentially expand jurisdictions of judicial committees based on context and need.

At the local level, clear referral and inter-agency coordination frameworks need to be established to help cater to the holistic access to justice needs of disputants. As mentioned above, judicial committees, local police, quasi-judicial bodies, district courts and other access to justice service providers need an arena where they can re-group on a regular basis and discuss their experiences and challenges and devise strategies to move forward effectively. Facilitating regular coordination meetings and policy dialogues will promote sound and efficient cross-referrals, improve monitoring and reporting of judicial committee processes, better assess their fairness, and raise awareness regarding their respective roles and responsibilities and support collaborative action in addressing local disputes under the new federal structure. All these different, yet interlinked, mechanisms need to work in tandem so that access to the holistic needs of disputants is guaranteed. These low-cost forums provide an opportunity for judicial committee members to build their capabilities through the sharing of experience and practices, and advocate for effective implementation and policy reform. More specifically, networking workshops can be utilized to develop referral guidelines that judicial committees can use to connect individual clients to relevant services or forward cases to appropriate providers. This is important to rectify the current state of events where judicial committees often either refuse cases because of a lack of skill, or worse, attempt to settle cases that fall outside their scope of authority or skillset.

Commission on Legal Empowerment of the Poor: Working Group Report

“The South African Legal Aid Board, which experimented with a variety of models for providing civil legal aid, found that the most effective model is a ‘justice center’ model — a ‘one stop legal shop’ that provides comprehensive legal services through a combination of lawyers, advocates, paralegals, and administrative staff. Similarly, many Latin American countries have had success with ‘Casas de Justicia’ (Houses of Justice) that provide assistance with both legal and non-legal aspects of common problems, such as child support and custody issues, property disputes, domestic violence, and administrative matters.”⁹⁰

For an effective judicial eco-system to flourish, constant interaction and collaboration between district courts and judicial committees is highly recommended. This reduces the burden on district courts and subsequent higher courts and allows judicial committees to develop their skills; evaluate their work and apply corrective measures under the guidance of judges and judicial officers. These interactions also help district court judges situate the challenges judicial committees face and devise uniform and standard monitoring and appeal guidelines (as discussed above in policy reform section).

In the Philippines, the responsibilities and duties of the Lupon are primarily to supervise over the conciliation panels, to meet once a month to provide a forum for discussing issues on the amicable settlement of disputes, and to enable conciliation panel members to exchange their experiences, as well as other duties and functions that may be prescribed by law.⁹¹

5. Provide Adequate Resources

One of the key objectives of Nepal’s transition into a federal structure is to increase efficiency and expand the delivery of basic services. Local governments will deliver basic services like education, health, local transport, water and justice. As the first line of justice delivery, judicial committees practice and provide a platform for ordinary and routine forms of justice

90 Commission on Legal Empowerment of the Poor – Making the law work for everyone, Vol. II. Working Group Reports. 2008. Pg. 27

91 Clause 402. Local Government Code 1991. The Philippines.

that directly affects daily life. Judicial committees should not be forgotten in considering the judiciary's irreplaceable role in instilling a commitment to the rule of law and providing access to justice. To ensure adequate resources for judicial committees, advocating for the allocation of resources (funds and human resources) is crucial. For this, judicial committees can work closely with local associations to amplify their voice. This needs to be supplemented by involving local bodies in the planning process and strictly adhering to policies guiding the proper usage of funds.

Building a separate building for the judicial committee and its judicial work or, at the very least, creating a separate hearing room for judicial committees is important. Hearing rooms are meant for dispute resolution but could also serve as an archive section for keeping a record of the number of cases registered, number of cases settled, the nature of decisions taken, and the implementation status of decisions. However, there needs to be clarity on the structure of the hearing rooms. Reports, as highlighted earlier, suggest that some judicial committees have created structures resembling formal courts complete with witness stands to adjudicate cases. The implications such a judicial space has on the disputant's mindset cannot be under-stated. Courts, or structures resembling courts, experts suggest re-enforces hierarchy and power dynamics at the local level.⁹² This could potentially hamper access to justice process at the local level. Further, disputes must be settled in line with prevailing legal parameters. Therefore, it is necessary to have access to at least the books of law, precedents by the Supreme Court and other legal reference materials. The library does not necessarily have to be a physical space and can be setup virtually (digitally). Simultaneously, building of shelter homes and safe houses, for disputants who are at risk, needs to be considered.

Mechanisms to arrange the police force to enforce decisions is also recommended. Schedule 8 of the Constitution allows local governments the autonomy to establish and manage town police. Based on this, local government can enact laws allowing town police to follow up and support the enforcement of agreements/settlements achieved through judicial committees.

Simultaneously, federal and provincial governments need to allocate adequate human resources to local governments (especially judicial committees). For this, the qualification of judicial officers designated to support judicial committees should be ensured. Further, as recommended

92 L. L. Levenson. 2008. Courtroom Demeanor: The Theater of the Courtroom. *Minnesota Law Review*.

above, a policy framework giving local governments the autonomy to recruit specific personnel as per their need is missing. Therefore, it is recommended that local governments be given the autonomy to recruit personnel.

Clause 49 (1) of the LGOA, 2017 provides for the establishment of mediation centers in each ward for the purpose of settling disputes through mediation. Disputes to be settled through mediation by judicial committees have to be referred to enlisted mediators. For this, it is recommended that mediation centers are established at the ward level. Judicial committees should prepare a roster of eligible and interested mediators⁹³ who can then work as a mediator for disputes registered at a committee. Judicial committees have to arrange for 40 hours of training to produce qualified mediators by themselves or with the help of other organizations and should keep them in a roster. The Mediation Council has accredited around 25 civil society organizations capable of providing mediation trainings. Judicial committees can solicit support from these organizations to prepare mediators at the ward level. To sustain mediation practices at the ward level, local governments need to provide appropriate financial and other incentives to local mediators.

Based on the lead taken by some municipalities, such as Dhangadhi submetropolitan city, local governments should be encouraged to design a simple case management database to assist judicial committees in recording and analyzing information for decision making. This will enable judicial committees to record and maintain important information such as the total number of cases registered, types of cases, and breakdown of disputants. The database will also be useful in analyzing and extracting information on the type, frequency and location of disputes, satisfaction levels of disputants and the durability of settlements.

Lessons from Nepal's Formal Judicial Mechanism

The judiciary has made progress towards clearing its backlog of cases which is vital for increasing access to justice. The introduction of electronic case management platforms and court-facilitated mediation has advanced this process. The switchover to technology has been slow, however, and its effective use will require continual upgrading of systems and the effective maintenance of equipment.⁹⁴

93 Unless specified by local mediation laws; otherwise, currently, to act as a mediator, one must get at least 40 hours of training on mediation as per Rule 46 (1) of the Mediation Rules, 2014.

94 A Guide to Government in Nepal: Structures, Functions, Practices. 2012. The Asia Foundation.

6. Re-think Women's Agency and Social Inclusion

Gender and social inclusion must begin somewhere, and the greater representation of women and members of disadvantaged communities in local political and governance structure is a positive start.⁹⁵ As key actors, across the three tiers of government, maneuver and reposition their interests and power in the transforming landscape, it will create both opportunities and constraints for re-configuring women's agency and social inclusion.

Despite the positive momentum gained through local elections in 2017, it is now evident that increased representation has not translated into increased decision-making roles. Currently, there is a lack of adequate policies and implementation guidelines to address systemic challenges that affect women's participation in governance and judicial matters. As discussed before, Nepali women's participation in leadership roles is fraught with challenges, reflecting stubborn traditional gender biases in Nepali society that compromises their ability. For example, in our interviews, female judicial committee heads complained that policies do not protect them against their exclusion from local executive and policy-level decision-making. The first step is to evaluate our policy making approaches, and re-think ways we can enhance women's agency and inclusion. For e.g., supporting the revision of existing laws to make them gender-sensitive and responsive to GBV through the introduction of civil remedies, repeal of discriminatory laws, and harmonization of domestic legislation with international standards.

95 Ibid. D. Thapa. 2019. Pg. 82

Notable international Standard

CEDAW General Recommendation No. 33 on women's access to justice lists six components – justiciability, availability, accessibility, good quality, accountability and provision of remedies – as necessary for ensuring women's access to justice. In notes “while differences in prevailing legal, social, cultural, political and economic conditions will necessitate a differentiated application of these features in each State party, the basic elements of the approach are of universal relevance and of immediate application.”

The Committee specifically observed that “...the centralization of courts and quasi-judicial bodies in the main cities, their non-availability in rural and remote regions, the time and money needed to access them, the complexity of proceedings, the physical barriers for women with disabilities, the lack of access to quality, gender competent legal advice, including legal aid, as well as the deficiencies often noted in the quality of justice systems (gender-insensitive judgments/decisions due to the lack of trainings, delays and excessive length of proceedings, corruption, etc.) all prevent women from accessing justice.”⁹⁶

In terms of empowerment, scholars have argued that trainings alone will be insufficient and a more long-term approach looking beyond “empowerment” at ways to transform social norms and values needs to be considered.⁹⁷ As noted above, peer support networks for judicial committees and community members can be an effective way to organize people (e.g. to identify, set and promote access to justice priorities; gain influence and negotiation power; promote the dissemination of general legal information; share knowledge or teach practical skills).⁹⁸ More specifically, as an example, a provision of legal aid services to women and marginalized groups including the removal of all impediments that women and disadvantaged communities may encounter in accessing justice must be mainstreamed across all the targeted interventions recommended (i.e. from policy reform, curriculum refinement, inter-agency collaboration mechanism to resource re-allocation, community engagement and others).

96 No. 13. 2005. CEDAW General Recommendation on women's access to justice. #33

97 Seira Tamang. 2018. They've given us the chair but bound our hands and feet: Embedding elected female representatives in institutions in Nepal. *Studies in Nepali History and Society*. 23(2): 309-352. Pg. 343

98 Commission on Legal Empowerment of the Poor – Making the law work for everyone, Vol. II. Working Group Reports. 2008.

Legal empowerment literature argues persuasively that the answer is unlikely to be generic investments in improving the efficiency of the justice system, but rather politically informed strategies to help victims of injustice use the legal system to their advantage. This may include law reforms, procedural changes to justice institutions to allow for public-interest litigation and class actions, investments in informal justice, awareness raising and community mobilization.⁹⁹

It is critical to reduce gender inequality and disparities that lead to the exclusion of individuals and groups. In Nepal, disparities are rooted in gender, age, ethnicity, religion, caste, class, sexual orientation, place of residence, mother tongue, and dress. People face exclusion due to disability, poverty, denial of rights; and lack of access to resources, political and economic power and authority, and justice. “Nepali women” are often seen as a homogenous group, ignoring the diversity within women and the special needs of women at the margins. Any targeted intervention needs to focus on the intersectionality within Nepali women (and other socially excluded groups) to promote an inclusive and gender just society. This can shift gender and social inclusion attitudes and practices.

7. Promote Community Engagement

Local governments have not invested enough on educating people on the meaning and purpose of judicial committees and local dispute resolution mechanisms. There is a lack of ownership in rural municipalities or municipalities on the decisions made by judicial committees and therefore a pressing need to inform local people about the significance and jurisdiction of judicial committees in order to enhance their access to justice. This will increase people’s trust in judicial committees and build an environment for community ownership. Simultaneously, barriers need to be removed to give poor, marginalized and deprived people ease access to the services provided by judicial committees. The Survey of Nepali People¹⁰⁰ research, indicates that one of the main ways citizens receive information on government services and engage in civic participation is through face to face interactions with trusted members of the community. Partnering with an organization that is already

99 Ibid. Cox, Marcus (2008). Pg. 176

100 Most recently updated in April 2019, see www.asiafoundation.org/publication/a-survey-of-the-nepali-people-in-2017/

providing community legal education such as NARMIN, MUAN and the District Justice Coordination Committee or other civil society organizations could be a good starting point. The Survey of Nepali People research also indicates that citizens are very receptive to information provided by (Public Service Announcement) PSAs, especially over community radio and TV.

In the same study, World Bank notes emerging lessons on community education initiatives: "...the design of public education initiatives should be informed by existing, context-specific barriers to knowledge dissemination and the impact of education efforts is heightened when education is connected to concrete problems facing poor people, and to opportunities for citizen action."¹⁰¹

Lessons Emerging from World Bank Practices on Community Engagement

"In Armenia, the Judicial Reform Project, produced a television program, My Right, focused on legal awareness. The program topped Armenian public television ratings two years in a row and received a positive assessment. The show was accompanied by a website that provided legal information and an opportunity to pose questions to legal experts from the Ministry of Justice.

In Indonesia, the Women's Legal Empowerment Program included a creation of a multi-stakeholder forum at the district level. This forum brought representatives from the police, prosecutors, and general and religious courts together with local NGOs and women's paralegal groups. The forum provided a space for dialogue on women's legal rights and delivered legal training to female paralegals."¹⁰²

Utilizing the vast network of community radio broadcasters, community radio programs tailored for each locality could serve as an avenue for public law dissemination as well as a platform for dialogue that provides a feedback loop to judicial committees and key stakeholders. PSAs could include a mix of awareness raising on judicial services available at the local level and highlight small success stories resulting from access to justice within the communities. In particular, radio programs should be designed to allow community members to interact with judicial committee members, mediators and district court judges through phone-in and/or face to face interactions through community

101 Ibid. Pg. 11

102 Maru, V. (2010). Access to Justice and Legal Empowerment: A Review of World Bank Practice. Hague Journal on the Rule of Law, 2(2), 259-281. doi:10.1017/S1876404510200076

radio listeners' groups.

Supplementing these, traditional methods such as posters, newspapers, and street drama as well as newer and more innovative methods such as social media, creative competitions (such as Nepal's 'Integrity Idol' conducted by Accountability Lab Nepal)¹⁰³ could be leveraged for increased civic engagement. The Supreme Court's Access to Justice Commission works on institutionalizing access to justice practices across the judiciary. Currently, the Supreme Court is contemplating creating access to justice groups at the provincial level to establish vertical linkages between the federation and provinces. Going a step further, the creation of local 'Access-to-Justice' community groups which will link with provincial level 'Access-To-Justice' groups proposed by the Supreme Court could be another avenue to establish vertical linkages and promote a network of practicing access to justice service providers to amplify and include the voices of practitioners in policy making.

Access to Justice Commission, Supreme Court of Nepal

The commission has conducted various activities in pursuit of access to justice, including the establishment of an information and assistance desk, ensuring minor services can be delivered within an hour, free legal aid, the creation of a free legal inquiry service accessible through a mobile and toll-free number, provisions for meetings with judges, interpreter services, SMS services and easing the process of collecting legal notices from the concerned court. The commission is also using information and communications technologies (ICTs) to provide information regarding cases, encourage mediation, monitor the services provided by courts, organize community outreach programs, institutionalize pro bono legal services and undertake studies on access to justice.¹⁰⁴

To further promote civic engagement and policy dialogues, national officials such as those from the Supreme Court, Mediation Council, MOFAGA, NJA and Ministry of Law and Justice should be encouraged to periodically travel to municipalities/rural municipalities across the seven provinces and

103 Integrity Icon, as discussed above, is a global campaign by Accountability Lab, including in Nepal, that is powered by citizens in search of honest government officials. It aims to generate debate around the idea of integrity and demonstrate the importance of honesty and personal responsibility. See <http://www.integrityidol.org/countries/nepal/>

104 Supreme Court, "Yearly Work Plan of Access to Justice Commission," 2072/73 BS (AD 2015/16).

interact with community members. These visits, together with participation in community dialogues, will allow members from the Advisory Committee to assess the local justice situation and engage with local communities for responsive policy reform. It will also allow key local community members to engage with policy makers in real-time feedback loops. Additionally, these community engagements could engage participants in a structured process of sustained dialogue that moves beyond awareness-raising activities to directly tackle deeply held injustices such as discriminatory gendered norms and exclusionary practices.

The implementation action plan of these strategies is given in Annex II.

7

CONCLUSION

Access to justice reforms should not be considered in isolation, but rather from a system wide perspective: what combination of interventions will most effectively maximize the right of access “in its amplest sense”?¹⁰⁵ May 2017 was a momentous occasion in Nepal’s transition, it paved the way for successful local elections. There are high expectations on governance to be more responsive and effective, allowing for inclusive economic development. The lack of progress in state reform has created confusion over the roles and responsibilities of the various tiers of government including judicial committees at the municipal/rural municipal level. With numerous challenges plaguing judicial committees, priorities and needs have begun to expand and multiply. Judicial committees are now under increasing pressure to administer their responsibilities and provide essential services to their constituents. Even amidst this lack of clarity and fluidity, judicial committees are attempting to provide judicial services, but public expectation to deliver on commitments made in the electoral cycle continues to grow.

In the current scenario, elected representatives are jostling between the high expectations of their constituents on the one hand and on the other, navigating the complexities of deciding on a just result amid competing economic, social, political and legal forces. This raises fears that the poor and marginalized will continue to be ostracized, politicization and corruption will continue to persist, and access to holistic justice will continue to be elusive in the new federal setup.¹⁰⁶ As Nepal navigates this complex reform process, state and non-state justice actors – including the newly elected local representatives, judicial committees, the police, community mediators, and district court judges – who have little history of cooperation and who often hold reciprocal suspicions and misperceptions of one another must forge new ways of working together.

From a system wide perspective, institutionalizing judicial committees will

¹⁰⁵ Ibid. A Review of World Bank Practice. Pg. 18

¹⁰⁶ Wagley. N, Pande. A. 2018. Federalism’s birth pangs or death rattle? Navigating the sub-national landscape, a year after the 2017 elections. Nepali Times.

require a multi-faceted intervention starting from clarifying and designing coherent policy frameworks; holistic trainings and regular practice sharing for committee members; establishing quality control and judicial oversight mechanisms; creating linkages with other access to justice service providers (such as town police, shelter homes, human rights based NGOs, quasi-judicial bodies); and installing integrated judicial support systems (physical and human) to promoting greater community engagement with access to justice structures.

Supporting this model for a tiered, locally led justice delivery system has the potential to bring justice administration closer to individual communities and make it more responsive to the time, cost, and efficiency needs of citizens. To do so, it must operate on the basis of coherent policy and practice frameworks, and promote citizen participation. It needs to build good faith working relations between judicial committees and their members and between justice delivery mechanisms including community mediation centers and district courts. If these conditions are met, the benefits of the local justice system will benefit everyone, but be especially significant for the poor, women, and other marginalized groups.

Annexes

Annex -I

Details on the Rights of Judicial Committee

Subject of Judicial Right	Concerned Clause	Details of Judicial Right
Right to Justice Dispensation	Clause 47 (1)	<ul style="list-style-type: none"> ▪ Distribution and use of canals, water source, public taps ▪ Damage to crops ▪ Wood, cattle feed, grass ▪ Non-payment of wages ▪ Disappearance of pets/lost and found ▪ Care of senior citizens ▪ Minor children or husband/wife not provided with proper food and education ▪ House rent of up to NRs. 2.5 million annually and rent facilities ▪ Planting of trees/saplings affecting other's properties ▪ Lack of proper piped outflow of waste water affecting other's land or properties ▪ Non-fulfilment of legal obligations to set aside certain empty spaces when building windows in a house adjoining other's properties ▪ Stopping or disturbing traditionally accepted utilization of public space/facility even though it is under no one's ownership ▪ Other disputes specified by federal or province law ▪ Encroachment, trespassing of land properties apart from the government, public or community one ▪ Illegal construction of a structure on other's land or properties apart from government, public or community ones ▪ Divorce between husband and wife ▪ Beating that is punishable by maximum one-year imprisonment in which there is no consequent disability ▪ Slander ▪ Robbery ▪ Affecting others by letting loose pets or through improper handling of pets ▪ Trespassing into other's properties ▪ Using other's properties ▪ Affecting neighbor by noise pollution or throwing waste improperly ▪ Other civil case in which the prevailing laws provide for mediation, and criminal cases in which there could be a maximum of one-year imprisonment

Implementation Plan of Strategies

Strategy 1: Initiate Policy Dialogue

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Policy Dialogue on Conceptual and Procedural Clarity	Judicial Committee	Determination of guidelines on the conceptual and procedural framework of judicial committees	Advisory Committee with representation from Ministry of Federal Affairs and General Administration (MoFAGA), Supreme Court, Ministry of Law, Justice and Parliamentary Affairs (MoLJPA), NARMIN and MUAN.
Policy Dialogue on Inter-Agency Coordination	Judicial Committee	Determination of guidelines on an inter-agency collaborative framework	Advisory Committee with representation from Ministry of Federal Affairs and General Administration (MoFAGA), Supreme Court, Ministry of Law, Justice and Parliamentary Affairs (MoLJPA), NARMIN and MUAN.
Policy Dialogue of Training Quality and Accreditation	Judicial Committee	Determination of guidelines on training curriculums, accreditation of training institutions and training methodologies.	Advisory Committee with representation from Ministry of Federal Affairs and General Administration (MoFAGA), Supreme Court, Ministry of Law, Justice and Parliamentary Affairs (MoLJPA), National Judicial Academy (NJA), Local Development Training Academy (LDTA) NARMIN and MUAN.

Strategy 2: Amend the Local Government Operation Act to end contradictions

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Formation of drafting committee to amend Local Government Operation Act to end contradictions	Judicial Committee	Decision to form drafting committee made	Ministry of Federal Affairs and General Administration (MoFAGA)
Hold interactions with stakeholders for suggestions on issues to be included in the law	Judicial Committee	Report on interactions prepared	Drafting Committee
Preparation of draft law	Judicial Committee	Draft prepared	Drafting Committee
Hold discussions to collect suggestions on the draft	Judicial Committee	Report on discussions prepared	Drafting Committee
Preparation of the final draft of the law	Judicial Committee	Final draft prepared	Drafting Committee
Submission of the final draft of the law	Judicial Committee	Final draft submitted	Drafting Committee
Approval of the law	Judicial Committee	Law approved	MoFAGA

Strategy 3: Formulate local procedural laws

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Formation of drafting committee to draft laws	Judicial Committee	Committee formed	Chair/Chief of Municipal/Rural Municipal Assembly
Required subject experts appointed for the drafting of laws		Experts appointed	Chair/Chief at the recommendation of drafting committee
Drafting committee holds discussions with stakeholders for feedback		Discussion held	Drafting Committee
Preparation of a draft		Draft prepared	Drafting Committee
Hold discussions on the draft to collect suggestions		Discussion held	Drafting Committee

Prepare a final draft and submit to the concerned level		Draft submitted	Drafting Committee
Approval of the bill of legislation	Judicial Committee	Bill approved	Rural Municipal/Municipal Assembly

Strategy 4: Formulate procedural guidelines and directives

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Formation of drafting committee to formulate guidelines and directives	Office bearers of judicial committee	Drafting committee formed	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Identify the content of the draft	Office bearers of judicial committee	Content of draft determined	Drafting Committee
Hold interactions to finalize the content to be included in the draft	Office bearers of judicial committee	Content to be included finalized	Drafting Committee
Prepare the draft guidelines and directives	Office bearers of judicial committee	Draft ready	Drafting Committee
Hold interaction workshops to collect suggestions to finalize the guidelines and directives	Office bearers of judicial committee	Interaction workshops held	Drafting Committee
Prepare the final draft guidelines and directives	Office bearers of judicial committee	Final draft ready	Drafting Committee
Submit the final draft to the Rural Municipality or Municipality	Office bearers of judicial committee	Draft submitted	Drafting Committee
Issue guidelines and directives	Office bearers of judicial committee	Guidelines and directives issued	Rural Municipal/Municipal Executive

Strategy 5: Formulate laws for mediation management

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Formation of drafting committee to formulate laws on mediation management as per Schedule 8 of the Constitution	Judicial Committee	Decision to form drafting committee made	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Hold interactions with stakeholders for suggestions on issues to be included in the law	Judicial Committee	Report on interactions prepared	Drafting Committee
Preparation of draft law	Judicial Committee	Draft prepared	Drafting Committee
Hold discussions to collect suggestions on the draft	Judicial Committee	Report on discussions prepared	Drafting Committee
Preparation of the final draft of the law	Judicial Committee	Final draft prepared	Drafting Committee
Submission of the final draft of the law	Judicial Committee	Final draft submitted	Drafting Committee
Approval of the law	Judicial Committee	Law approved	Rural Municipal/Municipal Assembly

Strategy 6: Formulate laws on mediated settlements and the implementation of decisions

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Formation of drafting committee to formulate laws on mediated settlements and the implementation of decisions as per Clause 52	Judicial Committee	Decision to form drafting committee made	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Hold interactions with stakeholders for suggestions on issues to be included in the law	Judicial Committee	Report on interactions prepared	Drafting Committee

Preparation of a draft law	Judicial Committee	Draft prepared	Drafting Committee
Hold discussions to collect suggestions on the draft	Judicial Committee	Report on discussions prepared	Drafting Committee
Preparation of the final draft of the law	Judicial Committee	Final draft prepared	Drafting Committee
Submission of the final draft of the law	Judicial Committee	Final draft submitted	Drafting Committee
Approval of the law	Judicial Committee	Law approved	Rural Municipal/Municipal Assembly

Strategy 7: Formulate and implement program for the capacity development of office bearers of judicial committees.

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Form a working group to identify programs for capacity development	Office bearers of judicial committee	Working group formed	On recommendation from Advisory Committee with representation from Ministry of Federal Affairs and General Administration (MoFAGA), Supreme Court, Ministry of Law, Justice and Parliamentary Affairs (MoLJPA), NARMIN and MUAN.
Submit report identifying programs for capacity development	Office bearers of judicial committee	Report submitted	Concerned working group
Approval of necessary programs for capacity development	Office bearers of judicial committee	Decision of approval made	Advisory Committee

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Budget allocation for holding the programs	Own resource	Availability of resources	Rural Municipal/Municipal Executive
	NGO	Report on programs prepared	Rural Municipal/Municipal Executive/ Judicial Committee
	Donor agency		
Conduct the program	Office bearers of judicial committee		NJA, LDTA

Strategy 8: Establish a quality control institution

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Feasibility study on the establishment of a quality control institution	Office bearers of judicial committee and other officials of local level	Study committee formed under recommendation of the Advisory Committee.	Advisory Committee (mentioned above)
Holding of consultation programs with concerned office-bearers for the feasibility study	Office bearers of judicial committee and other officials of local level	Consultation programs held	Study Committee
Preparation of report on the feasibility and design of the institution	Office bearers of judicial committee and other officials of local level	Report prepared	Study Committee
Formulation of laws for the establishment of a quality control institution	Office bearers of judicial committee and other officials of local level	Drafting Committee prepared	Advisory Committee

Management of necessary infrastructure	Office bearers of judicial committee and other officials of local level	Arrangement for land made and building construction completed	Advisory Committee
Establishment of the institution and its management	Office bearers of judicial committee and other officials of local level	Institution established and operational	Advisory Committee

Strategy 9: Enhance coordination with stakeholder agencies

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Identify stakeholder agencies (Police operating at local level, government or NGOs, community organizations etc.)	Chiefs of stakeholder agencies	List of stakeholder agencies prepared	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Identify areas of cooperation and coordination with stakeholder agencies	Judicial Committee	List of areas of cooperation and coordination prepared	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Hold interactions on areas in which coordination from stakeholder agencies is expected	Office bearers of stakeholder agencies	Report on interactions prepared	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Hold periodic interactions with judges of district court, the police, local CSOs, other access to justice service providers	Judges and office bearers of judicial committee	Report on interactions prepared	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Develop referral guidelines	All stakeholder agencies	Referral Directory Prepared	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer

Strategy 10: Build a separate building for the judicial committee and its judicial work

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Arrangement of land for constructing the building	Judicial Committee	Land arranged	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Prepare cost estimates for building construction	Judicial Committee	Cost estimates prepared	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Approval of tender for building construction	Judicial Committee	Notice for tender published and tender approved	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Completion of building construction	Judicial Committee	Building handed over	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer

Strategy 11: Build physical infrastructure for hearing rooms and mediation discussion rooms

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Determination of a framework for hearing rooms	Judicial Committee	Determination of guidelines on the framework for hearing rooms	Concerned Ministry
Cost estimates for building hearing rooms and mediation discussion rooms	Judicial Committee	Cost estimates report made	Chief Administrative Officer of concerned local level
Approval of cost estimates		Decision of approval made	Concerned Rural Municipal/Municipal Executive
Budget allocation as per cost estimates		Budget allocation made	Concerned Rural Municipal/Municipal Executive
Invitation of tender/bid for building construction and approval		Notice of tender published and approval	Chief Administrative Officer
Building construction	Judicial Committee	Handover of building to judicial committee	Chief Administrative Officer/Concerned contractor

Strategy 12: Train mediators and maintain a roster

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Determination of training manual (Manual approved by Mediation Council unless otherwise provided for by local law)	People interested to work as mediators and the meet the base requirements.	Decision to determine training manual	Chair/Chief of Judicial Committee/ Chief Administrative Officer
Select candidates from every ward	People interested to work as mediators and the meet the base requirements.	Candidates selected	Coordinator of judicial committee/ Chief Administrative Officer
Arrange necessary resources to hold training	People interested to work as mediators and the meet the base requirements.	Budget allocation made	Coordinator of Judicial Committee/ Chief Administrative Officer
Hold training	People interested to work as mediators	Training held	Coordinator of Judicial Committee/ Chief Administrative Officer
List the trained mediators in the roster	Trained mediators	Roster of mediators prepared	Ward Chairperson/Coordinator of Judicial Committee

Strategy 13: Establish mediation centers at the ward level

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Establish mediation centers in each ward	Ward mediators	Centre established	Chair/Chief of Judicial Committee/Chief Administrative Officer
List trained mediators in a roster in ward centers	Ward mediators	Roster of mediators prepared	Ward Chairperson/Coordinator of Committee/Chief Administrative Officer

Strategy 14: Arrange for assistant human resources

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Identify positions for assistant human resources		Determination of position	Chief Administrative Officer
Approval of position		Decision of approval for position made	Rural Municipal/Municipal Executive
Appointment of staff for approved position		Decision of appointment for staff made	Chief Administrative Officer

Strategy 15: Establish a decision implementation section

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Specify a decision implementation section	Parties to dispute	Decision implementation section formed	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Assign staff to work in the decision implementation section	Parties to dispute	Staffs for implementation section assigned	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer

Strategy 16: Arrange for a police force for decision enforcement/implementation

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Provide legal provisions for municipal police to enforce decisions	Judicial Committee	Local law formulated	Rural Municipal/Municipal Assembly
Formation of Municipal Police	Judicial Committee	Recruitment of Municipal Police	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer

Strategy 17: Set up an archive section to keep records of decisions and their state of implementation

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Set up an archive section to properly maintain decision files/records	Judicial Committee	Specified room for archive section allocated	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Allocation of staff for the archive section	Judicial Committee	Decision for staff allocation made	Chief Administrative Officer

Strategy 18: Establish a library

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Identify necessary books	Office bearers of judicial committee/concerned staff	List of books prepared	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Build a library room with necessary furniture	Office bearers of judicial committee/concerned staff	Library room fixed	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Staff allocation for library management	Office bearers of judicial committee/concerned staff	Staff allocated	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Purchase necessary books	Office bearers of judicial committee/concerned staff	Books purchased	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Organize books in the library	Office bearers of judicial committee/concerned staff	Books available in the library	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer

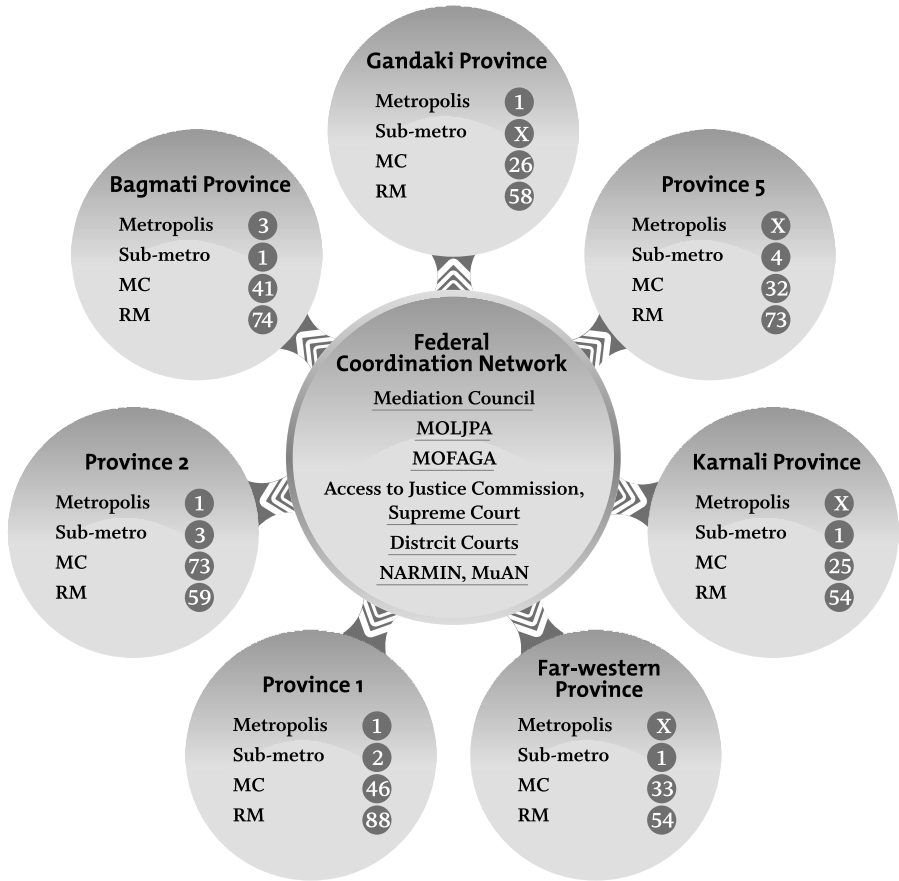
Strategy 19: Enhance access to judicial committees

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Hold programs in wards about jurisdiction and procedures of judicial committees	General public	Report of program prepared	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Waiver of fees for poor and needy	Service-recipients	Special provision in law made	Rural Municipal/Municipal Assembly
Provide for judicial facilitators to facilitate the complaint registration for parties who themselves cannot approach even when the case is of an urgent nature	Victim service-recipients	Judicial Facilitator appointed	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer

Strategy 20: Build practice sharing forums

Strategic Task	Target Group	Performance Indicator	Performance Responsibility
Identify stakeholder agencies (Judicial Committee, Mediators, District Court officials, police operating at local level, government or NGOs, community organizations etc.)	Chiefs of stakeholder agencies	List of stakeholder agencies prepared	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Identify overlapping areas and shared responsibilities	Judicial Committee	List of overlapping areas and shared responsibilities prepared	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer
Hold interactions on experiences, challenges, successes and ways forward.	Office bearers of stakeholder agencies	Report on interactions prepared	Chair/Chief/Coordinator of Judicial Committee/Chief Administrative Officer

Provincial Peer Network for Judicial Committees¹⁰⁷



107 This is a snapshot of recommended framework under which representation of 753 judicial committees is divided across provincial lines.

Some Facts Observed during the Field Study

In August 2018, field studies were undertaken in Dhulikhel municipality of Kavrepalanchowk district, Siddhalek rural municipality of Dhading district and Rupani rural municipality of Saptari district to observe the exercise of judicial rights. The study revealed the following problems:

1. At the time of the field study, the state of disputes and their settlement were as follows:
 - Dhulikhel: Out of 24 disputes registered, 11 were settled
 - Siddhalek: Out of 21 disputes registered, 7 were settled
 - Rupani: Out of 67 disputes registered, 12 were settled
2. State of Initiation of Proceeding:
 - Not a single case that comes under the jurisdiction of dispute settlement i.e. LGOA 47 (1) has been settled. All those settled were settled through mediation.
 - In Dhulikhel, mediators were used to settle dispute but elsewhere the office bearers of judicial committee, themselves, acted as mediators.
 - Set procedures have not been followed. Matters like serving notice, conducting mediation are all done verbally. Instead of taking disputes through formal process, the Chair or Chief alone has settled them
 - Weak archiving of decisions taken.
 - Decision record books were not maintained. Even though record books were kept in Dhulikhel, it was not properly maintained.
 - There were comments that people from different political ideologies feared approaching the committee. Likewise, some shared experiences that there was political pressure in some cases (Siddhalek) and difficulties in settling disputes brought by individuals belonging to different political ideologies (Rupani).
 - Suspicions were expressed that there would be difficulty in enforcing decisions if the Chair and Deputy Chair belonged to

different parties. There were also comments that the judicial committee conducted hearings even in the absence of the Chair or Chief.

- Except Dhulikhel, the other local governments lacked laws on procedures. Even though the Act states that a defendant should be given the time of 15 days to respond, in some places a seven-day notice was issued and in some places, a notice simply asking the defendant to be present on a certain date was issued.
- There were no mediators except in Dhulikhel.
- Lack of human resources (server of notice, Admin, technician, legal advisor and other staff) was evident in all locations.
- There were experiences where confidentiality was not maintained even when they should have been.
- In some cases, the defendant was not present (Rupani), and in others, the disputes were put on hold due to the absence of the defendant (Dhulikhel).
- There was confusion on what to do if a defendant does not present themselves before the committee despite a notice being served.
- Even when the defendant is present, an oral – not written – defense was filed.
- There is lack of knowledge about the jurisdiction. For example, in Siddhalek nobody was aware that the committee cannot investigate cases related to beatings and robbery.
- There are instances of complainants simply vanishing after registering the case (Rupani). There was confusion on what to do next in such instances.
- In all places, the lack of legal knowledge was the main problem. There was a lack of understanding about the difference between dispute settlement and dispute mediation.
- No physical infrastructure. No hearing room or mediation room.
- A training was arranged for mediators, but it was found that many mediators were inactive since no remuneration was paid to them.



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