Report

National Conference

to

INSTITUTIONALIZE MEDIATION IN NEPAL

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There prevails an attitude to grossly generalize dispute as a destructive agent, and therefore, should be avoided as far as possible. However, dispute in itself is neither bad nor good, but how it gets handled determines its nature. If it is not properly addressed, it disturbs the peace of individuals and societies, but if done properly, it provides an opportunity to give way to and accommodate new thoughts and ideas. Mediation therefore, applies the value of a peaceful yet simple solution to a dispute.

Christopher W. Moore in his book *The Mediation Process: Practical Strategies for Resolving Disputes* writes: Mediation is the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has not authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute. However, the issue of neutrality of mediators is quite debatable in a country like Nepal where there exists persistent discrimination against certain group of people based on caste, gender or ethnicity and the level of people's awareness is low. I think if mediators in such context, only focus on maintaining neutrality, it would be far away from rational mediation.

Mediation, as we practice is not totally based on the western model. Rather it has been contextualized as per Nepalese culture, traditional practices, social values, social setup and economic condition. This conference has also tried to bring into experiences of some Asian countries, American practices and share with Nepalese policy makers, practitioner, and stakeholders of justice. Therefore, it is a unique experience for all of us who directly and indirectly are trying to promote community mediation as a better alternative to existing conventional litigation process. The main objectives of this conference are: a) to sensitize the stakeholders to institutionalize Community Mediation Program in Nepal, b) to share experiences of mediation program of other countries, c) to share Nepali mediation experience with policy makers, stakeholders and also with practitioners, d) to broaden understanding on mediation and its practice, and e) to accelerate in legislation making process.

The experiences of Bangladesh presented by Dr. Ferdous Jahan, has stimulated all the NGO activists like us to act more intensively in mediation; Malaysian practice shared by Ms. Gunathevi Sinnadurai has opened eyes for using mediation in accelerating the performance of local bodies; *Barangay Justice System* shared by Atty. Rowena Daroy Morales of Philippines seemed unique to us; the *Singhalese* experience presented by Ms. Kamalini de Silva must have encouraged policy makers; and similarly Indian practice of *Lok Adalat* that Prof. Nomita Agrawal discussed upon, has definitely sensitized to modernize traditional practices; the presentation of Mr. Ben Reed was really appreciative as he acknowledged how various countries like Japan, Australia, US and others have institutionalized mediation; Mr. Mukti Rijal stressed to consider socio-economic orientations of mediation; Dr. Trilochan Uprety brought experiences of various countries

for incorporating mediation in formal justice mechanism; and finally the insights of Dr. Yubraj Sangroula has helped to identify probable issues relevant to institutionalizing mediation in Nepal.

Actually, this conference is a joint effort of CeLRRd, SUSS, IGD, RUDWUC and Pro-public and TAF. However, we, the CeLRRd family endured much stress to hold this conference timely and effectively. Eventually, we have realized that we stood up to the expectations of TAF and our own standards. However, many people have contributed to making this conference a success. Therefore, on behalf of the organizing committee, I would like to express my sincere gratitude to all foreign and national paper presenters for their enormous effort to prepare those brilliant papers, present them and satisfy the queries of conference participants. Similarly, I also would like to thank all commentators, and session chairs like Hon'ble Arju Rana Deuba (CA member and Chairperson, RUWDUC), Prof. Manik Lal Shrestha (SUSS), Advocate Prakash Mani Sharma (Pro-public), Mr. Gobinda Das Shrestha (Chief of Party, Rule of Law Program- USAID, TAF), and Dr. Sagar Prasai (TAF) for chairing various sessions of the conference and providing their invaluable feedbacks.

At this moment, I would like to give special thanks to Key Note Speaker, Prof. John Paul Laderach for his eye opening research based remarks, Mr Nick Langton, Representative TAF who encouraged us to hold such a historic event in terms of promoting informal justice system in Nepal and provided all possible supports. I am very much indebted to Hon'ble Deputy Prime Minister Bamdev Gautam, who in spite of his poor health managed to write well wishes for the smooth running of the conference; Hon'ble Top Bahadur Singh for accepting to be the Chief Guest; Hon'ble Ram Chandra Jha, Minister of Local Development for his gracious presence and remarks in the closing session. Here I must not forget Ms. Preeti Thapa, and Ms. Sameera Shreshtha of TAF for their contribution to have this conference.

I must also thank the students of Kathmandu School of Law who worked as volunteers and managed to run the conference. Likewise, I would like to thank Ms. Sakila Chhetri, and Mr. Ramsaran Pokharel for their hard work while preparing this report, and Mr. Mahesh Phuyal, IT Officer for his supports in computer. Here I must not forget President of CeLRRd Associate Prof. Geeta Pathak Sangroula, Mr. Kishor Silwal (Director-CeLRRd), Mr. Anjan K. Dahal (Secretary-CeLRRd) and Mr. Rammani Gautam (Treasurer-CeLRRd) whose direction and assistance were indispensable. The efforts made by Mr.Jaya Bista and Mr. Hari Magar, Account Officers for the smooth arrangement of conference cannot similarly be unacknowledged. Once again, thanks to all the persons engaged in anyway, to this conference.

Sudeep Gautam
Coordinator
Community Mediation Program
CeLRRd

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National Conference
on
Institutionalize Mediation in Nepal

A

INAUGURATION SESSION

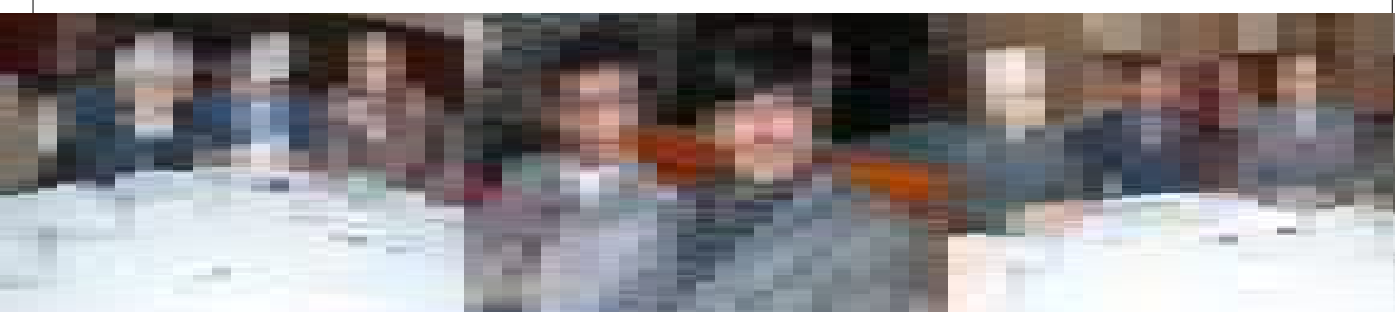
The two-day second national conference on Institutionalizing Community Mediation in Nepal was held from 16-17 January 2009 at Hotel Radisson. Its primary aims were to invoke discussions amongst the government stakeholders involved in the dispensation of justice, both formally and informally, representatives of local authorities, mediators, and other concerned ones upon the significance and strategies of institutionalizing community mediation in Nepal. Besides, it was to share experiences of other countries like India, Sri Lanka, Bangladesh, Malaysia, Philippines, and USA and also to give a broad platform to the

local mediators and other program implementers for expressing their experiences, best practices, successes and challenges so that they are referred to while devising strategies for institutionalizing mediation. Thus, the program provided a common forum for mediation implementing organizations, judicial bodies, trainers, mediators and academics engaged in any way in mediation to discuss on multiple issues entailing mediation. In other words, the conference sought to promote mediation in Nepal.

Ms. Geeta Pathak Sangroula, President, CeLRRd chaired the inauguration session, wherein Mr. Nick Langton, Country Representative, the Asia Foundation on behalf of the organizing committee, welcomed the distinguished Chief Guest, Honorable Top Bahadur Singh, Executive Director, National Judicial Academy, Dr. Ramkrishna Timalsina, Registrar SC, Honorable Arju Rana Deuba, CA member, the foreign paper presenters, and other participants. In his inaugural remarks, he mentioned that the first conference of this type was held three years ago, in 2005, and this was the second one whose objectives, as he pinpointed was, to share numerous regional innovations in community mediation and help in institutionalizing mediation in Nepal. Since 2001, TAF has been involved in mediation

program in Nepal, and now, 3800 community mediators are working in 14 districts of Nepal, he said. Around 15,000 cases have been registered, out of which 85% is settled. He emphasized that mediation is non-adversarial, inexpensive and efficient to improve access to justice in Nepalese context. Institutionalization of mediation in Nepal, though being a rigorous and long term process should be accomplished not just to settle more number of cases but also to bring sustainable peace.

The six foreign paper presenters from different countries provided a glimpse of mediation in their respective countries. In Bangladesh, as Dr. Ferdous Jahan, Department of Public Administration, University of Dhaka said, mediation, better understood as *Shalish*, is increasingly being popular, and therefore, in terms of institutionalizing mediation, Bangladesh is quite advanced. There are village court mediation, family court mediation and others run by locally elected representatives. In Malaysia, as Ms. Gunathevi Sinnadurai, Vice-President, Bangsar Baru Residents

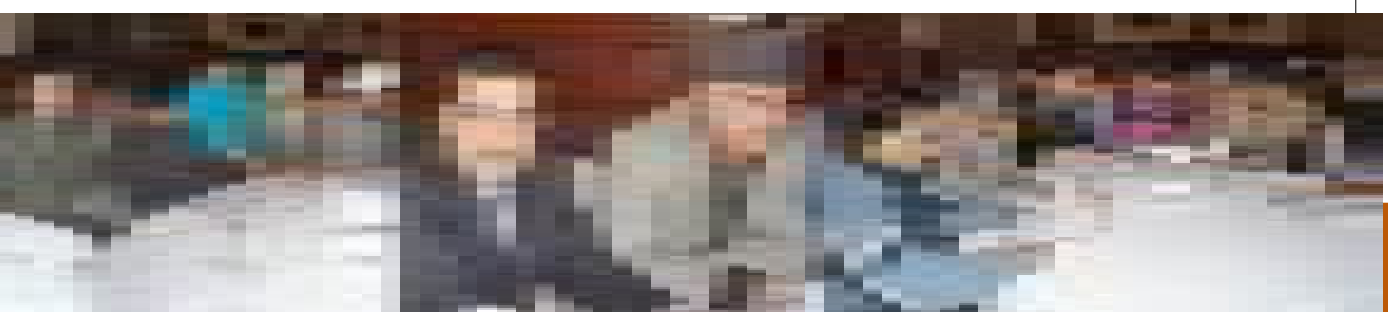


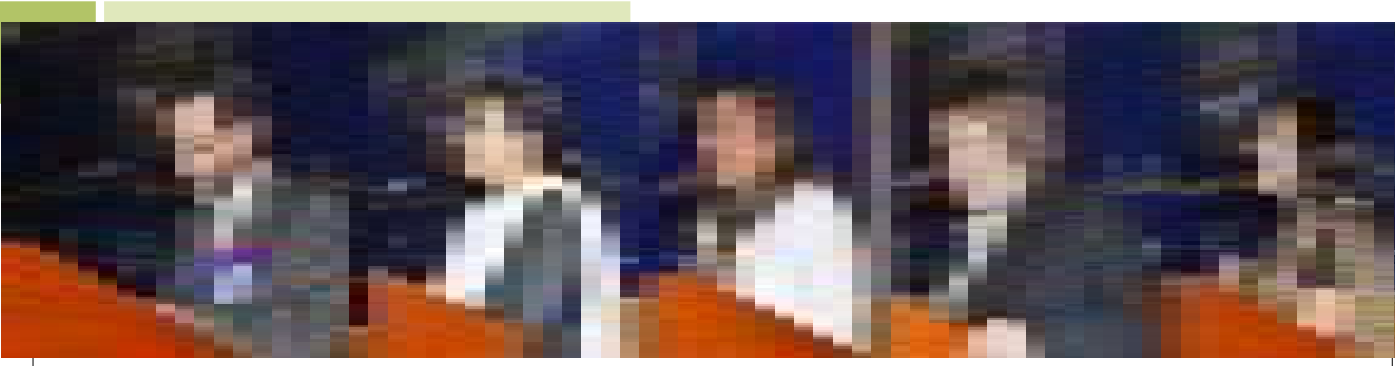
Association, Kuala Lumpur, Secretary to Coalition to Save Kuala Lumpur said, "Though lots of mediations are done at various levels, community mediation is lacking in Malaysia." Atty. Rowena Daroy Morales, Professor, College of Law, University of Philippines, acknowledged that they had the *Barangay* system that started since 1965 and hold almost every feature of community mediation. There are altogether 33000 *Barangays* in Philippines. She highlighted that conflict can be resolved in its own cultural setting, and *Barangay* system applies the concept. Mediation has already been incorporated at legislative framework.

Ms. Kamalini de Silva, Attorny-at-Law: Additional Secretary, Ministry of Justice and Law Reform, Sri Lanka said that Srilanka had long been practicing conciliatory methods to settle disputes, but since 1990 onwards, mediation got incorporated with TAF's support,and it had been institutionalized by then. There is not only community mediation, but also environmental mediation and commercial mediation.

Prof. Nomita Aggrawal, Professor of Law, Campus Law Center, Delhi University (Former Dean of Delhi University) India said that India has a long history of mediation and its Lok Adalat, which started since 1950s and got statutory recognition in 1987 under Legal Authority Act, has succeeded to create access to justice for many citizens. There is a provision of a mediation center in every High Court. Now, both court-annexed and court-referred mediations have been adopted. So, mediation in India has become a buzz word.

Dr. Ramkrishna Timalsina, Registrar, SC highlighted that community mediation has gained worldwide fame in a very short span of time. A new legislation in mediation is coming in Nepal, and being a member of the drafting committee, he said that many discussions were held on the issues of mediation. Since community mediation devolves power to local people to dispense justice at the local level, it has been included in the Act, and local government is hoped to enforce community mediation. Yet there was a serious discussion on whether commercial mediation should be included in the Act or passed a separate legislation. As District Court rules, Appellate Court rules have recognized court-annexed and court-referred mediation, the Act has also acknowledged them along with community mediation, local governance level mediation, and commercial mediation. He said that institutionalizing means both legalizing and legitimizing,



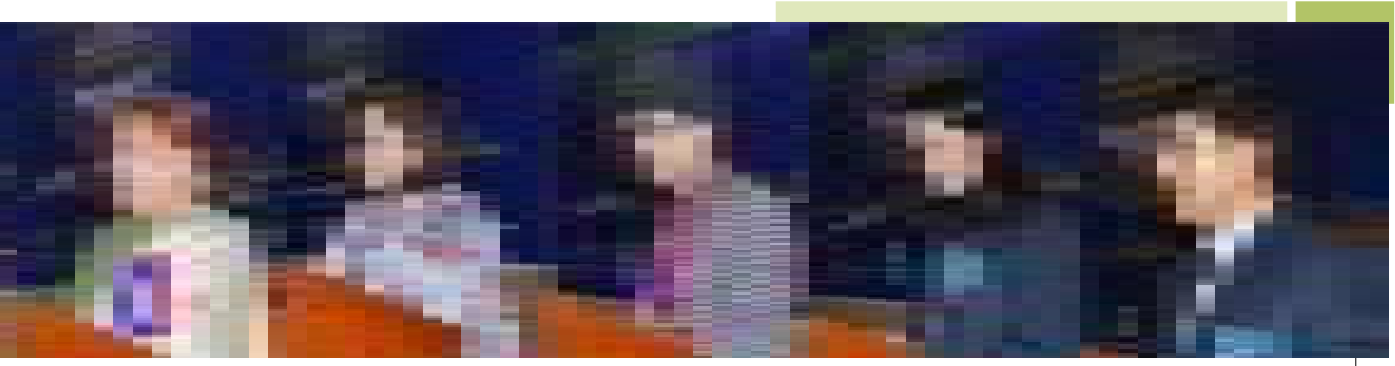


and our cultural set up and mind set put great effect in such endeavor. Nepal is such a country where mediation has reached to the level of Supreme Court and majority of the legal professionals have positivistic attitude towards mediation. Moreover, in the strategic plan of judiciary, mediation has been prioritized. Hence, mediation process may be the basis of New Nepal as mediation is a tool to bring peace in societies.

Mr. Sudeep Gautam, the moderator read the message of Hon'ble Bam Dev Gautam, Deputy Prime Minister as he could not attend the conference due to his poor health. Hon'ble Gautam expressed his grief for not being able to participate but extended his best wishes for its success. Reform of justice system is one of the fundamental needs of the present context, and therefore, promotion of informal justice system should be prioritized. He also conceded that the scope of mediation in Nepal is high. His detail message is provided in Annex 1

Afterwards, Hon'ble Top Bahadur Singh, Executive Director, National Judicial Academy and Chief Guest of the program inaugurated the session by lighting the oil lamp. Besides, he said that community mediation has been practiced in Nepal since long time back at village level, and by now it has become an integral part of justice system in Nepal.

In stead of mediation, we have our own terminology, *Melmilap*. It has not been long that the mediation entered into courts and NJA has also conducted several trainings for court-annexed mediation. An important aspect of mediation is that mediators have no role or opinion of their own; rather they facilitate case parties to reach into an amicable solution. Hence, it is often observed that the parties get satisfied both in the methodology and the result unlike settlements made in courts. He argued "I hope that the political conflicts can also be resolved through mediation. We are hopeful that Nepal will achieve a sustainable peace through mediation."



Similarly, Hon'ble Arju Rana Deuba, Contituent Assembly Member (Chairperson- RUWDUC) also prioritized the efficacy of community mediation in the Nepalese context. Ms. Deuba presented herself as a strong supporter of the mediation program. However, she also revealed that initially she had some reservations regarding mediation as she wondered how the American way of justice dispensation would work in Nepal. But she said that the first conference convinced her that it has had more relevance in the Nepalese context. The program has not only empowered community people but also created easy access to justice at grass root level. Mediation has become a big success in Nepal even at the height of violent conflict and finally expressed hope that the government may be convinced through findings of the experts for institutionalizing community mediation.

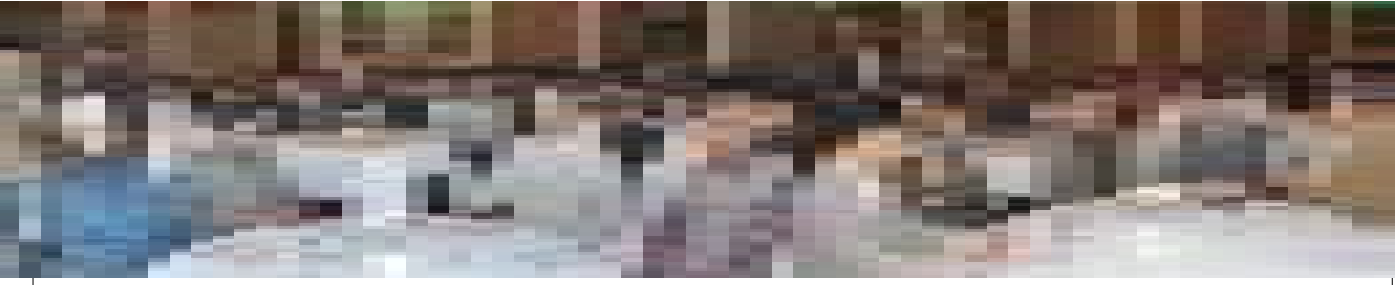
Keynote Speech, Prof. John Paul Lederach, Professor of International Peace Building, University of Notre Dame, Distinguished Scholar at Eastern Mennonite University

Prof. Lederach identified himself both as a practitioner and an academic. He stressed on making practices and approaches of mediation relevant, appropriate, effective and sustainable. Sustainability requires a capacity to understand and envision how any practice is shaped by the context in which it provides services. He said, "We need a discipline of reflective practice, that is, the actual practitioners of the craft like mediation reflect more deeply about the nature of their context, watch more carefully the modalities of their work, and develop a capacity to suggest how it works and why it works in a given location, what it contributes."

As a part of capacity building, practitioner must develop their capacity to understand the theory of change. It requires two disciplines- the discipline to de-mystify theory such that it is not exclusively the tool of the ivory towers and re-mystify practice such that the people who are practitioners become curious about their work, how and why it works.

He also explained about basic idea behind his field visit which was to develop a modality of action research, and for this a team of some 25 mediators from across Nepal has already been constituted. In the context in which the figures of cases are mostly counted, it is more necessary to explore the variety of impacts it has created in societies.

Mediators seem to be confined to the number of data instead of analyzing the real impacts of the mediation process.



However, mediation process is shifting from conflict resolution to conflict transformation. Rather than just understanding access to justice as counting cases, he said that he discovered a range of ways in which transformation may broaden the concept of justice.

To mention a few, they are – personal, relational, structural and cultural. At the personal level, the individual disputant has changed significantly, and also mediation has provided a much greater opportunity for women and marginalized people to work alongside those from the higher caste and class as teams. At the relational level, the situation is such that a *Dalit* woman and a Brahmin ex-policeman can work together as mediators on a panel which signals a relational change that creates something totally new in the community.

Significant changes in relationship could be traced both at family units and community level. At the structural level, from police to VDC, a new mechanism, embedded in the community and from the community has shifted the flow of conflict cases and broadened the response capacity within the districts. Cooperation has developed amongst a number of VDCs and small micro finance groups have emerged that reflect a shift from center government to local government.

At the cultural level, it has helped cause devolution of power to the local level. Unlike the dominant mindset regarding a culture of dependency like someone higher comes and helps to resolve conflict, mediation creates a shift from I cannot, We cannot to I can and We can.

Regarding the sustainability of the program, Prof. Lederach emphasized on a constancy of reflection and that reflection can be traced only in impacts.

There are two paradoxical elements – at one hand, people are facing a long standing and slow changing historic change and at the same time also enduring fast changing immediate situations. People have to find a way to respond to an immediate fluid change, and also act though slowly on the long-standing patterns of injustices and exclusion. Hence, he argued that together with keeping the quantitative success of mediation, we should institutionalize the capacity of practitioners, processes and adopt a bottom up approach. Community mediation in Nepal may provide a small example of such sustenance in fluidity. It is hoped that the day may come when mediation help facilitate national debates.

Ms. Geeta Pathak Sangroula, President, CeLRRd (vote of thanks)

Ms. Pathak appreciating the endeavors of 5 partner organizations said that the conference would not have succeeded if there had been differences amongst them. She said, "Sustainability of community mediation program is essential to ultimately bring constructive change. Mediation can be institutionalized with proper techniques and processes". Finally, she showed her gratitude to all for their presence in the program.

B

PAPER PRESENTATION & DISCUSSION SESSION

Experts from Sri Lanka, Philippines, Nepal, Malaysia and USA shared ideas and experiences through presentations on models, impacts of community mediation in their respective countries and other issues entailing mediation. More importantly, they focused their presentations on institutionalization of mediation.

Day 1

Group A, 1st Session

Paper

Access to Justice for the Poor in Bangladesh: Problems and Prospects

Chair	:	Hon'ble Arju Rana Deuba, Contituent Assembly Member
Presenter	:	Ms. Ferdous Jahan, Bangladesh
Commentator	:	Mr. Sadhu Ram Sapkota, Joint Secretary, MoLJCAM

Access to justice, being an important part of rule of law is considered an inseparable element of good governance. Over the years, the concept of 'access to justice' has been redefined and now it emphasizes on providing people with adequate knowledge, legal aid and right based awareness that in the long run will ensure their informed participation in the policy making procedure thereby, bringing in qualitative change in their lives whereas in the short run, it emphasizes on getting the poor people's rights realized.

Access to justice is not confined to the formal justice sector, rather it gives due importance to the informal sector as well. It emphasizes on resolution of conflict rather than punishment and also allows the poor to have influence in the law-making and law-implementing procedures. On the top of all, the new version of access to justice focuses on civic engagement, and on that note, the empowerment of marginalized segments.

In the formal legal system, justice follows the retributive principle where the State has the liability to fix the legal guilt, not

the factual guilt. Any crime is considered against the state and the state, after being sure that the very person is guilty and liable under the law, takes necessary arrangement to ensure that the guilty gets due punishment. The aim is to inflict similar pain to the guilty ones. On the contrary, restorative justice emphasizes on restoration of the harmony between the parties, and thus, tries to heal the wound a dispute has caused.

Access to justice therefore, means restoration of harmony by relying on the formal structure and counseling, mediation, negotiation and other forms of non judicial representation.

She also discussed about legal system in Bangladesh. From the highest tier, i.e., the Supreme Court to the lowest one, i.e., the village court has been included in the formal justice sector. On the other hand, the informal sector includes *shalish* (informal justice conference) and other NGO/CBO sponsored alternative dispute resolutions systems.

In the informal sector, the most well known justice procedure is traditional *shalish* which means the practice of gathering village elders for the resolution of local dispute. The village elders and the influential are in charge of delivering a verdict after listening to both sides' story. *Shalish* can be conducted in various forms- it can be arbitrary or mediatory or a blend of the two. Normally it takes more than one day for a *shalish* to come to a conclusion. As the people conducting the *shalish* are considered as respected or powerful, their decisions always carry a great weight. Furthermore, *Shalish* is affordable, comprehensible, convenient, and efficient, and therefore the first choice for poor and marginalized citizens.

Ms. Jahan then put forward the reasons behind inefficient formal justice system that bar poor people from access to justice. Leakage of Civil and Criminal Procedure Codes allows the cases to be lengthy. Lawyers in some cases also play their part in delay because more delay will ensure more earning. The lack of sufficient numbers of judges and courts force a judge to deal with five to six thousand cases in a year. The outdated laws that are, in fact, a legacy of the British heritage are still resorted to and therefore, this lack of indigenization of the Judiciary restricts the movement of the poor. Formal courts are often perceived as an alien and elitist legal system. It has created a kind of psychological barrier. Furthermore, the politicization of the legal sector, be it in appointing judges or public prosecutors or causing political pressure in operational matters have resulted in high degree of corruption. Shortage of Human Resources and Ineffective Law Enforcement Authority often make access to justice a dream for a poor citizen.

Hence, such poor ones seek redress in informal legal systems for a number of reasons: it is quick, fair, affordable, adopts the principle of restorative justice, and in fact saves the villagers from harassment and at the same time the whole procedure looks familiar to them, and the parties themselves take part in reaching to settlements. Ms. Jahan said that this very process to secure "justice" is similar to "mutual understanding' to most rural people. However, it is not free of problems. Bias and Corruption on the part of traditional *shalishkers* in the

favor of rich and elites creates an impediment to ensure justice for poor. Political consideration is also reflected in *shalish*. *Shalish* is also a subject to manipulation by corrupt touts and local musclemen who are hired to intimidate the entire process. Gender Discrimination is yet another setback that silences the voices of women, and therefore, they cannot enjoy the opportunity to participate or express opinion in a traditional *shalish*. Moreover, Declining Social Acceptance of Justice Delivered and Changing Social Norms has been reducing the significance of traditional *shalishes*.

Nevertheless, NGOs' efforts in ensuring access to justice, thereby institutionalizing Alternative Dispute Resolution and bridging the gap between formal and informal can never be undermined. It is in effect, a modernized version of traditional *shalish* which aims to produce the best of the *shalish*.

Legal remedies through an indigenous mechanism are not unique to Bangladesh. In last couple of years, the NGOs have played a pivotal role in ensuring access to justice for the marginalized population. The wide range of activities performed by the NGOs has actually helped them to be involved in these sorts of programs. With over three decades of involvement with local people the NGOs have successfully used the target-based approach and as such are quite able to identify the population who are deprived of access to justice. Besides, this close involvement with people has helped NGOs to gain the trust of the rural mass.

In practice, the NGOs' interventions include Awareness raising, Para legal Counseling, legal aid and similar others. NGOs like MLAA concentrate solely on mediation. In fact, the MLAA has developed its very own mediation model, known as *Madaripur Mediation Model* (MMM). The MMM follows a target-based approach where the NGO identifies potential local contact persons and they then attempt to popularize mediation as an alternative to the formal court. Once selected, these contact persons are required to form a mediation committee.

The committee members are then trained by the NGO on Human Rights and legal issues. After completion of training, they start working as mediators who are responsible to receive applications for the mediation, send letters to the parties concerned and arrange mediation sessions, and also supervise the mediation process, follow-up and monitor the outcome of the mediation process.

The MMM is widely accepted both home and abroad. In general, the MMM introduced by the MLAA functions at the two lowest tiers of the local government structure- villages and union Parishads. Since 2004, the MLAA has been playing a prominent role in activating the village courts through placing trained village court assistants at the union level to conduct legal awareness activities and trainings, complete all required paperwork, and otherwise

ensure that the village court process is implemented in accordance with the enabling laws and ordinances.

Some NGOs (for example *Bachte Shekha*) provide legal aid as part of their integrated approach to women's empowerment or social development. At the same time, these NGOs attempt to link the people who fail to achieve desired outcome through ADR with the formal courts. For instance, the Bangladesh Legal Aid and Services Trust (BLAST) mainly performs its duties in partnership with upazila (sub-district) and district bar associations and offers legal counseling and legal aid to disadvantaged people in filing cases to formal court. Again there lies some problems with NGOs like lack of full range of community legal services, inadequate training to *Shalishkers,* lack of proper monitoring mechanism on the outcome of ADR.

Hence, legal rights can be translated into reality only when the formal and informal legal system works hand in hand to ensure access to justice. In this regard, the NGOs have so far played an important role to build the bridge between these two sectors; however, they should act more carefully and comprehensively to ensure that everyone gets access to justice. The detail paper is provided in Annex 1.

Comments from Mr. Sadhu Ram Sapkota, Joint Secretary, MoLJCAM

It's very comprehensively written work in which she has well articulated the ins and outs of the failure of formal legal system. The integrated model she has suggested can be applicable in our context as well. In fact, the consortium of five organizations, CeLRRd, IGD, Pro-public, SUSS and RUDWUC also reflects some sort of joint effort happening in mediation. So far, mediation in Nepal has now already been institutionalized through court-annexed and court-referred mediation whereas in the past though, there was Local Self Governance Act 2055, there was no implementation. We also have our own traditional systems of dispute resolution wherein traditional leaders like *Badhgar*, *Mukhiya* settle local disputes like *Shalishkers.*

It would be best if we could also give them formal recognition and enhance them further. Ms. Jahan mentioned that NGOs activities cover 30-35% of Bangladesh, whereas though seven years have passed since mediation was introduced in Nepal, we have been able to cover 14 districts only. I see that young and educated people are reluctant to involve in informal justice system. Only if they are engaged, mediation will succeed in the long run.

Floor Discussion

» *NGOs activities in the informal justice sector are rigorous in Bangladesh. How is Government managing and what is the legality of shalish?* (Bandhu Raj Poudel, District Coordinator, Chitwan, IGD)

Legality of *shalish* in Bangladesh is very tricky. Government has not determined whether it is legal or illegal. But on just the part of religious *shalishes* which in fact victimize women, High Court has

put restrictions. Otherwise, traditional *shalish* (mediation) is done everywhere.

» *What sort of integrated model are you talking about?* (Bidha Khanal, IGD)

A mediators' panel is elected for 3-5 years from villagers. First of all, I go to mediation/*shalishes* upon which there is NGO supervision. If I am not satisfied, I go to Union Council Village Court, a 6 member committee. Again if I am not happy with the decision, I may go to formal authority, where NGOs provide the fullest legal support. Hence, it is a mix of all approaches.

» *Whether mediators are volunteers?* What is the level of implementation of agreements? And what is done in Bangladesh to bring the adamant second parties? (Gyanu G.C, District Coordinator, Nawalparasi, CeLRRd)

Mediators are both volunteers and professionals, and strong laws, which otherwise the case parties have to endure, if they do not comply with the mediation agreements, help most of the times in the implementation of the agreements. With regards to making second parties attend mediation session, first a series of notices are sent. Finally, if the party is firm in not attending mediation, the first party is asked to sue the second party before formal courts. Ultimately, it obliges him or her to attend mediation.

Finally, wrapping up the session, Arju Rana Deuba said, "As we are in the constitution making process, it is a right time to engage in fresh ideas and suggestions. Union Council Village Court of Bangladesh seems quite applicable in our context as well. Besides, the integrated model seems to be the best one to ensure access to justice for poor and marginalized".

Group A, 2nd Session

Paper Institutionalizing of Mediation Process through Lok Adalats

Presenter	:	Prof. Nomita Aggrawal, Professor of Law, Campus Law Center, Delhi University (Former Dean of Delhi University) India
Commentator	:	Dr. Ananda Mohan Bhattarai, National Judicial Academy

Due to back breaking cost of litigation, cumbersome legal process, inordinate delays and tremendous backlog of cases, access to justice for all have become a far fetched dream. To overcome the problem, there was a need of Alternative Dispute Resolution technique. Against such a backdrop, the concept of *Lok Adalat* was introduced in its modern developed form in 1982. *Lok Adalat* can be said to be the extension of traditional *Nyaya*

Panchayats with some modification in its functioning and characteristics. The basis of *Lok Adalat* is settlement which it does through mediation, negotiation, and conciliation. Thus, *Lok Adalats* are not alternative to the existing courts; they are supplementary. In India, statutory recognition has been given to *Lok Adalat* through Legal Services Authorities Act, 1987. It is informal and flexible before which all civil and pre-litigation matters may be brought.

Lok Adalats are organised by National, State, District, Taluk Legal Services Authority, Supreme Court Legal Service Committee, and High Court Legal Services Committee. Serving or retired judicial officers, law teachers, psychologists and social activists can serve. The benefits it furnishes are, parties are saved from the technical court procedures, protracted litigation, anxiety, the expenses of court fees and other expenses which they are likely to incur in future litigations by way of further appeal etc. Regarding its jurisdiction, it can handle any case pending before any court, and any matter which falls within the jurisdiction of and is not yet brought before any court for which *Lok Adalat* is organized.

More specifically, the appropriate cases for mediation are those where communication problem exist between parties or their lawyers; personal or emotional barriers prevent settlement; resolution is more important than vindicating legal or moral principles; parties have an ongoing or significant past relationship; parties disagree about the facts or interpretation; parties have incentive to settle because of time, cost of litigation, drain on productivity; a formidable obstacle to resolution appears to be the reluctance of the lawyers, not the parties and parties want to control the outcome.

Of the several ADR techniques used in *Lok Adalat*, mediation is the most widely used in India. Mediation, as a method of dispute resolution is no new phenomenon, rather the one that has for long existed in Indian traditions. Mediation has been employed by various tribes of our country by way of a village council, usually consisting of certain village elders. The institution of mediation has been statutorily recognized by the Parliament when Section 89 of the Code of Civil Procedure was amended providing for resolution of disputes in the cases where it appears to the court that there exists an element of settlement which may be acceptable to the parties. Mediators' role in *Lok Adalat* include proper introduction of mediator, identification of problem, exploring the problem, exploring options for resolution and concluding mediation. It is such that every award made by a *Lok Adalat* has to be taken as final and no appeal lie against that award.

In the end, she mentioned that in India, *Lok Adalats* have achieved a high stage and the credit should be given to the Government for constant

encouragement to organize as many *Lok Adalats* as possible by the National and State Legal Service Authorities.

To restore back the confidence of masses in our judicial system and prevent the anarchy and disorders in our society and uphold the spirit of democracy and justice to all, out of court settlement between disputants should be encouraged and efforts should be made to provide for various means and modes of such out of court settlement particularly through mediation.

She also mentioned that in India, traditional mediation process has received due recognition.

However, court annexed mediation is also getting momentum in recent years. Mediation centres have been established in many High Courts of the country. She expressed a hope that within two to three years, more and more people would prefer to resolve their disputes through mediation rather than going to a regular process in a court of law. The detail paper is provided in Annex 2.

Comments from Dr. Ananda Mohan Bhattarai

It is good to hear that in India, mediation has a much longer history. She said that even before mediation, there was the concept of *Lok Adalat* that got legalized through Legal Services Authority Act, 1987. Mediation is increasingly being popular in India and elsewhere and has now become an integral part of *Lok Adalat*. In a sense, mediation is institutionalized through *Lok Adalats* in India.

In India, *Lok Adalats* are conducted in holidays and other off-days, so it becomes easier for the service holders to work, and it reflects their commitment to enhance access to justice.

I perceive that if a status-quo is maintained while dispensing justice or making agreements, it would be against the spirit of justice itself. On the same note, if discrimination and exclusion persists, there comes no benefit from mediation. So, while making agreements, legal framework should be the basis. Furthermore, I think it will be better if judges send any parties for mediation in their consent only.

Two strategies would be important in our context: As we lack comprehensive legal framework, we should seriously consider this, and we should try to make formal procedure informal in the best possible ways.

Floor Discussion

» *To what extent does corruption prevail in Lok Adalats*? Padam Raj Bhatta, District Coordinator, Kanchanpur

Sometimes parties insist on having lawyers, and it has been found that only on their part and in very few cases, corruption has been observed. Otherwise due to constant monitoring of high authority like Bar Council of India, there is very little chance of corruption. If such cases are found, the Bar Council takes a very strict disciplinary action including

suspending their licenses. This has controlled corrupt activities in *Lok Adalats*.

» *Do the members of Lok Adalat serve voluntarily?* Geeta Pathak Sangroula

All are paid except retired judges. Heavy amount of budgetary allocation is done from the government for the smooth functioning of Lok Adalat.

» *What is the response of stakeholders, mediators and parties?* Shree Kant Sharma, Joint Registrar, SC

It is very positive and therefore increasing numbers of litigants are going to mediation. In around 60% of cases, the parties accept and implement the agreements.

Group B, 1st Session

Paper

Legislative Framework and Practices for Institutionalization of Mediation

Chair	:	Prof. Manik Lal Shrestha, General Secretary, SUSS
Presenter	:	Ms. Kamalini de Silva, Senior Assistant Secretary, Ministry of Justice, Sri-Lanka
Commentator	:	Hon'ble Judge Ishwor Prasad Khatiwada, Appellate Court

Ms. Kamalini de Silva stressed on a long tradition of community level dispute resolution in Sri Lanka where there used to be a Village Council (*Gram Sabha*), where tribunal hearing on complaints would be done under a tree-shade. It was only under British rule that Village Council acquired a formal recognition in the court system under Village Community Ordinance, 1945. Thus, it was the first step in institutionalizing mediation in Sri Lanka.

There used to be an amicable settlement of petty village disputes. It was the duty of the rural courts to bring by all means the disputing parties to a solution. Panel of conciliators were required to inquire the dispute to the satisfaction of parties. Due to most frequent abuse of power by conciliators panel, Conciliation Board Act, 1958 was introduced. In 1978, conciliation board ceased to exist and Judicature Act came into force. Success of board was felt to depend upon the competence of mediators like good listening skill, and therefore, much emphasis was placed in training the mediators after the enactment of Judicature Act. Mediators used to

provide voluntary service. Minor criminal offences could also be settled through mediation.

Due to conflict of jurisdiction, Judicature Act was replaced by Mediation Board Act, 1988. Then certain rules regarding jurisdiction have been laid down. For example, Mediation Board cannot look into the case in which one of the parties is the state. Mediation session is conducted in informal settings like school, temple, etc. Terms of settlement reached before the mediation board should be in written form. However in case of failure, the board will issue the certificate of non-settlement.

In between 1990-2008, there had been 1,743,407 applications for settlement through mediation. However, the success rate was 54%. There has been 3% cases related to familial dispute. Often times, the second parties show reluctance to appear before the Board and therefore, it has posed several difficulties in mediation process.

The support from the state for the sustainability of the program is really worthwhile. Mediation has helped for meaningful resolution of dispute including social and economic ones. In 2003 and 2004, 13 Special Tsunami Boards had been set up to resolve dispute in Tsunami affected area.

At present there are 290 Mediation Boards functioning with some 7500 mediators throughout the Island. Mediation Boards operate largely independent of the legal system, she clarified. Sri Lanka even has Peer Mediation, which specially focuses on mediation at school level. Each school has established "Mediation Cells" within the school and has a functional Mediation Panels to resolve disputes arose within the school.

In addition, selection of mediators is not simple as they have to undergo special training and certain minimum qualification is needed. She summed up with the idea that mediation is nevertheless essential in Sri Lanka. The detail paper is provided in Annex 3.

Comments from Hon'ble Judge Ishwor Prasad Khatiwada

The presentation was followed by comments from Hon'ble Judge Ishwor Prasad Khatiwada, Appellate Court. He said that the paper was comprehensive, informative and analytical providing a lot of inputs and feedbacks to our context. However, he pointed out two probable reasons for the failure of Conciliation Board Act, 1958 in Sri Lanka:

1. Panel constituted could not become free from political biasedness, and it is a very important lesson to us.
2. Persons involved in resolving disputes used to act as feudals but not as facilitators – same should not happen in Nepal.

The fact that the President of the country selects the members of the Mediation Board as provisioned in the Mediation Board Act, 1988 is very appreciative, as it reflects state recognition in mediation. Furthermore, Ministry of Law itself conducts training on mediation based on the targeted group, which if could be done in Nepal would bring consistency in the quality of mediators. He emphasized the idea of having same module and curriculum in most of the mediation trainings in Nepal. Furthermore, he said that Sri Lankan technique for testing aptitude of mediators seems significant to Nepalese context as well.

He then reiterated Ms. Silva's point of view that the philosophy of mediation is not to lessen the back log of court's cases but to provide speedy justice. If mediation is done with economic interest, there is a high chance of its failure. Hence, it should be kept in mind that self satisfaction that is gained after dispute resolution followed by restoration of relationship is in itself a reward.

He then traced some of the differences between mediation in Sri Lanka and Nepal: Partition, divorce, adoption are settled through mediation in Nepal whereas such cases do not fall under the jurisdiction of mediation in Sri Lanka; appearance of lawyer before Mediation Board while settling dispute is not permitted in Sri Lanka, whereas it is, in Nepal.

He doubted if it should be permitted. We should be cautious that in many cases, lawyers are found to spoil mediation in Nepal. Therefore, he conceded that we could learn a lot from Sri Lankan experiences to promote mediation in Nepal.

Floor Discussion

In the floor discussion and response session, Asst. Prof. Ram Prasad Aryal from Kathmandu School of Law asked if there was any code of conduct of mediators in Sri Lanka and if it is important to have. In its response, Ms. Silva said that there is a code of conduct in Sri Lanka, which is important as it enhances the capacities of mediators, and regulate their activities. Its monitoring is done through Mediation Board.

Answering Michella Parlevliet (Conflict Transformation Advisor,

DanidaHUGOU)'s , query about the success factors that Sri Lanka is benefited from mediation practices, she said that the most important factor is the state's support. Another is that people feel free to go to the mediation board, and feel very comfortable with the settings like school, temples, etc where mediation is done.

Deputy Superintendent of Police Geeta Uprety asked, "How could police be brought in mediation process?" Ms. Silva responded that small criminal offences are referred to Mediation Board by police themselves. Similarly, mediation board has been established in schools and any dispute between students needs to be settled by students themselves.

In response to the question of Asst. Prof. Kumar Ingnam, KSL regarding the reason behind not including some cases namely, partition, divorce and adoption in mediation in Srilanka, Ms. Silva told that the cases require legal documents and testaments to be checked and analyzed. However, the competence does not lie with mediators.

Prof. Manik Lal Shrestha, session chair summed up the session hinting at the reason behind the success of mediation in Srilanka.

As there is no *Varna Vyavastha* (Hindu Caste System) in Sri Lanka, mediation does not endure cultural complications. There existed thousands of mediation councils since the period of Ashoka in Sri Lanka which had been revived during British regime.

Group B, 2nd Session

Paper

Barangay Justice System: A citizen-driven tool for the resolution of disputes in Philippines

Presenter : Atty. Rowena Daroy Morales, Professor, College of Law, University of Philippines
Commentator : Hon'ble Keshari Raj Pandit, Appellate Court

The expert from Philippines, Atty. Rowena Daroy Morales, made a presentation on Barangay Justice System: A citizen-driven tool for the resolution of disputes in Philippines. *Barangay Justice System* is the system of resolving disputes at the basic political and socio-economic unit of government- the B*arangay*. *Barangay Justice Committee, Lupon* is the body composed

of the Village Chief and not less than 10 and more than 20 members which comprise the Conciliation Panel. There are different types of committees in *Barangay* justice system. Such as, *Barangay* agrarian committee looks into dispute relating to land. The Local Government Code of 1991 provided *Barangay* Justice System a statutory basis, thereby making substantial changes to Presidential Decree 1508.

Usually complaints are filed at the *Barangay* office where village chief mediates or arbitrates analyzing the situation of the case. If he/she fails, Conciliation Panel of 3 is constituted to do mediation after the selection made by the disputing parties. Again if conciliation panel fails, the chief signs "Certificate to file Action", and then only, a case can be filed in court. It mainly uses three processes of dispute resolution; mediation, conciliation and arbitration depending upon the choice of the disputing parties. In mediation or conciliation, village chief (*Barangay* captain who holds special respect in *Barangay*) or conciliation panel persuades parties to amicably settle their disputes and in arbitration, parties agree to be bound by the decision of a third person. It is managed by the Department of Interior and Local Government, though the Department of Justice provides supervision.

However, lawyers are not allowed before the *Barangay* justice proceeding. Any information obtained during the proceedings is held as privileged information and is not admissible to any legal proceedings. The main objective of *Barangay* settlement is to restore relation. Nevertheless, on the ground of fraud,

accident, mistake, excusable negligence, *Barangay* decision may be repudiated within 10 days.

Atty. Morales also discussed on the problems of *Barangay* Justice System. She mentioned that there is no standard practice, and also monitoring mechanism is very weak. The village chief or *barangay* captain is more involved in political matters, and women's involvement in the system is low compared to their engagement in government and other offices. However, besides these constraints in Philippines, *barangay* justice system has created positive impacts. The petty disputes relating to family are prevented from escalating into violent conflicts. People are also satisfied with the outcomes and proceeding of the system. The detail paper is provided in Annex 4.

Comments from Hon'ble Keshari Raj Pandit

He furnished comments on the paper discussing upon the historical practices of dispute resolution in Nepal. He mentioned that there existed many dispute resolution systems in Nepal like, *Pantungman* in Kirat period, *Maryajan, Kachari* during Shah Period.

Similarly, he also mentioned some of the statutory provisions for settling dispute at local level such as *Gaun Panchayat Ain 2000 B.S., Gaun Bikash Samiti Ain 2018 B.S.* which for the first time tried to mediate disputes at the local level. Though we have *Local Self Governance Act* that has the provision of forming arbitration committee, it is not in effect. So, taking into consideration Barangay Justice System, he said that we can learn a lot to reform our justice system.

At the end, Manik Lal Shrestha, the chairperson concluded the session relating Barangay with the village development committees of Nepal. As both the countries have diverse cultures and ethnic diversities, he said, there is a lot to learn from each other's context regarding dispensing justice in an efficient way. Barangay Justice System.

Day 2

Group A, 1st Session

Paper Community Mediation: A Pedagogic Reflection

Chair : Mr. Prakash Mani Sharma, Executive Director, Pro-Public
Presenter : Dr. Yubraj Sangroula, Associate Professor Kathmandu School of Law
Commentator : Dr. Ram Krishna Timilsina, Registrar, Supreme Court

Access to justice is one of the core rights of human beings to address conflict or causes of conflict. The concept of justice, which originally evolved through different forms of ordeal both in the eastern and western world, has now been transformed into litigation. However, it largely fails to ensure justice to ordinary people as the access to litigation has been limited, and the extreme formalism practiced in the form of 'procedures' is unfriendly to people who are pushed to marginal lines in different forms such as hierarchical social strata, poverty, and isolation.

Their phenomenal disenfranchisement makes them unable to use litigation as a means of protecting their genuine interests and rights. Litigation cannot be approached by the people who have no capacity to pay different forms of fee. Nepal as a nation with about 30% of population living under the poverty line cannot be expected

to receive benefit from the kind of justice system in which the cost is unbelievably unreasonable.

Mr. Sangroula argued, "In litigation, justice is not delivered but auctioned". Hence, the rich and powerful snatches justice. The vices of nepotism, financial irregularities, corruption coupled by 'formalism' makes the formal justice system 'a mockery'. Just for example, in many countries in South Asia, the judgment of the court and all other court documents are prepared in English language whereas the literacy rate is still not above 50%. Hence, the people seeking justice do understand nothing as to what their lawyers and judges are talking about. Is this what we 'intend to have in the name of justice'? In addition to it, courts are often neither concerned with escalation of conflict in the community by its decision nor the adverse implications of their decisions in welfare, stability and progress of the society.

Moreover, in the name of litigation, conflict instead of getting solved is being institutionalized, as it makes a party win and the other lose. It forever leaves a party in pain; hence the conflict is not settled but aggravated. However, unfortunately, litigation has been defined as a mainstream course of justice which is absolutely wrong, whereas,the legal education system in the past has nurtured set of doctrines which treat means of justice such as community mediation as 'Alternative Dispute Resolution'.

Hence, community mediation and many other similar forms of popular justice system which conveniently provide access to justice to the mass of unprivileged and disenfranchised population have received little attention of the university education and government funding in so-called developing countries. Thus, he challenged the authenticity and credibility of justice system as well as the legal education system of Nepal.

He said that the South Asian countries must review the curricula and do introspect the harms caused to the society. The curricula need to be reviewed to adjust the new changes in values and perspectives. Since the value attached to the objective of justice is fully changed in the present context, access to justice need to be taken as a fundamental issue of justice system, and for this 'the doctrine of 'litigation as the mainstream justice process' and the 'other many forms of popular justice' as alternative dispute resolution should be altered.

Currently, alternative dispute resolution is taught as a part of Comparative Study in the LL.M. and Advance Jurisprudence in LL.B. level at KSL. However, they are far short to address the need of specializing about ideas of community mediation. There are challenges: (1) traditional lawyers are yet not prepared to accept community mediation as a part of the legal education, and, hence, it is often difficult to convince the university policy makers to agree to incorporate such courses; (2) availability of the funding is problem to introduce such courses as government, donor agencies and non-governmental organizations, except some, have no culture of working with universities; and (3) the human resource to teach community mediation effectively is greatly deficit.

At such a backdrop, Kathmandu School of Law on behalf of Purbanchal University has been making endeavors to develop Mediation 'curricula' and while doing so the following 'principles' have

been adopted as the general policy guidelines: Approaches and Workability; and Importance of the Suggested Reform i.e., Strengthening Community Mediation; Deinstitutionalizing gender and caste disparity; Breaking of obstacles to 'access to justice,' Breaking the monopoly over local recourses by a group or outsiders and Philosophical Foundation of the Community Mediation Program. The detail paper is provided in Annex 5.

Comments from Dr. Ram Krishna Timilsina

He very rightly highlighted the pedagogic and institutional framework of Community Mediation. In the country like ours, in fact, formal legal system should be treated as alternative, not the mediation that has been in practice for quite a long time. However, Courts have existed not for revenue collection. Rather, it is a state responsibility to deliver justice to its citizens, and much budget is being invested in the formal legal system.

At the context in which a new Mediation Act is being prepared, I am confused whether Local Self Governance Act 2055 that is not yet implemented can be a part of the new Act.

The economic impact of both the State-sponsored judicial system and Community Mediation should be comprehensively studied. To reduce the caseload in courts, an idea to increase the court fee and delimit the categories of cases to be entertained by courts (to look into selected nature of cases only) seems logical. Doing this means promoting mediation. But the question is how to regulate mediation happening in many corners of the country. Whether it should be formalized (should it be recorded anywhere) or just be left to public?

The other area in which mediation can be applied is in executing court judgments. I believe that the separate Mediation Act would streamline all these perspectives.

Floor Discussion

Is there any role of mediators in the transformation of political conflicts? Ms. Bina Gyawali, CA Member, CPN-UML

Yes, indeed there is a role. But the tendencies to disregard if not deny the suggestions of experts in political assemblies are ruining the possibility. Hence, there is a broader scope of mediators.

Group A, 2nd Session

Paper

Socio-economic Orientations of Communities in Nepal: Possible Implications for Mediation

Presenter : Mr. Mukti Rijal, IGD
Commentator : Mr. Mahendra Prasai, Advocate, Mediation Center

This paper as stated by the paper presenter is based on the assumptions/hunches. Firslty talking about the cultural value patterns of Nepalese communities he stated that our approach is collectivist rather than individualistic and relationship is highly valued in our societies. Community mediation is responded greatly.

However, some cultural values and orientations of some communities in Nepal may militate against the rational standards of the mediation: the rationality for engaging and stressing in groups is dominant rather than being self deterministic which he called collectivist orientation of self, and many a times, it hinders rational mediation; power constraint in which much emphasis is put on seniority, rank, title, age etc, and in mediation if it is assumed that powerful and seniors know better, it may then bring unequal treatment; the pattern of communication amongst communities may be equivocal, for example, "yes" in mediation necessarily does not mean "yes" and it may mean others too; and the attitude to look into conflict not necessarily as confrontational and therefore, resolved in non-confrontational methods, may resolve the tensions in community but, may not result in the resolution of individual problem.

Mediation methods may vary according to the nature of conflicts and therefore, pre-mediation stage empowerment should be done prior to mediation while implementation of process should be done at mediation stage. Training should be given to the mediators specifically dealing with the intercultural and inter sectional mediation. The full paper is provided in Annex 7.

Comments from Mahendra Prasai

He said that socio cultural values have posed some barriers in rational community mediation. In fact, they are based upon needs, interests, and political influence which the paper lacks and if political influence while doing community mediation had been included, it would have been better. The situation is such that 'yes donor, yes mediation; no mediators no mediation'.

If we are trained, only then we can go a long way in mediation and thus, working in alternate dispute resolution. All ADR should therefore, be promoted as Appropriate Dispute Resolution.

Cases Studies Presented

With the objective of knowing how mediation works in community disputes, the following cases from various program districts were shared in the conference:

1. Mr. Kumar Singh Teller, a mediator, Doti RUDWUC presented a case on assault and battery perpetrated upon a Dalit, Mane by an upper caste, Indra. While at work in India, initially, they used to stay together. Once Indra asked some money from Mane, but he could not give, and it caused irritation to Indra. One day his sister-in-law came to visit him and Mane ignoring caste limitations happened to sit beside her. This made Indra so much angry that he beat him harshly. Later also, Indra tried to hurt Mane in the subsequent days. Once he along with his friends also vandalized Mane's house. When it became intolerable, he lodged an FIR in District Office accusing Indra of assault and battery and also looting 25 thousand rupees. Later this dispute was referred to RUDWUC and three mediators including Kumar Singh mediated the case. DSP was also present in the session. After mediators put much effort to make Indra aware of the evils like caste discrimination and intouchability, the case could be settled. Both of them realized the friendship they shared in the past. It was especially Indra who repented his past mistakes and finally agreed to bear all the compensations.

   It reflected how social discrimination against lower caste can be addressed through mediation.

2. Mr. Min Kumar Gautam, mediator of Pro-Public, Sarlahi presented a case on marital dispute between Ramesh and Sarita. After three

children were born, they started fighting everyday. They were very poor and therefore, both of them had to labor all the day even to join hand to mouth. However, Ramesh used to drink and beat her accusing her of having illicit relationship with other men at work. As it became intolerable, Sarita reported the case to VDC Secretary who then referred it to the Mediation Center. The case was mediated the very next day in which both of them put forward their sayings. Sarita requested for partition; Ramesh said that since it was Sarita's second marriage to him, he always feared that one day she would also leave him in the way she left her first husband 15 years back. Sarita also realized his frustration, and promised not to leave him if he stopped drinking and beating her, while Ramesh also pledged her not to go alone anywhere which would trigger his fear. On these grounds, they agreed to live together. The case reveals how mediation can save the lives of people including that of children from the crisis in marital life.

3. Mr. Yagya Prasad Adhikari, mediator of Kaski (SUSS) shared a case of a father-in-law assaulting a daughter-in-law, though they belonged to two separate neighboring houses. Their village had a community forest which community people need to take care of especially in winter season, and the community had managed to set a rotation from each house. As per the rotation, Harihar, the afore-mentioned father-in-law and Srijana, the daughter-in-law had gone to the forest. As they were working together, Harihar got furious at some of her words and threw the weapon that he was using at her and it cut her hand. She went to hospital and it was said that her nerve has been cut and her hand won't be working anymore. After that incident, she always used to curse him. She then approached the president of Village Development office who was in fact a trained mediator. Alongwith two other mediators, the case was mediated in the Mediation Center. Harihar said that he had already realized the mistake and given 4 thousands for treatment but she did not stop fighting with him. While the victim said that she feared that her hand would not work and as her husband was abroad, she would not be able to work anymore. Therefore, she demanded twenty five thousands for better treatment in Kathmandu. But the old man said the demanded amount was too high and if she wanted to do further treatment, he himself would take her to hospital in Kathmandu. The women said that she did have her own relative and would do treatment by herself and then reduced it to 15 thousands rupees. Harihar finally agreed to give the demanded money. Eventually, they were soft with each other. The case reflects how injustices are handled in a better way in mediation.

Group B, 1st Session

Paper Institutionalizing Mediation in Formal Justice Mechanism

Chair	:	Mr. Govinda Das Shrestha, COP, TAF
Presenter	:	Dr. Trilochan Uprety, Secretary MoLJ and CAM
Commentator	:	Mr. Narendra Prasad Pathak, Former Deputy Attorney General

Dr. Trilochan Uprety, Secretary MoLJ and CAM, presented on Institutionalizing Mediation in Formal Justice Mechanism. Dr. Uprety defined mediation as a means to settle dispute and ensure access to justice to the people; it is fair, cost effective and speedy process.

He gave illustrations of Afghanistan and East Timor. In Afghanistan 65% of cases including serious criminal offences are dissolved through informal justice system and in East Timor still people are asked to sit in big mat (*gundri*) so as to speak truth. He mentioned mediation as voluntary process which totally depends upon the free will of people. He strongly suggested for establishing regulatory mechanism so as to bring mediation into an umbrella of justice. While talking about institutionalization of mediation in Nepal, which he said, can be done by recognition in legislation gave the example of Chapter of so *Milapatra* in *Muluki Ain*. Yet some issues like validity of the system, viability of the system, and enforceability of the outcome are needed to be considered while institutionalizing mediation.

He also stated various objectives of the new Mediation Bill which is being drafted with collaboration of the Supreme Court and MoLJCAM. The Bill primarily aims to regularize all sorts of mediation at all levels, act as quality control mechanism, and build capacity of mediators. The detail paper is provided in annex 6.

Comments from Mr. Narendra Prasad Pathak, Attorney

He mentioned that the paper could not incorporate historical aspects of institutionalization process of mediation in Nepal. Sharing the overview of Nepalese society with regards to dispute resolution, he mentioned that formal justice system has seriously lagged behind in providing unrestricted and fair access to justice for its people. Therefore, informal justice system evolved. Mediation is one of its kinds, which consists of some of the merits like, parties to a dispute can be a judge in their own case, supports judicial democratization, and addresses social values and culture and thus, helps in achieving social justice. At the end, the commentator also highlighted some of the problems in mediation like lack of political commitment, and insufficient human resources.

Floor Discussion

In the following session of floor discussion and response, Shankar Subedi, General Secretary, Mediators' Society emphasized that there are hidden interests of people in disputes.

In such situations, settlement is thought to be successful if scope of settlement is allowed beyond their respective claim.

However, to develop professionalism in mediation, there should be some provision relating to the fee to the mediators. It depends upon community mediators either to accept or deny the benefit. But in case of court referred mediation, government should provide fees to the mediators.

Group B, 2nd Session

Paper

Scope and Practices of Mediation in Conflict Situation (also focus on conflict affected situation) and Lessons Learned

Presenter : Ms. Gunathevi Sinnadurai(Malaysia)
Commentator : Ms. Geeta Pathak Sangroula, President, CeLRRd

Ms. Gunathevi Sinnadurai, (Malaysia) provided an overview of mediation process and function of various mediation centers in Malaysia. Mediation is increasingly being popular as an alternative dispute resolution methodology in Malaysia.

Since 1600, the village heads that were called *Penghulus* used to deal matters relating to land claims, relations with traders, mining communities, religion, war illnesses and diseases. Despite the establishment of various mediation centers in Malaysia like, Insurance Mediation Bureau, Malaysian Mediation Centre, The Financial Mediation Bureau, Banking Mediation Bureau, The Housing Buyers Tribunal, the Tribunal for Consumer Claims and so forth, the Malaysian people at large are still unaware about mediation process, she clarified. These Mediation Bureaus are established for different purposes. For example, Insurance Mediation Bureau is to

provide mediation in consumer related cases for instance, between insurance companies and the consumers.

The Malaysian Mediation Centre is a committee set up by Malaysian Bar Council for alternative dispute resolution and it does extensive studies on various modes of alternative dispute resolution practiced in the Commonwealth countries. Similarly, the Financial Mediation Bureau is yet another independent body set up to help settle disputes between clients and their financial service providers like banking institutions, insurance companies, and then deal with grievances.

Moreover, for the customers' complain regarding excessive fee, interest and penalty, misleading advertisement, unauthorized ATM withdrawals etc from bank, the Banking Mediation Bureau has been established. Additionally, Malaysia also has separate tribunals for disputes of housing buyers, consumer claims, medical negligence, and others. In 2007 only, about 300 volunteers had undergone mediation courses as a part of government's efforts. Similarly, the Malaysian government and other concerned agencies are working to educate people on mediation. The detail paper is provided in Annex 8.

Comments from Ms. Geeta Pathak

Ms. Geeta Pathak commended the paper saying that the issues raised by the paper presenter were very genuine. She mentioned that the paper highlighted how mediation can be efficiently applied in cases of religious and racial friction, and how this sort of mediation has helped in restoring peace in Malaysian societies.

However, institutionalization demands concrete laws and policies which Ms. Sinnadurai said, are lacking in Malaysia. She then identified the challenges that mediation in Nepal is enduring: state-centric approach and lack of intra- level coordination mechanism.

Floor Discussion

Asst. Prof. Prakash KC, KSL asked if there were any Act to regulate mediation in Malaysia to which Ms. Sinnadurai answered that there is Malaysian Mediation Council Act which regulates mediation.

In response to Mr. Phatik Thapa (Ex-MP)'s query whether mediation can be said to have been institutionalized in Nepal since it's been in practice for quite long time in indigenous communities, Ms. Sinnadurai told that each society has its own traditional way of dispute resolution. In Malaysia also, they had *Sabha* which was unique to their context. However, institutionalization is more

about having legal base. So, in both Malaysia and Nepal, mediation is yet to get fully institutionalized.

Finally, Mr. Govinda Das Shrestha, the chairperson concluded the session briefing six issues: mediation's jurisdiction, mediation as voluntary or mandatory process, qualification of mediators, fees to mediators, implementation and institutionalization of mediation. Discussing on the jurisdiction of mediation, he mentioned that the Draft Bill should clearly mention and justify jurisdiction of mediation and also mediators. The mediation process at certain level should be voluntary but some time mandatory procedure should also be applied.

Training to mediators should be given for court referred mediation only after considering the qualification of the mediators. At the end, he said that only the enactment of Mediation Act is not sufficient. Only after incorporating the afore-mentioned issues which he said are inevitable, institutionalization of mediation can be done in Nepal.

Group B, 3rd Session

Paper Comparative Study of Legislative Framework of Mediation

Chair	:	Dr. Sagar Prasai, Deputy Country Representative, TAF
Presenter	:	Mr. Ben Reed, Deputy Chief of Party, Rule of Law Program, TAF
Commentator	:	Hon'ble Mr. Binod Sharma Judge, District Court

Mr. Ben Reed, Deputy Chief of Party, Rule of Law Program, TAF, presented on Comparative Study of Legislative Framework of Mediation. He mentioned about five existing systems of mediation in five countries-Germany, Australia, Japan, US and Nepal and every one of which he said, requires half an academic year to discuss.

"I will talk about Nepali culture and rules on mediation," he said. A country's formal law is in fact, product of its culture and related mediation to a number of issues, i) What are the major differences between civil and common law jurisdictions and, how do they influence mediation's development? ii) To what extent do history and culture shape mediation's development? iii) How do cultural differences among groups impact the development of mediation? iv) Which problems in the justice system drive efforts to develop mediation programs in a country?

He expressed that mediation practice of

a country differs to that of the other. In this respect, Germany differs from Japan, Japan from Australia, Australia from US and US from Nepal. He then discussed on the comparative practices of mediation in the afore-mentioned countries. The full paper is provided in Annex 9.

Comments from Hon'ble Binod Sharma, Judge

The presentation was followed by comments from Hon'ble Binod Sharma, Judge, District Court. He mentioned that the paper could elaborate more on the seven issues that he raised. Doubts like whether mediation should be made mandatory or optional or whether mediation should be a voluntary or a paid service, still loom large because community mediation is not clearly conceptualized in the proposed draft Bill of Mediation, but need to be discussed upon. He said, "I emphasize that some fees should be charged to those who can afford to pay while a separate fund has been provided so as to help those unable to pay while settling the dispute."

Question relating to cultural settlement is a thought provoking question. Many indigenous practices in *Solu, Thimi*, *Mukhia* system in Mustang etc reflect such cultural practices of dispute settlement. To mediate a case of murder is a legal deviation which should in fact be discouraged. Regarding training, a defined curriculum is important. But some important aspects like confidentiality, non-interference should not be forgotten while designing curriculum. Supreme Court of Nepal has taken initiative to formulate the standard.

He said that some of the provisions proposed in the bill have in fact violated the spirit of mediation. For instance, it says, mediation can be done by representatives of local bodies who should not necessarily be trained on mediation and the people who don't obey mediators' verdict should be penalized. He finally urged to have clarity on mediation in the coming Act.

Floor Discussion

It was followed by floor discussion and response session. Loknath Ghimire, Student, TU asked, "What is the conceptual difference between mediation and arbitration? Answering the question Mr. Reed said that in arbitration there is a third party to give decision.

Honestly saying, arbitration is far better than mediation because some new injustice may come through the way of mediation which sometimes goes on and on. He also added that Nepal Bar should supervise mediation agreements to look into the cases of human rights violation.

Mr. Mahendra Prasai highlighted on three types of mediators as recognized by the bill. They are community, court referred and commercial mediators. He put more emphasis on mediation done by trained mediator if the decision is to be recognized by the state mechanism.

Finally, Mr. Reed seemed to be supportive to the idea of charging at least in commercial mediation and state supporting the indigents to have access to justice through mediation.

C

CLOSING SESSION

Ms Geeta Pathak Sangroula facilitated the closing session, which was chaired by Prof. Manik Lal Shrestha, General Secretary, SUSS and Honorable Minister Ram Chandra Jha, MoLD was the chief guest. Besides, the following persons were also present in the event:

1. Prof John Paul Lederach,
2. Hon'ble Ek Raj Bhandari, Member of Constituent Assembly
3. Hon'ble Ram Chandra Rai, Judge, DC Dolakha
4. Dr. Sagar Prasai, Deputy Country Representative, TAF
5. Atty. Rowena Daroy Morales, Paper Presenter, Philippines
6. Mr. Bidur Mainali, General Secretary, Municipality Association of Nepal (MUAN)
7. Mr. Mukti Rijal, Executive Director, IGD

The session was preceded by Ms. Preeti Thapa (Programme Manager, TAF)'s presentation on TAF's efforts and experiences in community mediation in Nepal. She revealed that it's been nearly 15 years that the Asia Foundation is doing mediation program in Nepal. There is now mixed system in Nepal – both traditional approaches and the mediation process. Nevertheless, due to rapid development and complexities developing in the communities, the popularity of traditional mediation is decreasing. At such context, TAF introduced modern mediation technique based on traditional mediation system.

In Nepal, community mediation is being managed in 16 districts (14 TAF and 2 Danida) by 5 partners. She also shared some quantitative and qualitative achievements made under mediation

program to the date. Around 4000 trained community mediators in 118 VDCs of 14 districts of Nepal have been generated, amongst whom, 2500 are certified mediators. She also expressed that systems of data base and quality check have been developed; an action research is being conducted on mediation in coordination with Dr. John Paul and a new Mediation Manual is being developed based on it so as to implement the findings into practice. At the end, she also extended her special thanks to VDC secretaries who have contributed in making the program successful, and also to community members who have been involved from the very beginning.

Preferring social rules to legal rules, Mukti Rijal, IGD said that a shift from state-centered to society-centered approach should be recognized in the present time in terms of dispensing justice, because often times the latter is more efficient, and relevant. Though community mediation is in the process of getting institutionalized, Section 33 (of the Local Self-Governance Act) giving power to VDC, and Section 101 giving power to Municipality to settle dispute at community level have not been activated yet. So request is being made to acknowledge mediation adopted by societies at the national level.

Hon'ble Minister Ram Chandra Jha, Ministry of Local Development, expressed that traditional practices were dominant in the past era as legal rules and regulations are in the present time. However, the concept behind both of them is to control society. The situation is such that power has been given to the concerned body but an environment to exercise that power has not been created. For instance, s. 33 and s. 101 of Local Self Governance Act.

He informed that an Act relating to

devolution of power to the Local Governance System is under discussion at the Parliament. How legal space can be ensured to mediators in provision relating to judicial power in the said Act is also a matter of consideration. Roles of both the state and society should be sought forth. However, our action should not aggravate conflict; instead it should down size conflict. He also shed light upon the common attitude of people to conceal evil practices, injustices and other grave issues in the pretext of customary law, and urged not to do so as it preserves status quo and dissipation and denies any social change that, in fact, is a forward moving force.

Mr. Mohammed Hasim Nadaf, Mediator, Dhanusa, Pro-public reminded of the bitter reality wherein politicians used to mock the mediators saying that they knew nothing. But gradually, politicians started believing mediators and disputes started coming before mediators for settlement. Now, community people have trust upon mediators. Yet there lies threats from the armed groups of Terai, but the mediators of such crisis zone are not provided security from police administration.

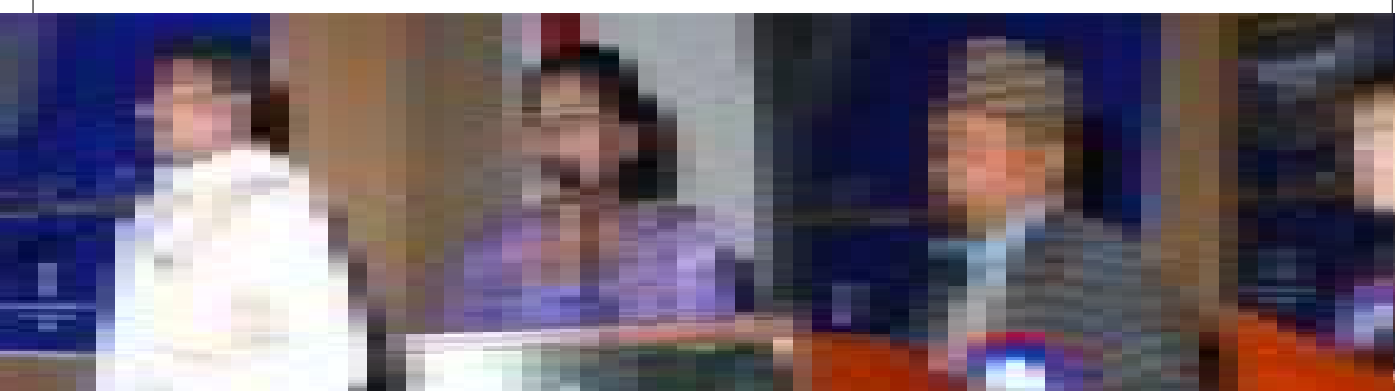
Ms. Alina Hingmang, Mediator, Dhankuta, SUSS conceded that mediation has not only helped minimize caseload in courts to some extent, but also empowered vulnerable groups, mainly women like her those who did not have voice until they were selected as mediators.

Mr. Bidur Mainali, Secretary, MUAN exclaimed that despite the requests made to the government time and again to enforce s. 33 and s. 101 of Local Self Governance Act, no attention was given. During his tenure as Deputy Mayor, he said, "I have had experiences of settling chronic cases through mediation. As NGOs have worked well sharing and/or shouldering the responsibility of the local bodies, I would like to thank them and simultaneously commit on behalf of MUAN that it will support in every possible way."

On behalf of all the foreign paper presenters, Atty. Rowena Daroy Morales said, "We are grateful to all the participants for showing their generosity to share whatever little nugget of knowledge we have on mediation and also experiences of their respective locations."

Honorable Ram Chandra Rai, District Court Judge, Dolakha while mentioning about traditional practices of mediation said that *Limbu Kirant* had a type of mediation center called *Chumlung*. Similarly *Rai Kirant* had *Yayokkha*. Yet, our time and resources are being wasted in litigation. If the same time and resources are invested in nation building, we will have a prosperous Nepal.

Similarly, Honorable Ek Raj Bhandari, CA Member also argued that judicial

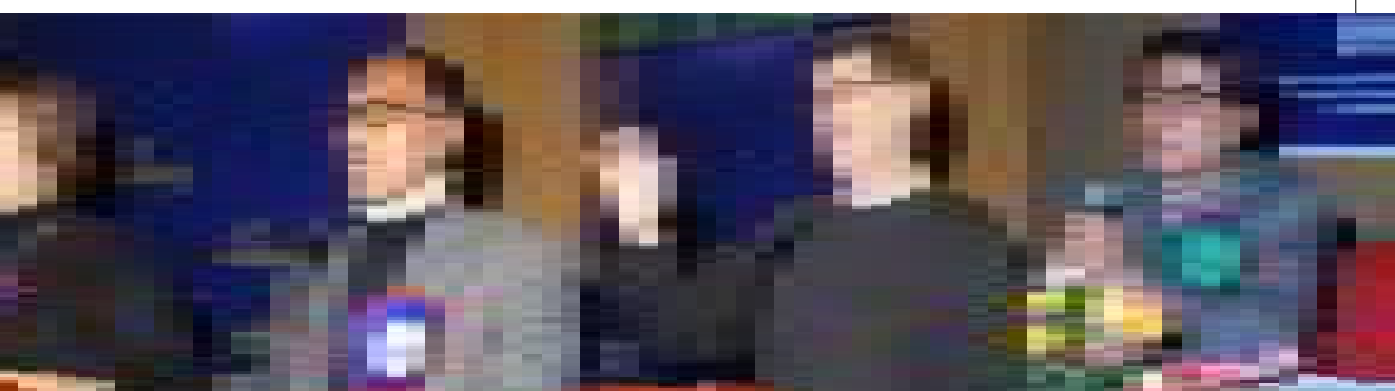


system is one of the most important requirements to give the sense of sovereignty to its people. Speaking on People's Court run by Maoists during the time of people's war, he said that it was similar to *Barangay* justice system in Philippines. He further added that when a community undertakes a dispute, it is the community itself which is well placed to trace the motive behind the dispute, and therefore, there lies the importance of community mediation. Maoists have committed for the promotion of informal justice system in its manifesto and are therefore, trying to safeguard it constitutionally.

Prof. Lederach appreciated diversities amongst participants from the highest, i.e., ministry to the lowest level, i.e., grassroots. He said that Nepal is currently emerging from a deep conflict and therefore, it requires capacity of people to take the responsibility and tackle new situation on the basis of dialogue and mutual understanding even among diversities. Nepal has rich and dynamic varieties of peace processes at the local level, and it is being studied at the international arena for the national peace process. He finally urged to create equal access to resources for all as conflicts happen when one blocks somebody from reaching to those resources.

Prof. Manik Lal Shrestha finally furnished closing remarks. He said that Nepal is at a post-conflict, transitional and therefore a crucial stage. Community mediation process should be able to contribute to the main cause of achieving sustainable peace.

At such a context, we need to adopt an Alternate Judicial System, similar to North Korea and Cuba. We have our own traditional practices which we can call alternate judicial system. Further, he added that in a radical society, we very much depend on radical legislation but the main idea is to change the mind-set of people through their mobilization for the sake of justice.



D

ANNEXES

Annex - 1

ACCESS TO JUSTICE FOR THE POOR IN BANGLADESH: PROBLEMS AND PROSPECTS

- Ferdous Jahan
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1. INTRODUCTION

Access to justice, being an important part of rule of law is considered an inseparable element of good governance. In last few years, there has been a redefinition of 'access to justice' and the concept now emphasizes on providing the citizen, i.e. the demand side with adequate knowledge, legal aid and right based awareness that in the long run will ensure their informed participation in the policy making procedure. Thus access to justice, in the short run, emphasizes on getting the poor people's rights realized and in the long run, concentrates on equitable share and effective participation in the decision making procedure that will bring in qualitative change in their lives.

2. ACCESS TO JUSTICE: CONCEPTUAL FRAMEWORK

Access to justice is defined as-

> Access by people, in particular from poor and disadvantaged groups to fair, effective and accountable mechanisms for the protection of rights, control of abuse of power and restoration of conflicts. This access includes the ability of people to seek and obtain a remedy through formal and informal justice systems, and the ability to seek and exercise influence on law-making and law-implementing processes and institutions (Bender, 2004).

This definition points out a number of significant things. First, access to justice does not concentrate on the formal justice sector only rather it gives due importance to the informal sector. Second, it emphasizes on resolution of conflict rather than punishment and third, it allows the poor to influence the law-making and law-implementing procedures. Finally and most importantly, it emphasizes on civic engagement. In case of ensuring access, it deals with the people who are left out of the formal legal system. It aims to arm them with instruments like legal aid or consciousness, to help them to take control of their life. It moves out of the usual domain of law (in its normative sense) and emphasizes on empowerment. From a theoretical perspective, the concept of justice as reflected in 'access to justice' is indebted to two dichotomous views- retributive-restorative dichotomy and distributive commutative dichotomy.

2.1 Retributive versus restorative justice

In the formal legal system, justice follows the retributive principle where the liability is vested upon the State to "...fix the legal guilt, not the factual guilt." Any crime is considered against the state and the state, after being sure that the very person is guilty and liable under the law, takes necessary arrangement to ensure that "...the [legally] guilty must get just deserts" (Christie, 1977). This particular model emphasizes on the process and makes sure of causing the similar pain in return of pain. On the other hand, restorative justice emphasizes on restoration of the harmony that the particular crime had disturbed. According to Zehr, "It creates obligations to make things right. Justice involves the victim, the offender, and the community in the search for solutions which promote, repair, reconciliation and reassurance" (Zehr, 1990). So the basic difference between retributive and restorative justice is whereas the former demands the punishment of an offender and considers it

as the only way of preventing further crime, the latter tries to heal the wound and bringing back the harmony by allowing the offender in taking part of the healing process (Jahan, 2005) .

2.2 Commutative versus distributive justice

The commutative-distributive dichotomy is an extension of the concept of restorative justice. According to this dichotomy, commutative justice tries to ensure restorative justice within legal bindings. At the one end, it tends to follow the law and on the other hand, it ensures equal exchange in all cases in order to restore the status quo. It means, "The party who has lost resources to another has a claim for the amount necessary to restore his original position" (Sadurski, 1984, p. 335). However, distributive justice is more radical when compared with commutative justice. Pointing out that the legal bindings may often fail to ensure equal exchange, it emphasizes on defining what is just according to social standing of an individual. Based on the principle that profit or loss in case of seeking justice may depend on the relative power of an individual, it demands that while delivering justice, it must take into consideration the impact it will create on an individual's life (Sadurski, 1984, p. 335-337).

For instance, let us consider a case. In a village, once an unmarried woman became pregnant. Later, the man who allegedly had a physical relationship with that woman admitted the guilt but denied to marry her. Now, the retributive justice would say, the court will take necessary action against the man once the guilt is proven. The action may include imprisonment, compensation etc. However, it could have created certain problems, which the formal system would fail to address. First, taking into account the social background, the girl might never get married. After getting out of jail, the man may take revenge etc. On the other hand, in this case, restorative justice would try to reestablish the harmony. Following a restorative principle, the man may be ordered to marry the mother of his child if the woman wishes or he can be fined with ample amount of money so that the woman will not face any trouble in future. In this same case, commutative justice will seek remedy within the legal framework and it will not consider the impact of the justice imposed on the unmarried mother of a child. Distributive justice on the other hand will consider the social status and outcome of that particular incident on the individuals concerned. If both the man and woman share an equal responsibility in that particular relationship, justice should distribute the burden of restoration equally on both. Therefore, either they will marry each other or the father of the child will provide allowance for his unborn child until he/she becomes 18 years old.

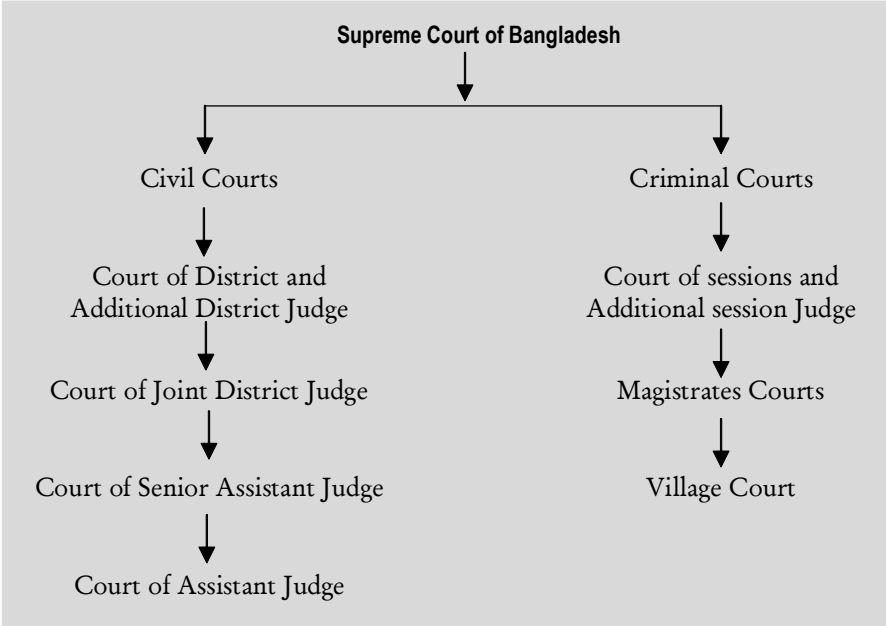
The outcome of the analysis of these two dichotomies is as formal legal systems depend on legal bindings solely and emphasize on law in its normative sense, they often ignore the meaning of justice as reflected by the society or by the individuals living in that society. A number of studies has shown that in case of getting justice, their primary concerns include not punishment but the restoration of harmony and compensation to the victims and this so called justice, provided by the formal legal system- be it retributive or commutative, does not match with their own understandings of justice (World Bank, 2007).

To sum it up, access to justice means restoration of harmony by relying on both the formal structure and "...counseling, mediation, negotiation and other forms of non judicial representation" (Golub, 2003, p. 26). Its main aim is to empower the poor with the tools available to them. In this framework, formal system must work hand in hand with the informal sector in a comprehensive manner.

3. LEGAL SYSTEMS IN BANGLADESH

Taking into consideration the informal ways of dispute resolutions, we can divide the overall justice sector into two parts- the formal justice sector and the informal one.

From the highest tier, i.e., the Supreme Court to the lowest one, i.e., the village court has been included in the formal justice sector. On the other hand, the informal sector includes *shalish* (informal justice conference) and other NGO/CBO sponsored alternative dispute resolutions systems (ADR) (EC, 2005).



In the informal sector, the most well known justice procedure is traditional *shalish* (justice conference). *Shalish* actually means- "the practice of gathering village elders for the resolution of local dispute" (The Asia Foundation, 2002, p. 6). In case of a *Shalish,* 'the parties to a legal dispute are summoned in the presence of village elders' and other powerful elites. The main aim of this assembling is discuss the problems and to reach a peaceful conclusion (The Asia Foundation, 2007, p.21). The village elders and the influential are in charge of delivering a verdict after listening to both sides' story. *Shalish* can be conducted in various forms- it can be arbitrary or mediatory or a blend of the two (Golub, 2003). Normally it takes more than one day for a shalish to come to a conclusion. As the people conducting the shalish are considered as respected or powerful, their decisions always carry a great weight (Khair et al., pp.8-9).

Shalish is most of the time "...the first and only option available to the poor" and it is considered to be "...affordable, comprehensible, convenient, and efficient" (The Asia Foundation, 2007, p. 21-22). This reliance on *Shalish* is based on the fact that the poor and marginalized citizens most of the time are quite reluctant in seeking justice from the formal sector.

4. BARRIERS TO ACCESS TO JUSTICE (FORMAL RULE OF LAW) FOR THE POOR

Despite the working of an apparent fully structured formal justice systems and traditional informal systems, there are numerous problems that impede access to justice for the poor. The common problems related to access to justice in formal systems are described below:

Justice delayed, justice denied: In any literature on the legal system of Bangladesh, delay in dispensing justice is considered as the number one problem that hinders the access to justice. "There are some civil cases which were filed during the Pakistani regime and are still under trial," lamented one bureaucrat in an interview. There are many reasons behind this delay. **First**, leakage of civil and criminal procedure codes allows the cases to be lengthy. Lawyers in some cases also play their part in delay because more delay will ensure more earning for them (Osman, 2006). **Second**, the lack of a sufficient number of judges and courts force a judge to deal with five to six thousand cases in a year. **Thirdly**, even after justice is delivered, it cannot be enforced until the confrontational parties receive a written copy of the judgment. **Fourthly,** criminal cases are delayed due to two reasons: the delay in submission of police report and the delay in

court. Police takes long to submit an investigation report due to shortage of manpower and excessive workload as well as existence of corruption in a police station. When a final charge sheet is submitted to the court, it becomes the place where justice is stuck. "In one year, 40% to 60% of the cases are charge sheeted but only 25% of these cases are put on trial. Following this rate every year cases are accumulated causing a huge backlog" (Jahan and Kashem, 2006). **Fifthly**, dissolution of a bench stops the procedure of the cases of that bench. Later, when that particular bench gains its jurisdiction again, the suspended cases are re-opened from the very first stage. As a result, justice is not delivered in time and a backlog is created. Up to 2003, 3,500 petitions for leave to appeal and 700 appeals were pending at the appellate division (EC, 2005). In high court division, 150,000 cases are pending (ADB, 2001). The situation is even more severe in lower courts.

Outdated Laws and Lack of Indigenization of the Judiciary: In the case of criminal court, some of the primary legislations are almost 150 years old (Kamal, p. 112). The British heritage still plays an important role and the judiciary still follows some penal statute "...the sole purpose of which is to restrict the movement of the poor" (Hoque, 2003, p. 81)". Ignoring the dynamicity of law is placing it in a static position where laws are not keeping pace with the changing pattern of crime.

We have so far failed to indigenize the judiciary. For instance, given the huge backlogs of cases mainly due to shortage of judges, three months vacation in the high court is quite ridiculous. "In fact, during the colonial days, judges coming from European countries needed three months' yearly holiday to visit home, but in the present scenario these long holidays are quite unnecessary and it only undercuts the performance of justice sector further", observed a politician. During these three months vacation witnesses may forget the case, evidence may be distorted, judges may die or many other unpredictable things may happen (Osman, 2006).

Politicization of the Legal Sector: Legal sector has usually been considered as the utmost source of accountability. However, in recent years, the particular phenomenon- politicization has touched this very sector. Even, the high court and the Appellate divisions are not beyond its reach. Until pretty recently, judiciary had to suffer from a lack of operational independence as the appointment, posting, promotion to the higher court remained under the control of the executive (EC, 2005). Though the immediate past caretaker government decided to finally separate the judiciary form the executive organ, its effectuation would require some time. At the same time, the appointment procedure of the judges at the higher court has not been changed and it will still allow the party in power to exercise its power over the judiciary.

Other than the judges, almost all the court officials are appointed based on their political leanings. Specially, in case of appointing Public Prosecutors (PPs), political biasness has become the sole criteria and the competence of the lawyers is ignored.

This overwhelming politicization has created a number of consequences. **First**, this sort of appointment is resulting in a unique "accountability" mechanism, where the politically motivated judges or the PPs remain accountable only to their political masters and this, in turn, "...creates incentives to distort legal processes in favor of political or personal gain (World Bank, 2007). **Second**, due to political consideration a large number of not-so-competent lawyers are being appointed as judges or lawyers, whose failure bar people's access to justice. **Thirdly**, this political appointment results in high degree of corruption. As political blessing becomes the survival mechanism, corruption establishes itself as the norm (Osman, 2006; EC, 2005). In addition, renowned lawyers are reluctant in taking up the job of judges, as it would limit their income.

Shortage of Manpower: With the increase of the population of the country, the number of litigations has increased as well. However, the number of courts and judges and other personnel involved in the system has not been increased sufficiently. It is found that almost about 10,000 cases are filed everyday. Under the circumstance, it necessitates to enhance the number of court and judges for speedy disposal

of the cases filed everyday.

Lack of a systematic delegation of authority in court management makes the judges overburdened. There is no database about the number and status of cases dealt by a court.

Ineffective Law Enforcement Authority: There are many flaws in the law enforcement mechanism of criminal justice system. In the criminal cases, police reports are the foundation of criminal justice. The police arrests, frames the case, investigates and submits charge sheet to the court inspector. Police does all the preliminary work of justice, based on which judgment is delivered from the court. As the police are the framer, investigator and reporter of the case, there is huge scope for manipulation (EC, 2005). In some cases, charge sheet depends on the amount of the bribe. Sometimes they even manipulate the murder case by tampering evidence. "Justice is affected due to corrupt practices of police. They make weak charge sheets with an attempt to weaken the case they get bribes from the offenders" (Jahan and Kashem, 2006). Moreover, police personnel are often used by the ruling political party. The ruling party also appoints police personnel from the party cadre. As such, police normally cannot work independently. Corruption of police seriously affects criminal justice (Hasle, p. 7-8).

In terms of capacity, police has many limitations too. Geographical area of a police station/*thana* is too big compared to its manpower. "...the average police people ratio is 1:1400 while in Singapore it is 1:250", informed a police officer (Jahan and Kashem, 2006).

This section has highlighted a number of problems of the formal legal system.

With all these problems, the formal legal system is simply inaccessible to the poor and marginalized population of the country. Whereas they require quick solution to their most of the time petty problems, late disposal of cases creates a heavy burden on their financial conditions. Due to politicization and unbridled corruption, courthouses become a fearful place to them. It becomes a common phenomenon that money could buy the justice and lack of money often results in lack of justice.

5. DEPENDENCE OF THE POOR ON INFORMAL JUSTICE SYSTEMS

The failure of the formal legal systems has actually forced the poor to move towards the informal legal systems. This dependence has been created for a number of reasons-

- Unlike the formal legal system, justice is delivered rather quickly in the informal sector which thus saves both time and money of the rural mass.
- The informal sector rather than punishing the guilty emphasizes on restoring harmony. The rural villages, which normally comprise of a closely-knit social system actually prefer this mode of justice.
- The informal system in fact saves the villagers from harassment and at the same time the whole procedure looks familiar to them.

Besides, the poor may confront a psychological barrier to go to the formal court. The main reason behind this is formal systems' adherence to formalistic and retributive principles. There is another important reason which is forcing the rural mass to rely on the informal sector. Apart from serious crimes like murder, rape and acid violence, which are less frequent, majority of the problems that the poor experience consist of family matters, petty disputes, petty theft, sexual abuse etc. Usually a formal court does not consider these cases because of the insignificance of their nature and the enormity of their amount of more serious cases. Often, these petty cases, if filed in a formal court, are redirected to the Village Court (VC). However, a particular characteristic of these apparently insignificant problems is that from being insignificant they can gain significance and may potentially cause probable injury to the people involved. If resolved earlier through village court or informal systems then the bigger problems (severe injury, violence etc.) could have been averted if they were nipped in the bud. The opinion of the rural people is unanimous here- problems should be forestalled at the first sign of it, not after the damage is done. According to them, court only considers problems when they reach the

extreme, whereas the extreme stage can be prevented if addressed properly in the primary stages through local level institutions (Ali and Alim, 2005; World Bank, 2007).

There are some other issues which the formal legal structure tends to ignore. According to rural people, justice can only be delivered by people who live in that particular village. "How can someone who does not know us deliver justice? A judge should be some one whom both the confronting parties know. As he lives with us, he can realize what actually happened" (World Bank, 2007). This idea goes directly against the idea of justice present in the formal legal system, where to ensure objectivity and fair trial, the judge should be an anonymous person to both the parties. But according to rural people it is impossible to give a fair verdict by an anonymous person based only on the narratives of the incident and without knowing the personalities of the parties involved, and who is telling lies and who is not.

To the rural poor, there is a very little possibility of being biased in a village *shalish* because in the present context the status of the shalishkers (mediators/adjudicators) is achieved rather than ascribed as happened in the past. Being biased will not help them in the long run to maintain their status. Therefore, not only they have to gain the faith of the villagers but also have to maintain their objectivity throughout their lives because villagers have the liberty to choose shalishkers. This make the villagers feel that that they have more control here in comparison with the formal court where they have to obey the orders of a judge whom they did not have the right to choose.

Another reason responsible for people not being at ease with the formal legal system is the lack of control they have on the procedures and processes of the court. In Bangladesh, the legal system is adversarial, i.e., it requires victims to prove the offence with all evidence instead of offenders. A victim has to present the witnesses in front of court, which is arduous and expensive (Osman, 2006). On the other hand, in a *shalish*, a complainant has no such pressure.

Witness plays an important part in the formal legal system. In formal legal systems, a witness is under the oath to speak the truth and perjured him or herself when truth is not spoken. But the very idea of taking an oath is quite meaningless to the rural people as they do not consider it as effective. To them, the setting or arrangements in a traditional *shalish* is far more efficient because they think that it is not possible for one to lie in front of all villagers. Moreover, in most of the cases those who are present in *shalish* are themselves eyewitnesses of the disputed incident (World Bank, 2007). These types of differences coupled with the problems of language, settings and norms led people to drift further away from the formal legal systems.

Moreover, when a verdict is delivered in a formal court, there is no scope to take the opinions of the parties about the solution to be given. But in the local system, parties are generally asked about the best possible solution according to their views. The very idea of "justice" is similar with "mutual understanding' to most rural people. One male mediator puts it this way- "justice means to deliver a resolution after taking consent of both the confronting parties" (ibid). To them, it should be a participatory process where everyone involved will reach into a consensus.

In the eye of the law or to be specific, the formal legal system, all citizens are equal. But living in a stratified society, where social status still plays an important role, this concept of 'equality' is unfamiliar to the rural people. Therefore, whereas in a formal court the degree of punishment will depend on only the crime itself, in *shalish* the resolution will be different for different people based on their social background or status. For instance- "if a problem arises between a father and a son and if it turns out that the fault lies with the father, still, the *shalish* will rebuke the son for his misconduct. Behind the scene, the father will be told, 'look, its your fault don't let it happen again.' Thus, both parties will go home happily" (ibid).

These particular issues are beyond the understanding of the formal court. Undoubtedly, for its elitist outlook and negligence to the norms or values deeply rooted in rural areas, even when the situation is ideal, i.e., the formal legal system is working without

any flaw and existence of any political or economic barrier, the majority of the rural people will still seek justice from the informal systems. To most people, formal legal systems are unfamiliar as they are brought in and imposed by the foreign rulers mainly to serve their purposes and thus they fail to understand the basic demand of the people of this country and formal courts often perceived as an alien and elitist legal system. This particular psychological barrier will be difficult to address even if the formal legal system promises a fair trial for the poor.

6. PROBLEMS OF INFORMAL JUSTICE SECTOR

Despite this reliance on informal justice sector, at recent times, the significance, importance and effectiveness of *shalish* are declining. There are many reasons behind this lowered status of *shalish*. The problems faced by the informal systems are:

Bias and Corruption: Traditional *shalish* emphasizes heavily on the existing social structure and this unequal power structure creates an impediment to ensure justice for the poor. People who belong to the upper strata of the society can easily exercise their economic influence in traditional *shalish* and if their confronting side is poor, justice may be easily denied. Besides, many a times, the *shalishkers* (*shalish* conductors) help the rich or the elites to receive something in return. Political consideration is also reflected in *shalish*. In fact, political affiliation of the person seeking justice has become an important point of consideration and the just resolution is not delivered as the *shalishkers* have started to consider the consequence of their resolution on their vote bank (Ali and Alim, 2005). *Shalish* is also a subject to manipulation by corrupt touts and local musclemen who are hired to intimidate the entire process (Golub, 2003).

Gender Discrimination: One of the main reasons behind the success of traditional shalish is its support towards traditional values, customs and power structure. On the other hand, this traditional outlook supports patriarchy and thus prevents women from getting justice (Haque et al., 2002, p. 22). Women cannot enjoy the opportunity to participate or express opinion in a traditional shalish. The women are not considered even as witnesses (Halim, 2007, p. 6-7).

For instance, an Asia Foundation report describes a case in which a victim's husband's dowry demands led to beating her and casting out of the home. She asked for help from shalish but it was quite fruitless as "...I could not speak up...I didn't have the chance to say anything" (Haque et al., 2002, p. 22)

Lack of Legal Awareness: Still today, most people of rural Bangladesh are unaware of their legal rights. Dowry is a common phenomenon in village and the villagers just do not know that giving or receiving dowry is prohibited by the law. The actual meaning of "*Denmohor*" (dower) is not yet understood by women and most of them failed to collect it in time (ibid). For its patriarchal nature, traditional shalish fails to provide justice in these cases.

Declining Social Acceptance of Justice Delivered and Changing Social Norms: The acceptance of the outcome of shalish is declining as we observe a declining trend in terms of social values which is ultimately loosening the social fabric. The social norms, customs and context that helped to endure *shalish* as an effective dispute resolution mechanism for long, has started to fall apart. In the past, one of the main reasons behind the effectiveness of *shalish* was the social importance the elders/shalishkers carried and the overwhelming acceptability of them. (World Bank, 2007). However, this norm is becoming non-functional day by day. Time has changed and many citizens now belong to a new generation. Unlike their predecessors, they do not show the same respect or obedience towards elderly and the social acceptance of shalish is thus declining.

Moreover, in the past, the word *'shalish'* was almost synonymous to "law" and everyone was bound to follow it. But, at present, the formal law of the country has made a distinction between "*shalishable*" (shalishworthy) and "*nonshalishable*" (nonshalishworthy) crimes and disputes. As a result, unlike the past, people are

reluctant to seek the help of shalish. Finally, the spread of education is creating an impact on the quality of shalishkers. In the past, when the number of educated people was quite limited, their judgment was accepted by all. However, in recent days, the spread of education has put everyone in the same height and no one is likely to consider another person who can be trusted in case of shalish. In our FGDs, we have found an interesting but common comment: "you think he is learned, so what are we *Mofij* (Fool) (ibid)?

However, the declining status of traditional shalish and changing social norms may be in fact the key to legal empowerment and access to justice for the poor. In the past, shalish was the only institution and people did not have any alternatives to choose from. But, at present, formal law and legal system, which in the previous era was somewhat alien to the rural people, is not beyond their reach now. Besides, a number of organizations are working in the villages to provide legal aid to the people. Access to media has also been a positive phenomenon for the poor.

7. NGO/CSO ROLE IN ENSURING ACCESS TO JUSTICE

The failure of the formal and informal (traditional shalish) legal systems has resulted into the introduction of new form of legal system, known as Alternative Dispute Resolution (ADR). ADR is "...to combine some of the advantages of speed, proximity and agreement between parties of the informal system, in an institutionalized, legally-enforceable form" (World Bank, 2007). It is in effect, a modernized version of traditional shalish which aim to produce the best of the shalish.

Legal remedies through an indigenous mechanism are not unique to Bangladesh. A number of countries actually practice this sort indigenous legal mechanism to resolve conflicts. For instance, In order to solve the problem of high number of backlog cases, the West Bengal government, in 1987 decided to establish a statutory body known **as** "*The Lok Adalat*" (The People's Court). Its main objective is to ensure access to free, fair and equitable justice to the entire citizen. These are organized by the legal aid committees/boards of the respective states and its verdict has the authority similar to a legally binding decree by a civil court or any other tribunal. In west Bengal, *Lok Adalat* has succeeded to establish itself as a "...popular supplementary system for the resolution of disputes, especially for the rural poor" (Jahan 2008). Normally *Lok Adalat* is formed by retired judges, retired and practicing lawyers, doctors, and educators etc. from the locality. It sits once in a month and on the assigned day, the lawyers of both the parties assemble before the Lok Adalat and discuss informally about the problem and its solution. Besides, there is *Parivarik Mahila Lok Adalat* which deals with domestic violence and family related cases. One significant characteristic of these *Lok Adalats* is, they enjoy an institutionalized form and this informal structure works hand in hand with the formal legal sector (Jahan 2008). Similarly, a World Bank initiative, attempting to identify and promote indigenous justice mechanism in Indonesia, Vanuatu, Solomon Island is currently going on. Thus, there is growing emphasis on the informal legal sector as they tend to be more effective than the formal sector in case of ensuring access to justice. In Bangladesh, the same effort is going on with the help of the NGOs.

The history of NGO intervention in Bangladesh is almost as old as the history of country. The NGOs started their journey by providing relief assistance to the poor. During the mid-'70s, the NGOs changed their approach and attempted to address the local power structure. However, this earlier attempt of social mobilization did not last long and since the '80s, the NGOs started focusing on service delivery. During this period, the NGOs basically adopted the target group approach and through building a partnership with the government, the NGOs continued these service delivery activities throughout the '90s. Again, since the mid-90s, the NGOs shifted their focus and started concentrating on advocacy activities. The NGOs advocacy campaign especially received boost with the success of anti-Flood Action Plan. Besides,"... Public interest litigation (PIL) scored early successes at this time, in particular the 1994 landmark ruling that even individuals not directly affected could

represent an aggrieved community. Established service-delivery NGOs began to give institutional form to their advocacy work at this time" (CGS, 2006). As Bangladesh settled into its new democracy, since mid-90s NGOs decided to focus on governance issues and "...most established service-oriented NGOs now feature advocacy programmes with a governance focus" (CGS, 2006). In last couple of years, the NGOs have played a pivotal role in ensuring access to justice for the marginalized population. The wide range of activities performed by the NGOs has actually helped them to be involved in these sorts of programs. With over three decades of involvement with local people the NGOs have successfully used the target-based approach and as such are quite able to identify the population who are deprived of access to justice. Besides, this close involvement with people has helped NGOs to gain the trust of the rural people mass.

The NGOs also can play the role of catalyst effectively in creating demand. These characteristics altogether build the foundation of Community Legal Services (CLS) activities- an innovative approach through which the NGOs are opening the closed door of justice to the rural people. Due to their respective mode of operation and activities, it is much easier for the NGOs to identify the basic legal rights – the one the rural mass are deprived of and at the same time they can also identify the population, their class base, to whom justice is inaccessible. Furthermore, for NGOs, it is not a hard task to make the people aware about their legitimate rights and to create demand for that particular right. Finally, if the NGOs decide to provide training to the people that will help them to have access to justice, due to close interaction over the last three decades, people will believe them.

In practice, the NGOs' interventions (community legal services—CLS) include-

- Awareness raising and legal education of the poor
- Para legal Counseling
- Legal aid in the form of legal advice
- Dispute resolution
- Legal advocacy (The Asia Foundation, 2007)

Of these CLS activities, awareness raising, legal education and legal advocacy mainly aim at getting legitimate rights recognized. Furthermore, para legal counseling, legal aid and dispute resolution mechanism attempt to translate the right into reality. Thus, the CLS activities altogether are an effort of rejuvenating the traditional shalish with less problem and more access for the poor.

However, different NGOs follow different approaches to ensure access to justice. So far, the most common tools used in providing access to justice are mediation and legal aid. Throughout the country, the NGOs that concentrate on legal empowerment of the poor rely on these tools. Of these, Ain o Shalish Kendro (Ask) works mostly in north-eastern districts of Bangladesh; Baanchte Shekha conducts its CLS activities in Jessore and other south-eastern districts; Bangladesh National Women's Lawyers Association (BNWLA) covers the west central districts and limited areas of the Dhaka, Khulna and Syhlet divisions; Madaripur Legal Aid Association (MLAA) concentrates most of its operations in the four districts south of Dhaka and limited areas in the northeastern, central and southwestern districts; and, Rangpur Dinajpur Rural Service's (RDRS) legal services are centered in the northwestern districts of Rangpur and Dinajpur (TAF 2007: 8-9).

The following box shows how the NGOs actually work:

> The experience of Monowara is a classic example of how the NGO-led mediation can successfully ensure marginalized population's access to justice. Monowara was a victim of child marriage. She was first married at the age of 7/8. When she was 19/ 20 years old, her husband died leaving her with two daughters and one son. After husband's death, she cam back to her parents' house with her two daughters. She had to struggle hard and eventually became a SL (Learning to Survive—Bachte shekha) group member. By the age of 30, she became quite well-off according to the village standard and managed to wed both of her daughters. Then due to loneliness and

pressure created on her by the neighbors, she decided to marry again. The marriage took place and her husband was 48 years old. During the wedding ceremony it was decided that there would be no payment in the form of dowry and both the parties (i.e. husband and wife) agreed on it. However, the problem started just after one year of marriage.

Monowara's husband demanded money from her and she was abused both physically and verbally by her husband. Initially Monowara tried to resolve this matter with the help of her parents, neighbors and others. When that did not work, she informed about her problem to SL group members. The local SL ADR committee arranged two consecutive conferences and at one point the husband agreed to stop abusement. However, that, too, did not last long and he started to abuse his wife again. Then SL filed a dowry suit against the husband.

The judge ordered the Ansar and VDP (another community police force) to investigate the case. The VDP officer never came to Monowara to ask anything rather the husband bribed the officer and he submitted a report against Monowara, telling that no violence took place. Monowara's lawyer objected to the report and refused to pursue the case based on that report. As a result, the case was dismissed. Then SL filed another case against the husband under Act 2000 and an arrest warrant was issued. According to the provision of that law, the husband was arrested and was in custody for 9 days. When he came back, he requested another conference to SL and SL did that. In that conference he agreed to do whatever Monowara wanted him to do. This conference finally solved the problem that Monowara faced.

This particular case demonstrates how NGOs actually work. When Monowara failed to translate her rights into reality through informal means (i.e. by seeking helps from community members), the concerned NGO (in this case Bachte Shekha) intervened and attempted to solve the problem through Alternate Dispute Resolution mechanism. When that did not work, the NGO provided legal aid to the victim to fight for justice in the formal sector. However, even when the formal sector failed to provide justice, Bachte Shekha intervened again and made sure that justice is delivered. Moreover, following the principle of restorative justice, the NGO finally ended up arranging a solution that worked for the best interest of both the parties.

The approaches through which these tools are used can largely be divided into three categories. **First**, NGOs like MLAA concentrate solely on mediation. In fact, the MLAA has developed its very own mediation model, known as Madaripur Mediation Model (MMM). The MMM follows a target-based approach where the NGO identifies potential local contact persons and they then attempt to popularize mediation as an alternative to the formal court. Once selected, these contact persons are required to form a mediation committee. The committee members are then trained by the NGO on Human Rights and legal issues. After completion of training, they start working as mediation workers and are bestowed with the following activities-

- Receive applications for the mediation
- Send letters to the parties concerned and arrange mediation sessions
- Supervise the mediation process, follow-up and monitor the outcome of the mediation process

The MMM is widely accepted both home and abroad. In general, the MMM introduced by the MLAA functions at the two lowest tiers of the local government structure- villages and union Parishads. Since 2004, the MLAA has been playing a prominent role in activating the village courts through placing "...trained village court assistants at the union level to conduct legal awareness activities and trainings, complete all required paperwork, and otherwise ensure that

the village court process is implemented in accordance with the enabling laws and ordinances" (TAF 2005: 25-26).

Second, Some NGOs (for example Bachte Shekha) provide legal aid as part of their "...integrated approach to women's empowerment" and community or social development. To these NGOs, ensuring access to justice is sort of a secondary duty which is supposed to complement the bigger goal- be it women's empowerment or social development.

Finally, there are NGOs like BELA, Odhikar, ASK, BLAST that aim to "...complement the efforts of community organizations through national level legal and human rights advocacy, public interest litigation and related program activities focusing on women's rights, environmental law, and other areas" (The Asia Foundation, 2007, pp. 2-3). At the same time, these NGOs attempt to link the people who fail to achieve desired outcome through ADR with the formal courts. For instance, the Bangladesh Legal Aid and Services Trust (BLAST) mainly performs its duties in partnership with upazila (sub-district) and district bar associations and offers legal counseling and legal aid to disadvantaged people in filing cases to formal court.

These wide ranges of CLS activities carried out by different NGOs have a number of significance. First, the CLS activities aim to feel up the vacuum created by the formal legal system to meet the need of the marginalized population. This is mostly done by reintroducing and modernizing the traditional dispute resolution mechanism. Second, CLS activities, through informal legal education attempt to raise the awareness level of the people regarding their legitimate rights and demands. Third, The NGOs, through these CLS try to build a bridge between the formal and the legal system.

Different studies conducted to measure the outcome of the CLS activities reflect a positive scenario (e.g. EC 2005; TAF 2007). The EC study (2005) on MLAA activities concludes that- "The NGO administered mediation is...more equitable, especially where women are concerned as they are encouraged to speak and put their side" (EC 2005: 60-62). The TAF study (2007) has supported this and at the same time points out that CLS activities are playing a major role in both reducing poverty and making the government more responsive to the demand of the poor (TAF 2007: 15).

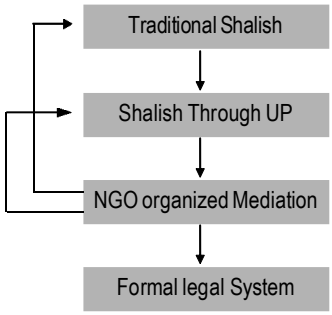
There is no doubt that the performance of the NGOs in this case is quite praiseworthy. However, a study conducted by The Asia Foundation (2007) identified a number of drawbacks of the CLS activities conducted by the NGOs. They are-

- Despite these wide ranges of activities, community legal services are available in an estimated 35 to 40 percent of Bangladesh
- Most of the NGOs do not conduct a full range of community legal services
- In most cases, the NGOs do not provide adequate training to the *Shalishkers*
- Most of the NGOs so far have not focused on higher level legal empowerment techniques that would equip the entire communities to use the law to advance their collective interest
- In most of the cases, the NGOs do not monitor the out come of the ADR.

Thus, in order to ensure access to justice, it is necessary to develop an integrated approach that would allow the NGOs to overcome the aforesaid problems and at the same time would make interaction with formal legal system much easier.

8. CONCLUDING REMARKS

It has become quite evident that the formal legal system for its Westernized, individualistic outlook and emphasis on legal guilt, has remained far from the reach of the people. For poor, the effective remedy could be the traditional shalish which has an entirely Eastern outlook but at the same time, their importance and effectiveness are declining. If the informal system fails to fill in the gap created by the formal system, the situation may become quite dire. However, the positive indication is that the NGOs have come into existence to build a bridge between these formal and informal systems.



In order to ensure access to justice, the primary emphasis should be on the informal sector and this sector needs to be strengthened. This strengthening process should be carried out by the home-grown initiatives with active participation of the NGOs. We have to keep in mind that ideas are not raw materials that after importation they can be used in setting up various institutions. Every idea, strategy or issue taken to implement rule of law must be in line with the political, social or economic context of a certain country. Thus, the basic idea of access to justice for the poor in this case will depend on how the Eastern values and systems (traditional system) integrate with the modern Western individual human rights based systems (formal legal System). Reforms and innovations are required in formal systems by recognizing and entertaining the rights of the poor. The formal systems have to see disputes from a restorative perspective, not a monarchical or colonial retributive perspective. The objective of the justice systems should not be inflicting pain, rather to restore and harmonize the society.

To sum it up, legal rights can be translated into reality only when the formal and informal legal system works hand in hand to ensure access to justice. In this regard, the NGOs have so far played an important role to build the bridge between these two sectors; however, they should act more carefully to ensure that everyone is successfully crossing the bridge.

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Annex - 2

INSTITUTIONALIZING OF MEDIATION PROCESS THROUGH LOK ADALATS*

- Prof. Nomita Aggarawal, India

INTRODUCTION

It has been rightly said, "Justice delayed is justice denied". But it is not the Courts which are to be solely blamed for the tremendous backlog of cases because after all, their capacity continues to remain almost the same or steadily increases while litigations are galore and continue to further increase drastically every year. According to one survey, there are merely ten judges for one million people in India.

With poverty and illiteracy assuming dimensions in our country, it has become most difficult to bear the back-breaking cost of litigation and manage the cumbersome legal process with it's undue delays. These factors are in themselves sufficient to drive an ordinary citizen away from the Courts. It is a pity, that in a democratic set up like ours which enshrines the principle of social, political and economic justice in the preamble of our Constitution, people are deterred from exercising their genuine legal rights which in turn is bound to breed contempt and disillusionment. It is with this end in view that out of Court settlement through Lok Adalat as a mode of dispute resolution without intervention of law courts has been developed. Such settlements may be brought about by the parties to the dispute themselves or with intervention of third parties by way of mediation, negotiation, conciliation and arbitration. In fact, informal dispute resolution has a long tradition in many of the world societies dating back to 12th century in China, England and America. The business world has rightly recognized the advantages that the ADR in one form or other is a right solution. It is felt that it is less costly, less adversarial and thus more conducive to the preservation of business relationships which is of vital importance in the business world. The use of ADR has grown tremendously in the International business field in recent years. The growth has been permitted by several factors including tremendous expansion of International commerce and the recognition of global economy. Many governments around the world have supported the demand for ADR as an efficacious way of handling international commercial disputes.

The Indian civil justice system features a civil service of court administrators, an independent judiciary, a rich supply of professional legal talent, and a modern procedural code. However, the system also exhibits a general failure to manage effectively the dispute resolution processes of a democratic, socially diverse and newly market-oriented society. Comparatively inefficient court administration systems, excessive judicial passivity in an adversarial legal process, and severely limited alternatives to a protracted and discontinuous full trial frustrate several goals of the adversarial process itself. Inefficiency in court administration denies timely access to legal dispositions. Excessive party control places those seeking legal redress in an unequal position because respondents can abuse and delay the resolution procedures with impunity. Finally, the unavailability of alternatives to litigation clogs the system. Many cases awaiting judgment are no longer contentious and long-awaited judgments are often difficult to enforce.

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CHANGES IN THE LEGAL CLIMATE

Global climate change is not confined to weather conditions – it applies also to the climate of the law, which is probably changing faster now than ever before. These changes are occurring not in one country but in many. Unlike the extreme weather conditions we have seen recently, however, these are not cataclysmic changes, but more of a quiet revolution in the way that disputes are resolved, and law is practiced.

The adversarial way of resolving disputes has been with us for several thousand years. The parties to a dispute are pictured as two 'sides', and we look to a judge or other third party to rule on which side is in the right, and which is necessarily 'wrong'

From the story of the inquisition into Adam and Eve's adventures in the Garden of Eden, to present court-based methods of resolving disputes, the process is essentially the same – two (or more) parties to a dispute look to another to rule on who will win and who will lose. Chief Justice Warren Burger, very aptly said:-

"The entire legal profession, lawyers, judges, and law professors, has become so mesmerized with the stimulation of the courtroom contest, that we tent o forget that we ought to be healers of conflict. For many claims, trial by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system has become too costly, too painful, too destructive, too inefficient for truly civilized people."

Perhaps even more ancient in the tradition of resolving disputes by dialogue. In this model, the parties mediates or negotiate a settlement either themselves, or with the help of a neutral third party. The role of this individual, who has no direct interest in the outcome, is to help the parties to find their won solution to their problem. The range of methods of resolving differences outside court-based dispute resolution is known today as Alternative Dispute Resolution – ADR for short and today of the several ADR techniques 'mediation' seems to be the most widely used one.

OUT OF COURT SETTLEMENT IN INDIA

The institution of Lok Adalat was introduced in 1982 and since then it is steadily graining popularity. It serves as a supplement to existing law courts, reducing the burden of Courts of the one hand and the hardships and miseries of litigants on the other.

The institution of Lok Adalat is not new in India, it existed in all societies and continues to exercise decisive influence in the life of village folk even today. Lok Adalat can be said to be the extension of our traditional Nyayaa Panchayats with some modification in its functioning and characteristics. The Nyaya Panchayats were once popular tribunals in the rural countryside settling civil and criminal disputes through the intervention of villages elders. Village Panchayats were usually independent bodies. The ruler rarely interfered in Panchayat's matters. The common people held the Panchayats in very high esteem and confidence. In their reverence towards the Panchayats they referred to "Panchas" as Pancha Parmeshwar which gives an idea about the amount of respect and reverence that the Panchayats Commanded. With the advent of independence, the constitution movers made a provision in Article 40, under which one of the directive principles of state policy specifically laid down that the State would take steps to organise village Panchayats and endow them with such power and authority as may enable them to function as units to self-government. With this in view the institution of Panchayats were brought into recognition.

The modern version of Lok Adalat, however, arose out of the concern expressed by the Committees set up to report on organizing legal aid to the poor and the alarm generated by judicial circles on the mounting areas of cases pending for long at different levels in the Court system. The report of the Gujrat Legal Aid Committee (1971), the report on Processual Justice to the Peopole submitted to the Central Government (1973) and the "Jurisdicare : Equal Justice – Social Justice Report" (1977) submitted by Mr. Justice Pn. N. bhagwati and Mr. Justice V. R. Krishna Iyer consistently advocated the need for revival of informal systems of dispute resolution including the Nyaya Panchayats, Legal Aid Camps and Moble Courts.

WHAT IS LOK ADALAT?

Lok Adalat (Lok Nyayalaya) as the very name suggests means people's court 'Lok' stands for people and the vernacular meaning of the term 'Adalat' is court. Lok Adalat is not a court in the strict sense of the term though it has some attributes of a court. It settles litigation by mediation, negotiation, arbitration or conciliation. It is a dispute settlement agency. It provides seedy, simple and inexpensive justice to the poor and down-trodden. The Lok Adalats are not alternative to the existing courts. They are only supplementary.

There are certain definite advantages of this institution. The parties are saved from the technical court procedures which are followed in a regular court. They are saved from protracted litigation, anxiety, botheration and bitterness apart from the saving of expenses of court fees and other expenses which they are likely to incur in future litigations by way of further appeal etc.

The organisation of a Lok Adalat is informal and flexible. Apart from some minimum requirements in respect of procedures and approaches, the rest of the exercise is simple and varies as the nature of the problems and the culture of the community demand. Voluntary participation and honest settlement is only possible in a free and informal atmosphere subject to certain discipline within the permits of law. As a matter of fact there are no strict guidelines laid down in the procedures of a Lok Adalat. There can be variations in approaches as depending upon whether the place is urban, rural or tribal. Further, the nature of disputes to be taken up has to be seen. Whether it pertains to property, personal relations or public administration. It is advisable and advantageous to have specialized cells dealing with different types of disputes. For this mobilization of local bodies and resources becomes an absolute must. Law students, law teachers, law officers, social activist, etc. all can contribute a lot to the organisation of a Lok Adalat.

The motto is speedy, timely and inexpensive justice through settlement of disputes by mediation, negotiation, arbitration or conciliation. It is a mean of providing speedy justice to one and all through and informal attempt to settle the differences between parties. Lok Adalats are basically institutions for the settlement of those disputes which do not require an interpretation of law.

THE LEGAL SERVICES AUTHORITIES ACT, 1987

In India, statutory recognition has been given to the institution of Lok Adalat. Chapter VI of the Legal Services Authorities Act, 1987 deals with the organisation of Lok Adalat (Section 19) cognizance of cases by Lok Adalats (Section 20), Award of Lok Adalat (Section 21) and powers of Lok Adalat or permanent Lok Adalat (Section 22).

The above mentioned Sections run as follows:–

Section 19 – Organisation of Lok Adalats

(1) Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluk Legal Services Committee may organise Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit.

(2) Every Lok Adalat organised for an area shall consist of such number of –

  (a) serving or retired judicial officers; and

  (b) other persons, of the area as may be specified by the State Authority or the District Authority or the Supreme Court Legal Services Committee or the High Court Legal Services Committee, or as the case may be, the Taluk Legal Services Committee, organizing such Lok Adalat.

(3) The experience and qualifications of other persons referred to in clause (b) of sub-section (2) for Lok Adalats organised by the Supreme Court Legal Services Committee shall be such as may be prescribed by the Central Government in consultation with the Chief Justice in India.

(4) The experience and qualification of other persons referred to in clause (b) of sub-section (2) for Lok Adalats other than

referred to in sub-section (3) shall be such as may be prescribed by the State Government in consultation with the Chief Justice of the High Court

(5) A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of –

(i) any case pending before; or

(ii) any matter which is falling within the jurisdiction of, and is not brought before, any court for which the Lok Adalat is organised.

Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law.

Section 20 – Cognizance of cases by Lok Adalats –

(1) Where in any case referred to in clause (i) of sub-section (5) of section 19 –

(i) (a) the parties thereof agree; or

(b) one of the parties thereof makes an application to the court, for referring the case to the Lok Adalat for settlement and if such court is prima facie satisfied that there are chances of such settlement; or

(ii) the court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat, the court shall refer the case to the Lok Adalat:

Provided that no case shall be referred to the Lok Adalat under sub-clause (b) of clause (i) or clause (ii) by such court except after giving a reasonable opportunity of being heard to the parties.

(2) Notwithstanding anything contained in any other law for the time beign in force, the Authority or Committee organizing the Lok Adalat under sub-section (1) of section 19 may, on receipt of an application from any one of the parties to any matter referred to in clause (ii) of sub-section (5) of section 19 that such matter needs to be determined by a Lok Adalat, refer such matter to the Lok Adalat, for determination:

Provided that no matter shall be referred to the Lok Adalat except after giving a reasonable opportunity of being heard to the other party.

(3) Where any case is referred to a Lok Adalat under sub-section (1) or where a reference has been made to it under sub-section (2), the Lok Adalat shall proceed to dispose of the case or matter and arrive at a compromise or settlement between the parties.

(4) Every Lok Adalat shall, while determining any reference before it under this Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity, fair play and other legal principles.

(5) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, the record of the case shall be returned by it to the court, from which the reference has been received under sub-section (1) for disposal in accordance with law.

(6) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, in a matter referred to in sub-section(2), that Lok Adalat shall advice the parties to seek remedy in a court.

(7) Where the record of the case is returned under sub-section (5) to the court, such court shall proceed to deal with such case from the state which was reached before such reference under sub-section (1).

Section 21 – Award of Lok Adalat –

(1) Every award of Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub-section (1) of section 20, the court-fee paid in such case shall be refunded in the manner provided under the Court Fee Act, 1870 (7 of 1870).

(2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.

Section 22 – Powers of [Lok Adalat or Permanent Lok Adalat] :-

(1) The [Lok Adalat or Permanent Lok Adalat] shall, for purposes of holding any determination under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:-

(a) the summoning and enforcing the attendance of any witness and examining him on oath;
(b) the discovery and production of any document;
(c) the reception of evidence on affidavits;
(d) the requisitioning of any public record or document or copy of such record of document from any court or office; and
(e) such other matters as may be prescribed.

(2) Without prejudice to the generality of the powers contained in sub-section (1), every [Lok Adalat or Permanent Lok Adalat] shall have the requisite powers to specify its own procedure for the determination of any dispute coming before it.

(3) All proceedings before a [Lok Adalat or Permanent Lok Adalat] shall be deemed to be judicial proceedings within the meaning of sections 193[1], 219[2] and 228[3] of the Indian Penal Code (45 of 1860) and every [Lok Adalat or Permanent Lok Adalat] shall be deemed to be a civil court for the purpose of section 195[4] and Chapter XXVI[5] of the Code of Criminal Procedure , 1973 (2 of 1974).

Permanent Lok Adalat

Chapter VIA of the said Act deals with establishment of permanent Lok Adalat (Section 22B), cognizance of cases by permanent Lok Adalat (Section 22 C), Procedure of permanent Lok Adalat 22D and award of permanent Lok Adalat (Section 22 E).

Section 22B – Establishment of Permanent Lok Adalats

(1) Notwithstanding anything contained in section 19, the Central Authority or, as the case may be, every State Authority shall, by notification, establish Permanent Lok Adalats at such places and for exercising such jurisdiction in respect of one or more public utility services and for such areas as may be specified in the notification.

(2) Every Permanent Lok Adalat established for an area notified under sub-section(1) shall consist of –

(a) a person who is, or has been, a district judge or additional district judge or has held judicial office higher in ran than that of a district judge, shall be the Chairman of the Permanent Lok Adalat; and

(b) two other persons having adequate experience in public utility service to be nominated by the Central government or, as the case may be, the State government on the recommendation of the Central Authority or, as the case may be, the State Authority, appointed by the Central Authority or, as the case may be, the State Authority establishing such Permanent Lok Adalat and the other terms and conditions of the appointment of the Chairman and other persons referred to in clause (b) shal be such as may be prescribed by the Central Government.

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1 Section 193 of Indian Penal Code deals with cognizance of offence by Courts of Session.

2 Section 219 of Indian Penal Code deals with charging together for three offences of same kind committed within year.

3 Section 228 of Indian Penal Code deals with framing of charge.

4 Section 195 of Indian Penal Code deals with Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.

5 Chapter XXVI of Indian Penal code deals with provisions as to offences affecting the administration of justice.

Section 22C- Cognizance of cases by Permanent Lok Adalat

(1) Any party to dispute may, before the dispute is brought before any court, make an application to the Permanent Lok Adalat for the settlement of dispute.

Provided that the Permanent Lok Adalat shall not have jurisdiction in respect of any matter relating to an offence not compoundable under any law:

Provided further that the Permanent Lok Adalat shall also not have jurisdiction in the matter where the value of the property in dispute exceeds ten lakh rupees:

Provided also that the Central Government, may, by notification, increase the limit of ten lakh rupees specified in the second proviso in consultation with the Central Authority.

(2) After an application is made under sub-section (1) to the Permanent Lok Adalat, no party to that application shall invoke jurisdication of any court in the same dispute.

(3) Where an application is made to a Permanent Lok Adalat under sub-section (1), it –

(a) shall direct each party to the application to file before it a written statement, stating therein the facts and nature of dispute under the application points or issues in such dispute and grounds relied in support of, or in opposition to, such points or issues, as the case may be, and such party may supplement such statement with any document and other evidence which such party deems appropriate in proof of such facts and grounds and shall send a copy of such statement together with a copy of such document and other evidence, if any, to each of the parties of the application;

(b) may require any party to the application to file additional statement before it at any state of the conciliation proceedings;

(c) shall communicate any document or statement received by it from any party to the application to the other party, to enable such other party to present reply thereto.

(4) When statement, additional statement and reply, if any, have been filed under sub-section (3), to the satisfaction of the Permanent Lok Adalat, it shall conduct conciliation proceedings between the parties to the application in such manner as it thinks appropriate taking into account the circumstances of the dispute.

(5) The Permanent Lok Adalat shall, during conduct of conciliation proceedings under sub-section (4), assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner.

(6) It shall be the duty of every party to the application to cooperate in good faith with the Permanent Lok Adalat in conciliation of the dispute relation to the application and to comply with the direction of the Permanent Lok Adalat to produce evidence and other related documents before it.

(7) When a Permanent Lok Adalat, in the aforesaid conciliation proceedings, is of opinion that there exist elements of settlement in such proceedings which may be acceptable to the parties, it may formulate the terms of a possible settlement of the dispute and give to the parties concerned for their observations and in case the parties reach at an agreement on the settlement of the dispute, they shall sign the settlement agreement and the Permanent Lok Adalat shall pass an award in terms thereof and furnish a copy of the same to each of the parties concerned.

(8) Where the parties fail to reach at an agreement under sub-section (7), the Permanent Lok Adalat shall, if the dispute does not relate to any offence, decide the dispute.

Section 22D- Procedure of Permanent Lok Adalat

The Permanent Lok Adalat shall, while conducting conciliation proceedings or deciding a dispute on merit under this Act, be guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice, and shall not be bound by the code of Civil Procedure, 1908, (5 of 1908) and the Indian Evidence Act, 1872 (1 of 1872).

Section 22E - Award of Permanent Lok Adalat to be final

(1) Every award of the Permanent Lok Adalat under this Act made either on merit or in terms of a settlement agreement shall be final and binding on all the parties thereto and on persons claiming under them.

(2) Every award of the Permanent Lok Adalat under this Act shall be deemed to be a decree of a civil court.

(3) The award made by the Permanent Lok Adalat under this Act shall be by a majority of the persons constituting the Permanent Lok Adalat.

(4) Every award made by the Permanent Lok Adalat under this Act shall be final and shall not be called in question in any original suit, application or execution proceeding.

(5) The Permanent Lok Adalat may transmit any award made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were decree made by that court.

Section 22A defines the term Permanent Lok Adalat and Public Utility Services. The above mentioned section runs as follows :-

Section 22A – Definitions

In this Chapter and for the purposes of sections 22 and 23, unless the context otherwise requires–

(a) "Permanent Lok Adalat" means a Permanent Lok Adalat established under sub-section (1) of section 22B.

(b) "Public utility service" means any –

(i) transport service for the carriage of passengers or goods by air, road or water; or

(ii) postal, telegraph or telephone service; or

(iii) supply of power, light or water to the public by any establishment; or

(iv) system of public conservancy or sanitation; or

(v) service in hospital or dispensary; or

(vi) insurance service,

and includes any service which the Central Government or the Sate Government, as the case may be, may, in the public interest, by notification, declare to be a public utility service for the purposes of this Chapter.

THE PROCESS OF MEDIATION IN LOK ADALATS

Mediation is perhaps the fastest growing form of alternative dispute resolution used in Lok Adalats in India. Lawyers and clients seeking rapid, economical, and private dispute resolution are using mediation in court-annexed and private, for-fee settings. In India recently court annexed mediation process is gaining popularity and all the High Courts as well as the Apex Court of the Country are using this mechanism for dispute resolution. The appropriate case for mediation are those where –

1. Parties want to control the outcome
2. Communication problem exist between parties or their lawyers
3. Personal or emotional barriers prevent settlement
4. Resolution is more important than vindicating legal or moral principles.
5. Creative possibilities for settlement exist
6. Parties have an ongoing or significant past relationship
7. Parties disagree about the facts of interpretation
8. Parties have incentive to settle because of time, cost of litigation, drain on productivity, etc
9. A formidable obstacle to resolution appears to be the reluctance of the lawyers, not

he parties.

The institution of mediation has been statutorily recognized by the Parliament when Section 89 of the Code of Civil Procedure was amended providing for resolution of disputes in the case where it appears to the court that there exists an element of settlement which may be acceptable to the parties.

The Supreme Court in *Salem Advocate Bar Associaiton (I) v. Union of India* [(2003) 1 SCC 49] not only upheld the constitutionality of the statute but also directed framing of appropriate rules. The rules so framed by the Chairman, Law Commission, Justice M. Jagannadha Rao has been accepted by this Court in *Salem Advocate Bar Association, T. N. v. Union of India* [(2005) 6 SCC 344] laying down that "The intention of the legislature behind enacting section 89 is that where it appears to the Court that there exists and element of a settlement which may be acceptable to the parties, they, at the instance of the court, shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the Section 89 and if the parties do not agree, the court shall refer them to one or other of the said modes."

A mediator in Lok Adalat must follow the following process to resolve the disputes:-

(1) Identification of the problem
(2) Exploring the problem
(3) Developing options for resolution
(4) Concluding the mediation

Communication technique which are used in mediations in different Lok Adalats are as follows:-

(1) Summarizing
(2) Acknowledgement
(3) Redirecting
(4) Deferring
(5) Setting an agenda
(6) Using Private Sessions
(7) Dealing with emotions
(8) Reactive devaluation

CONCLUSION

In India Lok Adalats have achieved a stage which can be boasted and credit should be given to the Government for constant encouragement to organise as many Lok Adalats as possible by the National and State Legal Service Authorities.

There is no doubt about the fact that protracted litigation, anxiety and botheration create bitterness. These deterrent factors are bound to breed contempt and disillusionment among masses, leading them to agitate for their rights in streets as in feudal societies of the past.

Under these circumstances, an overhauling of our ageing legal system has become the need of the day. We need a new jurisprudence and that jurisprudence has to shift away from fine-spun technicalities and abstract rules to practical justice. As Mr. YV Chandrachud has rightly said: The legal system in India in its present form will collapse under its own weight within the next ten years. I believe people will loose confidence in the system of administration of Justice".

Therefore to restore back the confidence of masses in our judicial system and prevent the anarchy and disorders in our society and uphold the spirit of democracy and justice to all, out of court settlement between disputants should be encouraged and efforts should be made to provide for various means and modes of such out of court settlement particularly through mediation.

In the end, I would like to mention that in India traditional mediation process has got its due recognition. However, court annexed mediation is also getting momentum in recent years. Mediation centres have been established in many High Courts of the Country. And I am sure within two to three years more and more people would preferred to resolve their disputes through mediation rather than going to a regular process in a Court of Law.

Thank You.

Annex - 3

MEDIATION - THE SRI LANKAN EXPERIENCE.

THE MEDIATION BOARDS OF SRI LANKA

- Ms. Kamalini De Silva*, Sri Lanka

INTRODUCTION

Sri Lanka is an island in the Indian Ocean, situated at the southern tip of the Indian sub-continent. It is approximately 65,525 sq.km in area. Sri Lanka's recorded history begins some time in the 5th century B.C.

Sri Lanka is a multi-ethnic, multi-religious society. It has a population of 20.9 million and the majority of the people are Sinhalese (74%). The Tamil people account for 18% of the population. Moors constitute the next largest minority comprising of 7% of the total population. All other minorities represent 1% of the total population. Sri Lanka is known for the co-existence of four main religions of the world, Buddhism, Hinduism, Islam and Christianity. 70 % of the population are Buddhists, Hindus account for 16 %, Islamist 7%, Christians 7.5% and others 1%.

Since Independence from colonial rule, Sri Lanka has achieved a high level of literacy (91.8 %). Even with rapid urbanisation the country remains predominantly rural and out of the total population, over 70% live in the villages. Despite the impetus given to industry Sri Lanka remains primarily an agricultural country. Over 90% of the rural population directly or indirectly depend on agriculture. Traditionally agriculture has consisted of the export oriented plantation sector - primarily Tea, Rubber and Coconut and the household farming sector, growing mainly paddy and subsidiary food crops for domestic consumption.

HISTORICAL BACK GROUND

Sri Lanka has a long tradition of resolving disputes within the community. History records that Village Councils known as *Gam Sabha* existed in Sri Lanka as far back as 425 B.C. during the reign of *King Pandukabaya*. These Village Councils were described by Robert Knox in ***An Historical Relation of Ceylon*** as tribunals "for the hearing of complaints and doing justice among neighbours". These Village Councils consisting of village elders met at an *Ambalama* (village rest house) or under a shady tree to resolve village disputes successfully. These tribunals "inquired into and if possible, settled amicably and without expense, such criminal and civil matters of the village as disputes regarding boundaries, debts, theft, quarrels, etc. Its endeavours were directed towards compromise, not punishment; and obedience to its decisions.... was voluntary, not obligatory"[1]. However these Tribunals had the status of a Court of Law and those dissatisfied with decisions of the tribunal could appeal through a hierarchy of courts to the King. With the invasion of foreign rulers, Gram Sabha's ceased to exist.

The system of settling village disputes amicably was restored by the British in 1856 following the inadequacy of the British legal system to deal with local disputes. The success of the system led to the enactment of the Village Communities Ordinance. By the enactment of the Rural Courts Ordinance of 1945 these tribunals acquired a formal position in the court system introduced by the British. Though Rural Courts were presided over by a lawyer these Courts too were established with the intention of preserving the spirit of amicable settlement of disputes at village level. Section 23 of the Ordinance stated that it was the duty of a Rural

* Attorney-at-Law; Additional Secretary, Ministry of Justice and Law Reforms

1 Dr.Colvin R. de Silva, Ceylon under the British occupation,298(1953)

Court to endeavour to conciliate between parties. It said that "*it shall be the duty of the Rural Court by all lawful means to endeavour to bring the parties to an amicable settlement, and to remove, with their consent, the real cause of grievance between them*." In implementation however, the Rural Courts did not achieve the desired results.

CONCILIATION BOARDS

The Conciliation Boards Act No. 10 of 1958, which was the precursor to Mediation Boards Act, was enacted in 1958 with the object of curtailing unnecessary litigation. This enactment once again provided for the amicable settlement of both civil and minor criminal disputes. It was essentially created for the settlement of village disputes and therefore the members of the Board were people from the respective villages.

Conciliation Boards were established with the intention of encouraging the amicable settlement of "petty village disputes" and thus "avoiding bad blood, costly and time consuming litigation and crime inspired by such petty quarrels." The Act provided for any person involved in a civil dispute or minor criminal offence to appear before a Conciliation Board and attempt to settle the dispute. The Panels of Conciliators were required to inquire into the matter and resolve the dispute to the satisfaction of both parties. An action could not be instituted in a court without recourse being first had to the Conciliation Board and no court had jurisdiction to entertain an action without a certificate of non-settlement issued by a Conciliation Board. Under the provisions of the Act, a settlement arrived at before a Conciliation Board could be made a decree of Court. However due to certain implementation defects, the Conciliation Boards did not find acceptance with the public as the well as the legal fraternity. Legal luminaries R.K.W. Goonesekera and Barry Metzger having done an in depth study of the Conciliation Boards system were of the view that -

.....Many of the substantive abuses of the Boards' powers are attributed to the political nature of appointments and the resultant absence of quality people. Most frequent abuses of power by Panels seem to be inordinate delay, bias *and misuse of the summons power..... Conciliators on occasion have also exhibited a disturbing tendency to inquire into cases in which they are personally interested. Some Chairmen have also misused their power to summon witnesses apparently with no more significant object than to impress their fellow villagers with their importance."*[2]

Due to these deficiencies in the system and mounting criticism both by lawyers and the public, in 1978, the Conciliation Boards Act was repealed by The Judicature Act No. 2 of 1978 and Conciliation Boards ceased to exist. However the perennial problem of law delays was affecting the effective dispensation of justice. After much study and research and many seminars the consensus of opinion was that "the Conciliation Boards should be reintroduced into the legal system, but that the Panel of Conciliators and its Chairmen should be outside the pale of politics and perhaps drawn from a specified class such as religious dignitaries, permanent citizens of the area who have taken no part in politics, persons skilled in various sciences with technical or legal knowledge and elders who are familiar with customs and habits of the people of the area."[3]

MEDIATION BOARDS

The Mediation Boards were established by Act, No 72 0f 1988 with the objective of providing the people a cost effective, speedy mechanism by which they could mediate their disputes and arrive at an amicable settlement. The goal was also to divert minor disputes away from the traditional courts for settlement of a dispute to satisfaction of parties in an atmosphere that is free from rigid and laborious court procedures and conducive to amicable settlement.

The Mediation Boards Act was drafted taking into consideration the deficiencies in the Conciliation Boards Act. In order to ensure total independence in the selection of Mediators and

2 *Goonasekera,R.K.W. & Metzger, Conciliation Board Act-entering the second decade. Journal of Ceylon,1971*

3 *Herath,P.B. ".Mediation as a alternative dispute resolution mechanism "*

to ensure that persons who are free of political affiliations are appointed, the power to appoint and the disciplinary control of Mediators is vested in an independent Commission consisting of five members appointed by the President three of whom are required to be retired Judges of the Supreme Court or Court of Appeal. Mediators are required to be persons residing in the area and persons of high repute and unquestionable integrity. Appointments are made only upon a nomination made by a non-political Organization, religious dignitary, Principal of a school or a government official.

Success of the Boards is dependent upon the competence of the Mediators. Therefore persons selected to be appointed as Mediators after a stringent interview conducted by the Commission, are given a training in Mediation techniques and skills and appointed after assessing his/her aptitude to be a Mediator. The initial training course and the refresher courses are conducted by the Trainers in the official cadre of the Ministry of Justice, which Ministry is responsible for the implementation of the programme. These trainers too follow periodic in service training courses in Mediation to enhance their knowledge and upgrade their training modules. Much emphasis is placed on training the Mediators in the art of facilitating the resolution of disputes through mediation techniques and skills and following a structured mediation process.

Mediation Boards Act was enacted on the assumption that there are people in the community prepared to work for good cause without remuneration. It is indeed gratifying to note that the assumption has been proved correct and that in this day and age of consumerism there are still altruistic persons in the community willing to serve their peers without remuneration. The mediators provide a voluntary and honorary service and their reward is the satisfaction they derive in doing service to the community and individual who come before them seeking their assistance.

A Panel of mediators and a Chairman for each such panel is appointed by the Commission for each Mediation Boards Area. At present a Mediation Boards area is administratively identified to coincide with an administrative division demarcated by the State. It is the responsibility of the Chairman to constitute a Mediation Board consisting of three Mediators to mediate each dispute presented to the panel of Mediators by an individual, an institution, court or police.

The primary role of a mediator is to facilitate mediation process and, as set out in Sec.10 of the Act, the duties of a Mediation Board are *".by all lawful means to endeavour to bring the disputants to an amicable settlement and to remove, with their consent and wherever practicable, the real cause of grievance between them so as to prevent a recurrence of the dispute or offence..."* The Mediation Boars Act was subsequently amended by Act No. 15 of 1997 to enhance its effectiveness.

Under the provisions of the Act certain disputes below Rs. 25,000/- monetary limit are required to be mandatorily referred to Mediation prior to the institution of a court action. Interim relief may be sought from a court of law even in respect of a matter which requires compulsory reference to mediation. In such an event the dispute is referred back to Mediation after the interim issue is considered by court. However, disputes giving rise to certain specified categories of civil actions are not required to be submitted to mediation mandatorily even if the monetary value of the dispute is below the specified amount. These disputes set out in a schedule to the act include actions such as Testamentary, Partition, Adoption, Divorce, Fundamental Rights, which have been identified on the basis that they constitute an issue which cannot be settled by mediation and need to be adjudicated upon by a Court according to law . In these instances the parties concerned may institute a court action without recourse to mediation. All disputes however, may be referred to mediation voluntarily by the parties to the dispute.

Disputes pertaining to specified minor criminal offences (eg. Hurt, trespass, intimidation, insult, wrongful restraint, mischief, misappropriation), are mandatorily required to be submitted for settlement by mediation prior to the institution of action in court by the Police. The effect of a settlement in respect of a minor offence is the same as if it was compounded in a court.

The Mediation Boards do not have jurisdiction

to entertain a matter where one of the disputants is the State, or where a public officer is engaged in making recoveries on behalf of the State, or where the offence is one in which proceedings have been instituted by the Attorney-General.

Apart from applications made by parties to a Mediation Board there is also provision for Court references. Thus, a Court may *with the written consent of the parties* to an action refer any civil matter to the Mediation Board for settlement by mediation. In the event of a settlement being reached before the Mediation Board, such settlement will be referred back to Court to be entered as a decree of the Court. This is the only instance where a settlement reached by mediation will be entered as a decree of Court. Unfortunately to date only very few parties who are litigating have availed of this salutary provision.

In keeping with the concept of Mediation, appearance before the Mediation Board is voluntary and the mediators are not vested with the power to compel attendance. Mediation sessions are conducted in informal surrounding in schools, temples and public community centres easily accessible to all. In order to encourage uninhibited discussions the law provided that no statement made by any person before a mediation board shall be admissible in evidence in any civil or criminal proceeding. Parties are free to select their own mediator from the panel of mediators and there is also provision for the parties to appear before pre-constituted panels if they so desire. The Mediation Board is required to issue a certificate of non-settlement if a settlement is not reached within a stipulated time limit. Since mediation is not based on legal rights but on the interests of each party, lawyers or agents are prohibited by law from appearing before the Board. A Minor or any person under a disability can be represented by a parent, guardian or curator. One spouse may be represented by the other.

Terms of settlement reached before a Mediation Board is required to be reduced to writing. How ever such a settlement is not legally binding and is not enforceable in a court of law. The aggrieved disputant may go before the Mediation Board once again if any of the conditions of the terms of settlement are breeched by any one of the disputants. The Board is required to attempt to settle the matter once more and in the event of a failed mediation the Board will issue a certificate of non settlement. The disputants may thereafter seek a legal remedy in a civil court.

HOW EFFECTIVE IS MEDIATION?

Since Mediation Boards were first established in 1990, it is encouraging to note that mediation has gained increased recognition as a highly efficacious method of settling disputes. At present there are 290 Mediation Boards functioning throughout the Island. Mediation Boards operate largely independent of the legal system.

At present there are approximately 7500 Mediators appointed to 290 Mediation panels existing in the island. The Mediators have been selected from different disciplines and backgrounds such as Doctors, Engineers, Accountants, Surveyors, Teachers, businessmen, Native Physicians, Government servants of all grades and the clergy. The only criteria for selection is that they should be persons respected in the community and should possess the necessary qualities required to be a skilful Mediator. Though a Mediator is required to do gratuitous service it is considered a prestigious post, and many persons willingly offer their services to be Mediators. Culturally, Sri Lankans respect their elders in the community and as a consequence the majority of the Mediators are respected elders in the community, over 50 years of age and usually living a life of retirement. A Mediator is required to devote a great deal of his time towards this voluntary service. It is perhaps as a result of this that those in retirement and leading an unencumbered life, is inclined to accept appointment as a Mediator. It is regretted that only a few women consent to serve as Mediators. This may be attributed to the reason that women in Sri Lanka have domestic responsibilities even after retirement. However women show no reluctance to appear before the Mediation Boards.

From 1990 up to 2008 a total number of 1,743,407 applications have been referred to Mediation, of which 941,960 have been amicably settled, thus achieving a success rate of 54%.[4] The success rate is evidence of the fact that Sri Lankan society

in general has now accepted the Mediation process as a successful method of alternate dispute resolution supplementary to the established judicial system. It is envisaged that more and more people will access the Mediation process and thereby considerably reduce the backlog in the already overburdened courts. In a survey done in 1995 statistics revealed that there was an increase in the number of disputes referred to mediation and a corresponding decrease in the institution of court actions. Sri Lankans are by nature litigious and it is hoped that with increased awareness and acceptance of mediation as a suitable alternative to the adjudicatory process, only matters that require judicial adjudication will be referred to court.

A sample survey done in nine Mediation Boards in the Kandy district revealed that 25% of the applications made to the Mediation Boards are referrals by the Court and by the Police and 75% of such applications are in respect of offences such as affray and simple hurt. 40% of the applications referred by the public are in respect of land disputes, i.e. boundary, roadways etc. and 3% of the cases relate to family disputes. In addition, it is observed that financial institutions like State Banks, Commercial Banks, Commercial institutions and Rural Banks refer their disputes regarding non payment of loans, to the Mediation Boards. It is also observed that financial institutions refer their applications which are even above the mandatory monetary limit to Mediation Boards. This course of action is obviously adopted by the Banks because they are satisfied with the cost effective recovery procedure. This would bear out both the effectiveness of mediation as well as the confidence reposed by the people in the system.

USAID conducted a study on uses of ADR related to the rule of law in 1998. This study included key observations in the course of field assessments in Sri Lanka and the concluded that "*While not perfect the Sri Lankan mediation boards have been incredibly successful at providing low cost, accessible justice to a majority of Sri Lanka's rural poor. The system is well administered and enjoys a outstanding reputation.*"[5] In 2003 a survey of users of the mediation process was conducted by the Ministry of Justice with the assistance of the Asia Foundation, to ascertain the level of acceptance of the system, its strengths and weaknesses. Analysis of the 4000 responses indicated that "the majority of the disputants were highly satisfied with the mediators and the mediation process. 84% were of the view that the settlement was fair to both parties; and 81% had complied with the settlement; 10% of the respondents were dissatisfied with the time taken for the mediation process and found the mediators and mediation process unjust; however, the vast majority would recommend mediation to other persons, have confidence in the mediation process and view mediation as better than going to court. "[6]

One of the major obstacles that hamper the success of the mediation programme is the reluctance of the non-applicant disputant to appear before the Board. Considering that the spirit of mediation is dependant totally on the desire and commitment of the parties to settle an issue based on their own interests, it would be against the concept of mediation to compel by law attendance before the Board. Our experience has shown that an increased confidence in the system has resulted in acceptance of mediation as a better alternative to litigation.

While mediation is a new phenomenon its true potential needs to be aggressively marketed. The Ministry took several initiatives to de-mystify the mediation process by creating awareness regarding the key features of the mediation process, and a special effort was made to dispel myths and fears regarding its deficiencies. Educational and out reach programmes have been conducted for the last 15 years for Grama Niladharies, school children, law-students, Quazis, Environmentalists, company executives and factory workers. The programmes and training modules were designed according to

4 Source - Mediation Boards Commission

5 Alternative Dispute Resolution Practitioners Guide- Centre For Democracy and Governance-1998

6 Report on the Ministry of Justice 's Community Mediation Boards User satisfaction Survey-2003

the target audience and the benefits from these programmes have been tremendous and include winning over those critical of the concept and securing support of advocacy groups. Special stakeholders meetings were conducted by the Ministry under the chairmanship of the Judge of the relevant district. This interaction with stake holders resulted in having a better cooperation from the stakeholders involved in implementing the programme. From the very inception of our programme The Asia Foundation Sri Lanka supported the Ministry of Justice and support they provided was vital in expanding alternative dispute resolution landscape in the country and to enhance the quality of the programmes.

MEDIATION (SPECIAL CATEGORIES OF DISPUTES) ACT

Based on the premise that certain categories of disputes need to be resolved by the intervention of mediators who have expertise in the area of the subject matter of the dispute and special mediation skills and knowledge, Mediation (Special Categories of Disputes) Act No 21 of 2003 was enacted to establish special Boards and for the appointment of mediators with specialized training and identified qualifications. In specifying the categories of disputes the Minister is required to take into consideration the need to provide for meaningful resolution of disputes relating to social and economic issues. Unlike in the Community Mediation Board, the state or state official can be a party to a dispute.

Several disputes had arisen in consequence of the devastation caused by Tsunami in December 2004. In order to facilitate the expeditious resolution of disputes and grant relief to already traumatized victims it was decided to establish Special Mediation Boards under the special law and 13 Tsunami Boards have been established in the Tsunami affected areas. In terms of Regulations made under the Act, any dispute where the debt, damage or demand has arisen as a result of the tsunami may be referred to these Boards for resolution. If the value of the dispute is below Rs. 500,000 Mediation is compulsory. Several disputes have been successfully resolved by the special Boards however it is too early to comment on the success or failure of the Boards yet.

PEER MEDIATION

The Ministry of Justice in order to educate the younger generation and inspire belief in Mediation as an important tool to resolve disputes and prevent disputes expanded the mediation programme to schoolchildren. The Ministry initiated a project in 30 schools, and approximately 25 students in each school as well as some teachers were given five days training in Mediation techniques and skills. The training module was specially designed for peer Mediation. Trainers of the Ministry of Justice who were given a special training in peer Mediation visited the selected schools and conducted the training. Each school has established a "Mediation Cells" within the school and has a functional Mediation Panels to resolve disputes arising within the school. The panel are supervised by the Programme Assistants (mediation) attached to Ministry and they conducted various activities like school camps, leadership training programmes, competitions and exhibitions related to mediation. The response from the children has been very encouraging and Ministry is planning to expand the programme to another 100 schools in the island in 2009.

CONCLUSION

There is no doubt that the concept of Mediation is needed in Sri Lanka. The Courts are creaking under a workload which it cannot bear. The docket explosion is astounding. The time has come to look for effective alternatives and mediation has proved be a viable alternative.

In conclusion I would like to quote Lord Buddha-

Jayang werang pasawathi
Dhukkan sethi parajitho
Upasantho sukan sethi
Hithwa Jayaparajayan
Who wins, creates an enemy;
unhappily does the defeated sleep;
who is pacified sleep happily;
having given up victory and defeat.
(verse 201, Dhammapada)

Annex - 4

BARANGAY JUSTICE SYSTEM: A CITIZEN-DRIVEN TOOL FOR THE RESOLUTION OF DISPUTES IN THE PHILIPPINES

- Atty. Rowena Daroy Morales, Philippines

I. INTRODUCTION

The Philippines is an archipelago divided into 81 provinces, 136 cities, 1494 municipalities and 41, 995 barangays. The barangay is the smallest political unit in the Philippines. It is in the barangay level that the Barangay Justice System (BJS) is implemented. The barangay serves as the primary planning and implementing unit of government policies, plans, programs, projects, and activities in the community, and as a forum wherein the collective views of the people may be expressed, crystallized and considered, and where disputes may be amicably settled.

The Barangay Justice System is not part of the judicial hierarchy or the formal judicial system. An instance wherein the Barangay Justice System comes into contact with the Judiciary is when the Barangay Justice System issues a certificate to the disputing parties who have failed to reach an agreement to file a case in court. The Barangay Justice System has within its coverage a class of disputes, and failure to undergo this step before going into the hierarchy of the formal judicial system may be cause for a dismissal of the suit subject of the dispute. The Barangay Justice System is managed by the Department of Interior and Local Government, though the Department of Justice provides supervision.

II. PHILIPPINE INFORMAL JUSTICE SYSTEMS

The Philippines has informal justice systems, and these are usually found in the indigenous communities. These systems have long been in place in the Philippine context. These systems are recognized in the various laws enacted. The 1987 Constitution has a provision that states that the Philippines recognizes and promotes the rights of the indigenous peoples within the framework of national unity and development. The 1987 Constitution also mandates Congress to provide the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.

Under the Indigenous People's Rights Act of 1997, it is provided in Section 7(h) that indigenous people shall have the right to resolve land conflicts in accordance with customary laws of the area where the land is located, and only in default thereof shall the complaints be submitted to amicable settlement and to the Courts of Justice where necessary. Section 15 of the said law also states that the indigenous peoples shall have the The ICCs/IPs shall have the right to use their own commonly accepted justice systems, conflict resolution institutions, peace building processes or mechanisms and other customary laws and practices within their respective communities and as may be compatible with the national legal system and with internationally recognized human rights. If parties belong to the same ethno-linguistic group, the dispute shall be resolved in accordance with the groups' settlement procedure. But if the parties come from different ethno-linguistic groups, the dispute shall be settled in accordance with established procedures governing intertribal disputes; if none exist, the parties may agree on the applicable procedures. Section 65 of the said law recognizes the primacy of customary laws and practices. It states that when disputes involve indigenous peoples, customary laws and practices shall be used to resolve the dispute.

Indigenous peoples have had parallel justice

systems in place even before the institution of a formal judicial system in the Philippines. For instance, the Tagbanuas of Coron, Palawan have a tribal justice system called "*panglaw*", wherein a person found guilty of violating customary law is given 30 lashes of a rattan cane by a council of tribal elders. This occurs after the guilty person has been confined and made to stand for several hours in full view of the public. The Kankanaey of the Cordillera has a system called "*tongtong*", a dialogue held to resolve disputes, with the guilty party paying a penalty. The Tagakaolo in Sarangani Province call their indigenous justice system "*kasfala*", which usually requires a peace offering from the offender. In Kitaotao, Bukidnon, the Matigsalog people are using a customary law called "*gantangan owey palavian*" to resolve conflicts. The "*kedefawan*" tribal justice system of the Tedurays of Kidapawan in Cotabato, the "*matikadong*" or "*bagani*" system of the Mansaka tribe in Davao del Norte, the "*tabunawai* or *temuay*" of the Arumanen Manuvu, among many others have a tribal leader or council of elders resolve a dispute in the community.

The most famous indigenous method of dispute resolution among indigenous peoples is that of the Kalinga and Bontok tribes called Peace Pacts[1]. The Bontok Peace Pact, called *Pechen,* is a mechanism used by the Bontoks to end hostilities and armed conflict between two villages, and ensure safe travel and reestablishment of friendly relations.

Two types of people are involved in the preservation of the Peace Pact as follows:

1. *Peace Pact Holder*

   Usually the Datu or the Village head, the Peace Pact Holder is obliged to support, preserve and defend the pact's provisions, e.g., to collect fines and to impose fines, to prepare for ward feasts for pact renewals, to negotiate with the co-peace pact village whenever the occasion arises, and to handle any politics involving the co-peace pact village.

   The Peace Pact Holder is also required to give a share or contribution for every celebration, like the anniversary of the forging of the Peace Pact, and other activities that pertain to the Peace Pact.

2. *Go-between*

   The Go-between is a person sanctioned by the affinal and natal villages to carry out "diplomatic" functions on behalf of the conflicting villages. When conflict is settled and a Peace Pact perfected, the Peace Pact Holder takes over.

   The Go-between also helps the Peace Pact Holder to enforce the peace provisions and try to mediate when a conflict is ready to erupt in public gatherings. He/she also helps in the amicable settlement of cases between two villages through shuttle mediation.

   Moreover, the Go-between is obliged to stop an armed encounter between their affinal and natal villages by ritually positioning themselves between the two warring groups.

The qualifications of a Go-between is as follows:

1. Mature men and women; preferably those who have experienced being sent out on a mission in past cases;
2. A member of a large kin group in his/her natal village.
3. Must be neutral at all times in his/her dealings with both villages. In relaying messages between the two hostile communities, she/he should deliver messages accurately, without injecting his/her personal opinion; she/he should tone down heated words and always aim to bring about peace.

Generally, there is no compensation or reward provided for a Go-between. The service is rendered for the welfare of the village and village consensus sees it as duty performed by virtue of being "children of both villages." The reward is the prestige offered by both the affinal and natal villages. The Go-between is safe from harm during armed conflict between the affinal and

[1] MEDIATOR'S NETWORK Presentation for the XinJiang ADR Study Tour, The Asia Foundation, April 2008

natal villages.

Other informal justice systems include those traditional dispute resolution systems of the Moro people in Mindanao like the Agama Dispute Resolution system. In cases of Rido, which is a type of conflict characterized by sporadic outbursts of retaliatory violence between families, kinship groups, and communities usually caused by political disputes or land quarrels, the community acts as one to prevent violence, to manage and settle the conflict and to participate in reconciliation ceremonies. Sometimes, outside mediators are utilized to settle the conflict.

Filipino culture has long put a premium on informally settling disputes instead of going to the judicial process. Filipinos have an attitude that most conflicts or disputes can be settled and this is characterized in the Philippines by the phrases: "puwedeng pag-usapan," in Filipino, the national language, "puwede masabutan, " in Cebuano, "mabalin nga pagsaritaan," in Ilokano, and "pwede masturyahan," in Hiligaynon. Translated to English, these phrases mean "things can be settled or compromised." This is one reason why the Barangay Justice System has been for the most part successful.

III. ALTERNATIVE DISPUTE RESOLUTION SYSTEM

A system put in place by the Congress in the Philippines to resolve disputes is Alternative Dispute Resolution (ADR). Republic Act 9285 was the enabling law for the institutionalization of the use of an alternative dispute resolution system in the Philippines. Also known as the Alternative Dispute Resolution Act of 2004, the law sets the policy of the Philippines to actively promote party autonomy in the resolution of disputes or the freedom of the parties to make their own arrangements to resolve their disputes. The law further states that toward this end, the State shall encourage and actively promote the use of Alternative Dispute Resolution (ADR) as an important means to achieve speedy and impartial justice and declog court dockets. As such, the State shall provide means for the use of ADR as an efficient tool and an alternative procedure for the resolution of appropriate cases. Likewise, the State shall enlist active private sector participation in the settlement of disputes through ADR.

The law defines an alternative dispute resolution system as any process or procedure used to resolve a dispute or controversy, other than by adjudication of a presiding judge of a court or an officer of a government agency, as defined in the law, in which a neutral third party participates to assist in the resolution of issues, which includes arbitration, mediation, conciliation, early neutral evaluation, mini-trial, or any combination thereof. Parties to amicably resolve their disputes, outside of the judicial process, can utilize these forms of alternative dispute resolutions mechanisms. The Alternative Dispute Resolution Act of 1994 states that it shall not be interpreted to repeal, amend or modify the jurisdiction of the Katarungang Pambarangay under Republic Act 7160, otherwise known as the Local Government Code of 1991. This will be discussed in the latter part of this article.

Under this law, arbitration is defined as a voluntary dispute resolution process in which one or more arbitrators, appointed in accordance with the agreement of the parties, or rules promulgated pursuant to this Act, resolve a dispute by rendering an award. Mediation is defined as a voluntary process in which a mediator, selected by the disputing parties, facilitates communication and negotiation, and assist the parties in reaching a voluntary agreement regarding a dispute. Conciliation is a process in which the parties to a dispute, with the assistance of a neutral third party identify the disputed issues, develop options, consider alternatives and endeavor to reach an agreement. Early neutral evaluation is an ADR process wherein parties and their lawyers are brought together early in a pre-trial phase to present summaries of their cases and receive a non-binding assessment by an experienced, neutral person, with expertise in the subject in the substance of the dispute. Mini-trial is a structured dispute resolution method in which the merits of a case are argued before a panel comprising senior decision makers with or

without the presence of a neutral third person after which the parties seek a negotiated settlement.

This law places a premium on party autonomy in the settlement of disputes. Even before this law was enacted, the Civil Code has long recognized the settlement of disputes through compromises and arbitrations. Arbitration as a method of settling disputes was also institutionalized in a prior legislation to the Alternative Dispute Resolution Act. This was Republic Act 876 or the Arbitration Law. This law still is still the governing law when it comes to domestic arbitration in the Philippines.

Alternative Dispute Resolution is available to parties before a dispute starts, when there is a clause in their contracts. After the dispute has arisen, parties could either resort to the Katarungang Pambarangay in proper cases, the parties agree to submit to alternative dispute resolution before a case is filed or in case no case is filed, or when there is already a case pending, the parties could also resort to court annexed mediation, court referred mediation, judicial dispute resolution or Court of Appeals mediation.

Court annexed mediation is defined as any mediation process conducted under the auspices of a court after such court has acquired jurisdiction. Court referred mediation is ordered by a court to be conducted in accordance with the agreement of the parties when an action is prematurely commenced in violation of such agreement. Judicial Dispute Resolution is a series of activities undertaken for failed mediation cases. It is employed a last resort when the parties could not reach a settlement. It is also employed when there is a likelihood that the parties would change their minds. At this stage it is already the judge which will act as the conciliator or mediator. Appellate Court Mediation (ACM) is a mediation program in the Court of Appeals (CA), corollary to Court-Annexed Mediation in the lower courts. It provides a conciliatory approach in conflict resolution. Through ACM, the CA promotes a paradigm shift in resolving disputes from a rights-based (judicial) to an interest-based (mediation) process.

All civil cases in the Philippines are mediatable, save for those cases which by law cannot be compromised. These cases cannot be compromised:

(1) The civil status of persons;
(2) The validity of a marriage or a legal separation;
(3) Any ground for legal separation;
(4) Future support;
(5) The jurisdiction of courts;
(6) Future legitime.

Under the Civil Code of the Philippines, it is provided that the court shall endeavor to persuade the litigants in a civil case to agree upon some fair compromise.

IV. BARANGAY JUSTICE SYSTEM (BJS)

Presidential Decree 1508, which was enacted on June 11, 1978, was the first law which established a system of amicably settling disputes at the barangay level. In its whereas clauses, it provides that the perpetuation and official recognition of the time-honored tradition of amicably settling disputes among family and barangay members at the barangay level without judicial resources would promote the speedy administration of justice and implement the constitutional mandate to preserve and develop Filipino culture and to strengthen the family as a basic social institution, the indiscriminate filing of cases in the courts of justice contributes heavily and unjustifiably to the congestion of court dockets, thus causing a deterioration in the quality of justice, and in order to help relieve the courts of such docket congestion and thereby enhance the quality of justice dispensed by the courts, it is deemed desirable to formally organize and institutionalize a system of amicably settling disputes at the barangay level.

Under this law, there was constituted in each barangay a lupong tagapayapa. The lupong tagapayapa is the pool from which parties to a dispute choose the conciliation panel or the pangkat ng tagapagsundo composed of three members. This conciliation panel has the authority to bring together parties to a dispute

for amicable settlement. This law was later repealed with the enactment of the Local Government Code of 1991. The Lupong Tagapayapa was replaced with the Lupong Tagapamayapa, and the Pangkat ng Tagpagsundo was replaced with the Pangkat Tagapagsundo. The jurisdiction was also expanded by the latter law. The Katarungang Pambarangay as it is called in the law or the Barangay Justice System is governed by Sections 399-422, Chapter 7, Title I, Book III of the Local Government Code or RA 7160.

The Barangay Justice System is administered at the barangay (village) level for the purpose of amicably settling disputes among family and barangay members through mediation, conciliation, or arbitration. It provides for early, local-level procedures for reaching negotiated settlement of minor criminal complaints and civil disputes that arise between neighbours. It achieves this by directly involving local government administrations including elected officials. The scheme does not substitute for courts, but permits alternative methods of dispute resolution to be exhausted before formal court proceedings are available.

The objective of this system was to promote the speedy administration of justice at the local level. The Local Government Code of 1991 provided a statutory basis for the scheme and made substantial changes to the one introduced by Presidential Decree 1508, including promulgation of new rules governing the details of administration. The rules provided for the establishment, administration, and operation of the Lupon Tagapamayapa (Barangay Conciliators Pool) and Pangkat Tagapagkasundo (conciliation panels), as well as the procedures for settling disputes among barangay members through mediation, conciliation, and voluntary arbitration. In 1993 the Supreme Court issued an Administrative Order (No.14-93) which reinforced the place of lupons with respect to rights of access to courts. The order mandated recourse to lupon processes as a precondition for filing a complaint in court or any government offices, except in cases expressly outside the lupon jurisdiction.

The BJS is structured in the following manner:

The Barangay Captain, as head of the barangay, is also head of the Barangay Justice System. He is the executive official of the barangay. His functions include the following:

(1) Constitute the Barangay Conciliators Pool

(2) Perform mediation or arbitration functions

(3) Constitute the Conciliation Panel in case, at his/her level, no agreement to arbitrate was reached or his/her mediation efforts proved to be unsuccessful; and

(4) Perform other powers and duties such as presiding over regular Barangay Conciliators Pool meetings, ensuring Committee's administrative supervision over the Conciliation Panel, and enforcing by execution, on behalf of the Pool, the amicable settlement or arbitration award.

The Barangay Conciliators Pool

A body organized in every barangay composed of the Barangay Captain or Village Chief as chairperson and not less than 10 nor more than 20 members from which members of every Conciliation Panel *(Pangkat Tagapagkasundo)* shall be chosen. The *Lupong Tagapamayapa*, referred to generally as a *lupon*, administers the BJS processes. A lupon is constituted every 3 years and is composed of an elected *punong barangay or village chief* (chairperson), known generally as a *punong* and between 10 to 20 lupon members. The members are appointed by the punong from among persons residing or working in the barangay. The lupon formally supervises conciliation panels and also meets regularly as a group and with members of the public to share observations and experiences in the resolution of disputes.

The Conciliation Panel (Pangkat Tagapagkasundo)

A conciliation panel constituted from the Committee membership for every dispute. Consists of 3 members, chosen by agreement of the parties or in the absence of such agreement, drawn by lot by the Village Chief, from the list of Barangay Justice Committee members.

Disputes are usually settled in accordance with the following modes:

(1) Mediation or conciliation, which are used interchangeably indicating the process where the Village Chief or Conciliation Panel persuades the parties to amicably settle their disputes; or

(2) Arbitration, which is a process for resolving dispute where the parties agree to be bound by the decision of a third person.

The mechanism in the dispute settlement is as follows:

(1) When a complaint is filed at the Barangay office, the Village Chief as the head of the Barangay Justice Committee first attempts mediation or arbitration depending on the preference of the parties.

(2) If mediation of the Village Chief fails, then he or she constitutes a Conciliation Panel, which will again attempt mediation.

(3) If mediation of the Conciliation Panel fails, then the Village Chief will sign a "certificate to file action," which will then allow the parties to bring their case to the court.

Any party to a dispute has the right to repudiate an agreement to settle a dispute or an arbitration award, by filing with the lupon chairperson within 10 days a sworn statement that his or her consent to the settlement or to the arbitration agreement was vitiated by fraud, violence, or intimidation. The effect of repudiation is to entitle the parties to pursue their dispute in a trial court.

Amicable settlement agreements or arbitration awards may be enforced by a lupon within six months. After that time, enforcement is only available via the local trial court. Enforcement by a lupon is by motion filed with the lupon which is then to be heard by the lupon chairperson within five days of lodgment. The chairperson then has five days in which to induce the voluntary compliance with the agreement or arbitration award. If this does not happen, then the chairperson may issue a notice of execution that may then be enforced by the lupon itself, most commonly by seizure of property.

The effect of the BJS procedure is that where disputes can be settled by mediation, conciliation or arbitration, then the lupon itself can bring the dispute to finality and avoid involving the formal courts. Where agreement cannot be reached, or where there is a failure to comply with an agreement or arbitration award, then the lupon must issue documentation to permit the dispute to be pursued in a trial court.

IV. JURISDICTION (Cases/Disputes Cognizable by the BJS)

The Local Government Code provides that the lupon of each barangay shall have the authority to bring together the parties actually residing in the same city or municipality for amicable settlement all disputes except:

a) where one party is the government, or any subdivision or instrumentality thereof;

b) where one party is a public officer or employee, and the dispute relates to the performance of his official functions;

c) offenses punishable by imprisonment exceeding one(1) year or a fine exceeding five thousand pesos;

d) offenses where there is no private offended party;

e) where the dispute involves real properties located in different cities or municipalities unless the parties agree to submit their differences to amicable settlement by an appropriate lupon;

f) disputes involving parties who actually reside in barangays of different cities or municipalities, except where such barangay units adjoin each other and the parties thereto agree to submit their differences to amicable settlement by an appropriate lupon;

g) such other classes of disputes which the President may determine in the interest of justice or upon the recommendation of the

Secretary of Justice. The court in which non-criminal cases not falling within the authority of the lupon under this Code are filed may, at any time before trial, motu proprio refer the case to the lupon concerned for amicable settlement.

The law also provides for cases where the parties can go directly to court. These are:

a) Where accused is under detention;
b) Where a person has otherwise been deprived of personal liberty calling for habeas corpus proceedings;
c) Where actions are coupled with provisional remedies such as preliminary injunction, attachment, delivery of personal property and support pendente lite; and
d) Where the action may otherwise be barred by the statute of limitations.

The other disputes which are outside of the jurisdiction of the Barangay Justice System are labor disputes or controversies which arise from employer-employee relations, disputes where urgent legal action is necessary to prevent injustice, and disputes which arise from the Comprehensive Agrarian Reform Law.

The importance of the Barangay Justice System was emphasized by the Supreme Court of the Philippines in the case of Uy v. Contreras (G.R. No. 111416 September 26, 1994). In the case the Supreme Court of the Philippines wishes to emphasize the vital role which the revised *katarungang pambarangay* law plays in the delivery of justice at the barangay level, in promoting peace, stability, and progress therein, and in effectively preventing or reducing expensive and wearisome litigation. Parties to disputes cognizable by the *lupon* should, with sincerity, exhaust the remedies provided by that law, government prosecutors should exercise due diligence in ascertaining compliance with it, and trial courts should not hesitate to impose the appropriate sanctions for non-compliance thereof.

V. PROBLEMS AND ISSUES IN THE IMPEMENTATION OF THE BARANGAY JUSTICE SYSTEM

- Lack of a standard practice. Each barangay chief uses his/her own mediation technique as he/she fits under the situation. There are barangay chiefs who use their moral ascendancy over one or both of the parties to push for settlement. A lot of times, the barangay chiefs use extended family connections, either by blood or affinity, to convince the parties to settle. The only objective is to have peace, regardless of whether justice is achieved or not. A monitoring system is also absent so there is no way to evaluate the performance of the barangay chiefs and those of the conciliation panels.
- In many instances, the system is politicized because the barangay captain is an elected official. Since the first attempt to settle a community dispute is the responsibility of the barangay captain, sometimes, the offending party will seek the help of an influential person to negotiate with the barangay captain. There have been major criminal cases settled as a result of the barangay captain being cowed into submission by the powers that be in the community. The role of the barangay captain is crucial in the proper implementation of the BJS. There is a great need for a credible, respected, and a perceived "just" barangay captain in order for the community members to utilize the system.
- Few women members in the Barangay Justice Committee has an impact on the gender sensitivity of the Barangay Justice System processes. For instance, rape cases are settled by male members of the Conciliation Panel by asking the woman victim to just accept reparation from the offender. Sometimes, a marriage is arranged to settle the controversy. In VAW (Violence Against Women) cases, women are usually blamed as "naggers", warranting the abuse (physical or verbal) by husbands. Some civil society organizations have helped established Barangay Women's Desk (BWD) in barangays to handle women cases and to train the Conciliation Panel in gender

sensitivity.

- Insufficient ADR skills. With 42,000 barangays and with barangay captains elected every three (3) years, it is just not possible to train everyone in real Alternative Dispute Resolution methodologies. This has an impact on the way mediation is done thus, impacting also on the delivery of justice.
- Limited Jurisdiction which makes the BJS incapable of making a genuine impact on case dockets. There are some cases which can definitely fall under the jurisdiction of the BJS. For example, violations of the Bouncing Checks Law (Batas Pambansa 22), which is responsible for more than 60 percent of cases filed in courts, can be settled in the barangay, especially because the courts are being used as "collection agents" in these cases. But a more disturbing problem is the settlement of major criminal cases, like rape, murder, etc.
- Lack of funding. As a result of lack of resources, many good and well-intentioned citizens find it difficult to serve as members of the Conciliation panel because they have day jobs and can only serve at night or on weekends. Further, training is impeded as there is no funding to build the capacity of the barangay captain and members of the Conciliation Panel. To solve this, some barangays have started collecting minimal fees, e.g. 20-50 pesos, to take in a dispute. If this has an impact on access to justice, a study has yet to be done.
- No clarity regarding impact on court dockets. Studies have questioned the value of the barangay justice system in the decongestion of court dockets, though many studies have lauded the savings that the government has generated over the years as a result of cases being diverted away from the courts. However, the core value of the Barangay Justice System is in its ability to offer an alternative to the courts, its being cheap, fast, and accessible. Thus, it really doesn't matter for some, whether or not the BJS is able to avert court docket explosion.
- Lack of confidentiality. Confidentiality is a standard operating procedure in all mediation processes, but for the BJS, confidentiality is not the norm, rather, it is the exception. The processes are open to the public, unless the parties request confidentiality. Issues have been raised in the past as regards the integrity of mediation as a result of this lack of confidentiality particularly because it is a hindrance to a candid and informal exchange which is possible only if the parties know that what is said and what has transpired in the mediation or conciliation proceeding will not be used in a later court proceedings or in administrative proceedings if settlement is not reached.

VI. IMPACTS OF THE BARANGAY JUSTICE SYSTEM

Some of the impacts that have been proven over time include the following:

- Prevents disputes from escalating into violent conflicts. Some community conflicts span generations of families. With the Barangay Justice System, disputes are settled immediately which makes the restoration of peace and friendship possible.
- High level of public appreciation. Time series surveys done by the Social Weather Stations show that the public has a high regard for the Barangay Justice System. The most recent survey (2003) posted a +79%.
- High Level of Satisfaction by the Parties who have experienced the Barangay Justice System. Similar time-series surveys of parties done by the Social Weather Stations also show that parties feel that they have achieved justice through the BJS. Experience of and net satisfaction with solving disputes though the BJS from 1993 to 2003 show the following;
- 1993 posted a +59%; 1994 posted a + 57%; 1995 was a + 69%; 1999 was + 26% and 2003 was a +66%

VII. TABLE DEPICTING DISPUTES SETTLED

Disputes Settled In the Barangay Justice System, 1999-2005

Year	Number of mediated cases			Total mediated Cases	Cases settled	Settlement Rate (%)
	Criminal	Civil	Others			
2005				418, 117	309, 407	74.00
2004	124, 874	132, 547	84, 947	342, 368	259, 029	75.66
2003	179, 781	154, 605	60, 271	394, 657	302, 342	76.60
2002	137, 148	114, 855	40, 066	292, 069	227, 156	77.77
2001	158, 521	129, 847	56, 912	345, 280	285, 856	82.78
2000	159, 768	135, 905	57, 448	353, 121	305, 575	86.53
1999	143, 775	124, 298	50, 998	319, 071	273, 772	85.80

Source: National Statistical Coordination Board

These figures show that the Barangay Justice System has been a significant institution for the resolution of disputes and the timely administration of justice. The BJS enjoys broad acceptance because the parties tend to know and respect the Barangay Captain and the persons constituting the Lupon, who live in the same barangay. Also, the process is informal and convenient. A complainant can just drop by the house of the Barangay Captain to submit a complaint. The system appeals to traditional Filipino values. A people-oriented manner of conciliation and mediation is more acceptable than the impersonal formality of court adjudication. In this informal and consensual system, which operates without cost to the parties, the Barangay Captain is capable of taking on various roles – such as a fact-finder, facilitator, mediator, negotiator, broker, and even guidance counselor to the disputants – thus facilitating dispute settlement.

Some studies have found that many people who submitted their disputes to the system would probably not have gone to court if there were no Barangay Justice System. This is consistent with findings in other countries where most beneficiaries of community justice systems are people who would be reluctant to hire a lawyer and go to court, but who are in need of justice services. Thus, while the BJS surely disposes of some cases that otherwise would add to workload of the courts, its principal value is that it provides an additional service of access to justice for people with needs that the formal court system is less able to meet. The large number of cases settled through the BJS speaks for itself.

VIII. CONCLUSION

The Barangay Justice System is a fusion of folk traditions and western conceptions of justice tempered by universal declarations of human rights.[2] Its core message is that the citizens can be empowered to take into their own hands the resolution of their minor disputes. That the citizens can participate in the dispensation of justice at the grassroots level. Perhaps the judicial system can learn a lesson or two in this regard – to make it less bureaucratic and more accessible, less ritualistic and more into the process, less expensive and more affordable for the poor. Perhaps then, genuine justice can be achieved.

[2] Access to Justice For the Poor Project (Draft Report), EUROPEAID 123344/D/SER/PH

Annex - 5

COMMUNITY MEDIATION: A PEDAGOGIC REFLECTION

- Dr. Yubaraj Sangroula*

ABSTRACT

This paper reflects on 'need of evolving community mediation as a popular means of dispensing justice'. The access to justice is one of the core rights of human beings to address 'conflict or causes of conflict'. The concept of justice, which originally evolved through 'different forms of ordeal' both in the eastern and western world', has now been transformed into 'litigation'. It however largely fails to 'ensure justice to ordinary people as the access to litigation has been limited, and the extreme formalism practiced in the form of 'procedures' is unfriendly to people who are pushed to marginal lines in different forms such as ' hierarchical social strata, poverty, and isolation'. Their phenomenal disenfranchisement makes to unable to 'use the litigation as a means of protecting their genuine interests and rights'. Unfortunately, the litigation has been defined as 'mainstream course of justice' which is absolutely 'wrong'. The legal education system in the past has nurtured set of 'doctrines' which treat 'means of justice such as community mediation as 'Alternative Dispute Resolution'. In Nepal, litigation has continuously been used as 'a means of revenues' for the State. Hence, no litigation process can be approached by the people who have no capacity to pay 'different forms of fee'. Nepal as a nation with about 30% of population living under the poverty line cannot be expected to receive benefit from the kind of 'justice system in which the cost is unbelievably unreasonable'. In litigation practice prevalent in system like Nepal, the justice is 'not delivered but auctioned'. Hence, the person who is rich and powerful snatches the justice'. The vices of nepotism, financial irregularities, corruption coupled by 'formalism' makes the formal justice system 'a mockery'. Just for example, in many countries in South Asia, the judgment of the court and all other court documents are prepared in English language whereas the literacy proportion of the population is still not above 50%. Hence, the people seeking justice do understand nothing as to what their lawyers and judges are talking about. Is this what we 'intend to have in the name of justice'? Unfortunately, no community mediation and many others similar forms of 'popular justice' system which conveniently provide access to justice to the 'mass of unprivileged and disenfranchised population' have received the 'proper attention of the university education and government funding in so-called developing countries like ours'. This paper therefore challenges the 'authenticity and credibility of justice system' as well as the legal education system in Nepal'.

The paper proceeds with 'inspectional or primary theoretical discussion on notion of justice analyzes the problems facing the formal justice system and delves into necessity of developing instruments like community mediation. These issues have been dealt pedagogically. The roles and responsibilities the Universities in countries like Nepal are discussed along with the contents and issues they are supposed to address by their curricula .

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HUMAN BEHAVIORS AND DISPUTES

Human behaviors are not always consistent and stable; they are full of contradictions.[1] Conditions of livelihood, protection of freedoms, operation of the system of law and order, etc. do immensely influence human behaviors in daily life. Often, human beings are compelled to live with dilemmas-imbalance between needs and supplies, values and facts, efforts and constraints, quest for freedom and imposition of rules, etc.[2] In societies, the ruling echelon in particular, wrongly believe that stronger law and its rigorous enforcement is the only way of 'settling disputes' between human beings, which generally occur due to failure in adjustment of interests of two or more peoples.[3] Psychologists argue, the human mind is often in tense condition due to impulse of change for the conditions of lives towards betterment (progress), and constraints posed by surroundings accompanied by crisis of resources, including lack of required knowledge and skills. Physiologists describe this condition strife between 'red and white blood cells'. Sociologists describe it as a conflict between 'enshrined values and objectives facts'. For Theologians, it is a condition of conflict between

1. Zaki-ur Rahman Khan, 1996. "Human Behavior and Legislation" in D.R. Saxena (ed.) *Law, Justice and Social Change*. Deep and Deep Publications: New Delhi.
2. These dilemmas get changed consistently in the changed context. Sometimes they change the system of law and other time they are addressed by laws. Formulation of laws and system is not a capricious political phenomenon in the society. Laws are scientific and with this capacity they become able to harmoniously accommodate the contradictions of interests among peoples. As Prof. George P. Fletcher (1996:29, *Basic Concepts of Legal Thought*, Oxford University Press: New York) says, "The idea of law stands, more than anything, for inevitability. When a law applies, things cannot be otherwise; they conform necessarily to the law. Scientific laws represent more than just and observed co-relation between cause and effect". Law's relation's with human behavior, beyond the causal relation, is determined by the necessity. Obviously, a law exists not because it is implemented by some one, but because it is necessary for 'systematic accommodation of human relations in the society'. As Prof. Fletcher says one thing what we know for sure is that human laws are not fully and necessarily obeyed. Legislatures can pass laws telling people how to behave, but there is no necessary response from the public at large. Sometimes peoples conform to the changes in the statutory laws; sometimes they continue to o what they want to do. This tendency is more obvious where the law is associated with pleasurable habits, like smoking, drinking etc. The necessity may not successfully attract the positive response of the peoples. The fact may diverge from the law. In such a situation, the law demands for review and reformulated to address the need.
3. Traditionally, the Nepalese society developed an approach to settle disputes through 'community involvement'. As early as Lichhhavi period (2nd -12th Century), *Gosthi* (currently known as *guthi)* was the lowest body of the society to 'mediate disputes'. In course of time, a system of settling disputes by 'five elderly villagers' in presence of several peoples developed. This practice was called '*panchyati'*. Mediators involved in the dispute settlement process were called '*bhaladmi'* (bhala- gentle and *admi*-men). Bhalaadmi allowed peoples to put their causes and arguments, and persuaded to reach a settlement. In failure, they intervened with 'decision', generally supposed to be founded on 'righteousness, necessity and benefits of both parties). This practice continued for long time in the history, in fact till sometime after take over by brutal Rana regime. Although the exact date is not available, the Rana regime destroyed the 'practice of community mediation for its deceptive move to 'generate revenues out of court proceedings and penalties'. Every dispute was then dragged to the court so that the proceedings could be used to generate 'revenues'. They introduced a system of court fee, according to which every disputant to enter the court should have paid fee. In each step of the litigation procedure, parties had to pay some cost. For instance, litigants could produce witnesses but had to pay 'fees for that'. Even the compromise of the dispute in the court could be possible only after payment of fees. Party who intended to withdraw the case also could do so only by paying penalty. Since the Ranas extorted peoples, the litigation was found one of the most regular source for that purpose. "Community mediation was thus unfriendly to corrupt and extortion-loving regime'. See, Rishikesh Shaha, 1992. *Ancient and Medieval Nepal.* Ratna Pustak Bhandar. Kathmandu, Nepal; Rewatiraman Khanal, 1977 (2035). "Kotling Court in the Judicial History of Nepal", in Kusum Shrestha, et.al. (ed) *Nyaydoot.* No. 28. Year, 9. Nepal Bar Association, Kathmandu Nepal; Hodgson, B.H. 1880. "Some Accounts of the System of Law and Police as Recognised in the State of Nepal in Vol. II Section XII, Miscellaneous Essays. Reprinted by *Kanoon, a* Monthly Journal. Issue No. 45. Vol. 14. Lawyers' Club. Kathmandu Nepal; Kirkpatrick, 1811. *Account of the Kingdom of Nepaul. London.*

'good and evil'. For jurists, the condition is either an outcome of 'conflict between 'need and supply' or 'freedom and constraints created against its exercise'. As the very basic character of nature demonstrates, every living organism grows tending to overreach the growth of others. In animal kingdom, this phenomenon is fully regulated by 'competition and survival strategies'. There exists nothing as 'regulation' of behaviors except that is a system 'maintained by the competition and survival strategies' itself.[4]

Human society is different because it comprises of efforts, backed by prudence, to organize and reorganize 'lives of every member of the society in such a way that he/she is allowed to grow in an atmosphere where his/her genuine interests (claims, privileges, powers and immunities) are consistently and systematically (often defined as legally) recognized and protected.[5] This approach of living makes possible for emergence of a concretely and coherently established framework for 'harmony in lives of human individuals possible'. At this point the necessity of 'system of resolving disputes and adjusting differences in interests between individual members comes in'.[6] Obviously, when behaviors of two or more members become contradictory or their interests collide against each other, the existence of a system to resolve such contradictions becomes a condition precedent for a society to 'ensure peace, stability and harmony' among the members. However, such a system cannot be legitimate, if it has not been governed by a set of' norms or rules'. As eminent jurist John Rawls opines 'the rules and norms must be shaped and guided by democracy', meaning the protection of rights of everyone to participate in the process without fear and exclusion.

Nevertheless, the universities in the developing countries like Nepal, India, and Bangladesh hardly pay attention hardly to such issues and realities. The legal systems of these countries have densely been influenced by 'notion of colonial ideas', which unduly emphasize 'formalism'. The established procedure is practiced 'rudely' in a way to victimize the victim. Sapahala Devi who spent 23 years in court to obtain justice and died without getting the property she lost is an example of 'inefficiency of the judicial system'. But University Faculties in country like Nepal do hardly pay attention towards this short of miscarriage of justice. What they emphasize to teach are the '19th century formalist doctrines' by insulated teaching methods. They hardly have any components in their curricula which inspires students to 'think of new ideas, means, approaches and methods' of justice.

NECESSITY FOR DEVOLUTION AND DEMOCRATIZATION OF THE SYSTEM OF DISPUTE RESOLUTION:

The notion of justice should underpin 'principles of objective and participatory process of dispute settlement'. Long back in the history, almost all

4. The survival strategy for the sake of human being may be defined as the 'necessity' of the society for securing peace. 'Justice' is the foundation of 'peace', and the concept of 'justice' is the guarantee and reinforcement of the 'genuine interests' of the society legally as prescribed by the values of democracy and constitutionalism. Harmony of human relations in a society is thus not 'imposed phenomenon'. It is simply not possible to 'achieve only by a rule made by the authority capriciously'. The participation and consent of the people themselves is the crucial factor or this. Thus, the survival strategy in the context of human society means a 'struggle for achieving peace founded on justice'.
5. Although jurisprudence is a 'repository' of thousands of dissimilar ideas and opinions, one can for sure say that 'the recognition and protection of genuine claims, privileges, powers and immunities' is the main domain of the human desire, which requires the law to protect as its prime concern. No law can obtain legitimacy ignoring this domain of function.
6. System of justice, in order to systematically address the 'concerns of human beings, ' has been evolved as a crucial aspect of the human civilization. As pointed out by Herbert Spencer, civilization and laws are products of biological, organic evolution, with the struggle for existence, natural selection and survival of the fittest as the principal determination factors. According to him, civilization was a gradual progress of social life simple to more complex forms, from primitive homogeneity to ultimate heterogeneity (See, Edgar Bodenheimer, 1997. *Jurisprudence*. Universal Book Traders: Delhi.

civilizations used 'ordeal' as a system of delivery of justice, which believed on unseen force as the 'deliver of the justice'. The societies believed that 'the God would intervene in favor of truth, and, hence, would protect the right person.[7] In course of time it was found that 'the system was full of vulnerabilities'. Many civilizations thus gradually turned to 'litigation' through a formally established state apparatus. Procedures, formalities and principles emerged to 'regulate the fairness of the litigation'. However, these procedures, formalities and principles could hardly avoid the 'adverse conditions or circumstance of some persons created by disparities to access to power, knowledge, wealth and equality'.[8] The 'litigation' thus could not go far from being tainted as a 'game between two unequal players'. A few very unwanted as well as undemocratic characters developed in and within the litigation system are identified as follows:[9] The Universities ignored to see these pitfalls of the system, and they continued to train lawyers to indoctrinate 'the principles of formal system'. Most importantly, the university legal education ignored to 'empirical evaluation of the impacts made by the formal justice on the lives of people'. The access to justice as a fundamental right of persons had never been taught in the universities, and even today this practice continues. Hence, law students are not critically aware of the following pitfalls of the litigation system:

- Litigation is costly, as it has been basically founded on the notion of 'punishing the wrongdoer'. Obviously, the system does not concentrate on the 'cause of the dispute'; rather superficially makes attempt to 'find out one of the parties as wrong doer'. The wrongdoer is then penalized.
- Litigation is generally a 'competitive game' between two lawyers representing the litigants and the sole objective of the competition is to win over rather than to 'address the cause of the conflict' and avoid win and loss situation. Obviously, the participation of the parties in the process does not ensure 'involvement of them in finding out the cause of their conflict and the solutions to address it', but it prepares them to 'organize a 'wrestling' with all tricks so that the one handling tricks in better way 'overpowers' the other. Unfortunately, this setback has not been an issue of the 'legal education in the universities'.
- Litigation is formalized in a way that 'the parties

7. Both eastern and western societies used 'ordeals of various' kinds. In Nepal Agni and Jal parikchya (Fire and Water Ordeal) were popular till recent past. At least Prithwi Naryan Shaha is known to use it in Nuwakot, when he was planning to invade the Kathmandu Valley. . In 1818 B.S., King Jaya Prakash of Kathmandu, with assistance of Jaishis (a sub-caste or second class status Brahmin hierarchy) conspired to arrest Pratap Singh (son of Prithwi Narayan). Jaishis had been used by him to entice for hunting of wild bore in forest of Chitlang. This plot was leaked to spies of Prithwi Narayan. He thus arrested the alleged conspirators and tried. They did not confess the crime. Eventually, they were subjected to an 'ordeal'. On their palms, over a leaf of Pipal tree, a burning coal was placed. It is said that the culprit immediately confessed the crime. They were then subjected to death penalty (See, Ancient Nepal, Number 22, Page 10, Archeological Department, and HMG. Nepal).
8. In the formal litigation system, it is a state's apparatus that is decisive. In this system the civil society and community has no voice. Court is often not concerned with 'escalation of conflict in the community by its decision. Courts are not often concerned with the adverse implications of their decisions in welfare, stability and progress of the society. Obviously, courts are not the right forum for chandelling all disputes. In society often some citizens have the loudest voice whereas others have been suppressed. Judiciary is often vulnerable to 'give attention to those having loudest voice'. The judicial system as a state apparatus of justice functions with a fundamental weakness that it assumes that all participants have comparable access to, and influence on, the system. Many disputes in the society do occur because 'the political system does not function similar to all'. Obviously, some people think that their voice is not 'heard', and consequently they resort to 'alternative way of response- i.e. violence'. If the judicial system fail to take note of such agony of peoples, its response instead of addressing the problem further aggravates the situation. Generally, courts are the platforms that do not consider such issues. Consequently, citizens are alienated. Community involvement and treatment is the only trustworthy option to address this type of situation.
9. See, James J. Alfini, (et al) 2001. *Mediation Theory and Practice*. Lexis Publishing. USA. PP. 4-6.

may hardly understand what they have to do or refrain from doing'. Agents' cooperation is thus vital. The litigation is thus mainly a 'process to allow settlement of the conflict through arguments of legal professionals', but not through 'reaching minds between disputants'. Litigation thus divides society by 'institutionalizing controversy or enmity between the parties'. How universities have addressed this issue? The answer is blank.

- Judicial system responds to the dispute of peoples within the strengths and constraints of its institutional values and competence. The fundamental flaw in this system is that parties at the interest are not, due to series of legal formalities, able to trigger discussion on the very matters that mean the most to them with those persons in a position to effectively address their concerns.
- Mostly importantly, the litigation system fails, due to its institutional discipline and values secure civil stability and promote social welfare. It rather practices approaches that further deepen the controversy and mistrust among the parties. Judiciary is a passive intervener only. It has nothing to do with social relations of the parties. In fact, the court nothing to do with parties out of the court premise.

In brief, the litigation system lacks democratic character at least in two senses. Firstly, due to its established values and institutional constraints the free or unrestricted access to it is barred. Only those persons may be able to use it who have 'adequate financial resource, and knowledge and skills about its formalities. Secondly, it is less participatory as due to its established values and institutional constrains and competence the parties are not able to trigger out discussion on the very matters that concern them. Constraints of access and lack of parties' meaningful participation in the discussion renders the litigation process largely undemocratic.[10]

The university legal education most South Asian countries must review the 'curricula' and do introspect the harms caused to the society. The 'curricula' need to be reviewed to adjust the new changes in values and perspectives. Since the 'value attached to the objective of justice is fully changed in the present context, the access to justice need to be taken as 'fundamental issue of justice', and for this 'the doctrine of 'litigation as the mainstream justice process' and the 'other many forms of popular justice' as alternative dispute resolution should be altered. In the context of Nepal, the following characteristics of the community mediation must be give effect:

- It reserves to the parties the ultimate authority to "settle" the matter. Since disputing parties can refuse to accept settlement terms proposed in mediation, no one could be hurt by using it. Hence, the community mediation ensures participation of the parties and also secures the free access to justice.
- Terms of proposed solution are generated by disputing parties themselves in a circumstance without 'established values and institutional competence and constraints'. This situation helps parties to engage in 'triggering discussion on what that meant most to them with those persons who are in a position to effectively address their concerns. Why does this occur and what are the consequences?
- The mediation process is equally concerned with the 'impact of the dispute in future social relation of the disputing parties. Obviously, the settlement is an 'extermination of the cause of conflict' rather than the 'third party declared prize'.
- Mediation process protects peoples of not 'stronger voice' from being alienated. It provides a meaningful platform for 'their voice is heard and protected'. It generates respect of peoples of every walk of life to the 'community' which is so essential for 'consolidation of the democracy'.

Briefly speaking, the community mediation is a process of 'devolving the judicial power from

10. See, Ibid.

the state to the people for meaningful response to the social problems. In this character, the mediation process can be taken as a 'democratic approach to settle disputes' as it is characterized by a system that (1) permits stakeholders to the controversy to establish the discussion agenda- that is , they could "put on the table for discussion whatever concerns mattered the most o them, whether or not they fit within the existing 'legal or administrative categories'; (2) involves an inclusive process, permitting participation not only by trained advocates but also those persons or organizations which had to abide by the resolution; (3) requires persons to be accountable for designing solutions to problems, not just complaining about them; (4) supports the belief that meaningful, direct participation of parties in the disputes enhances participants' respect for the fairness of the process and strengthens potentiality of compliance with negotiated outcomes by parties; and (5) appears to be both harmless and minimal in cost involvement. Most strikingly, since the mediation views serious or hot disputes as social, not legal, conflicts, its social acceptance is higher to that of court's decision. Mediation thus not only democratizes the 'justice system', but by securing easy access to justice socializes the legal system.

The continuous pace of social change is where the civilization unfolds in. However, it is not necessary that every change is necessarily directed towards 'betterment' of every one. In a state of penetrating imbalance in the condition of 'exercise of power', the social change might occur only beneficial or advantageous to some pushing others into a condition of disadvantage. In the modern time, the legislation has been taken as one of the most 'effective and power instrument' to address this problem. Legislation's crucial role to ensure that there is no 'advantage of one to the disadvantage of others', and the need that it emerges and operates to empower the 'weaker section or to safeguard its interests against vested interests of the powerful one by providing and protecting the 'access to justice to the former', are largely unrealized in a society like ours.

Under the existing form of states, the power of legislation is vested in with the politicians and its enforcement with the judiciary. The people's participation in law making is seriously ignored and obstructed. On the other hand, the independence of judiciary in a country like ours is fully controlled by the executive branch through 'control over the purse of courts'.[11] Obviously, the judiciary has a huge scope of coming under control of the politicians. And, as Zaki-ur Rahman Khan, an Indian intellectual rightly says, "Politicians in many countries have neither any understanding nor any faith in future. They are driven by partisan approach and present gains. This makes

11. The judiciary's budget and modes of expenditure of it are fully controlled by Ministry of Finance, HMG. The court is not competent to use the 'recourse received from the state' in accordance to its own plan and needs. It receives 'itemized budget exclusively earmarked for the given item', and has to request the release of the costs on the expenditure basis. The judiciary is thus compelled to 'negotiate with executive branch for each coin it receives from'. This violates the independence of judiciary obviously, and these kinds of affairs render the role and efficiency of Judiciary in developing countries like Nepal subject to great suspicion. Additionally, A number of other factors pose a serious question to the 'objectivity, reliability and impartiality' of the justice delivered by courts. First, the judiciary is accessible to 'only a handful of rich and clever peoples'; a vast majority of disenfranchised community has never been in touch with the judiciary. Second, its formality and feudal fashions are 'scary' for downtrodden peoples. Third, the judiciary operates as an 'elite club' rather than an 'institution' of justice. Fifth, judges are comparatively conscious of issues of 'their position, protocol, and privileges and facilities' rather than their immense role of delivering fair justice. They demand for 'unlimited respect from people of their perceived position and protocol. They are happy to be 'addressed as "my lord, your hon'bel', etc. A psychology is sold to the poor people that 'the judge is a perfect person, and he/she never makes a mistake'. Sixth, the judiciary every day produces a huge volume of judgments', but what impacts these judgments create in the lives of many people is not a matter of concern for them. Seventh, access to this type of 'justice' is generally restricted. One has to pay 'court fees' to enter into the court's proceeding that continues for a considerably long time. It is sure that 'one of the parties' is definitely not satisfied with the court. Virtually, the court's justice is targeted not to all, but only to 50 % of those limited population that has access to justice. Even this 50% incurs huge cost for the so-called justice. Corruption, favoritism and other influences are rampant. Justice is thus not realized here; it is rather capriciously made.

the legislation a 'paradise of rulers'. A justice made by the court based on centrally legalist interpretation of the court is thus vulnerable to commit a 'miscarriage of justice'. A court is thus not a platform for all types of cases.

In Nepal, University legal education has not institutionally addressed these issues. While Purbanchal University has some components of it included in the course, it is simply not enough to prepare students. Kathmandu School of Law, however, has made efforts in collaboration with Center for Legal Research and Resource Development (CeLRRd) to popularize the concept among the students. They have been engaged in the process of mediation as interns in districts the programs are implemented by CeLRRd. In Tribhuvan University, the clinical education program introduced the concept in 1992. However, the program did not continue and the institutionalization of the same was halted.

Considering the need of overtly emphasizing 'community mediation and similar means', Kathmandu School of Law has implemented the following activities in the past:

a. Mediation skill training of "chiefs of Thakali community in Mustang' which protects the culture of mediating conflicts between people of their communities.

b. Formation of 'Village Woman in Dhadhikot, Bhaktapur' and training to help them mediating family disputes.

c. Formation of 'cells' in villages by Student law Society in Bahaktapur district, and popularizing the concept of community mediation.

RETHINKING ABOUT JUSTICE SYSTEM: NECESSITY TO REVIVE THE CURRICULA

The discourse hereinbefore calls for 'rethinking about the system of justice', especially in less developed country like Nepal, of which large population is illiterate, economically and socially marginalized and psychologically humiliated and oppressed for long period of time. In this context, a formal system of justice which wrongly perceives that the 'access to it stands on equal footing for all' is nothing but a 'glaring lie and myth'. Rethinking about the justice is thus urgent need of the Nepali society. The following prevailing conditions of the justice system make the need of 'rethinking further glaring':

- Delay in proceeding is severe. Over 50% of cases in all level of courts are every year shifted to next year.[12] About 90% of caseload in the Supreme Court is occupied by the civil matters, and the petty cases constitute the large proportion of it.[13] Obviously, litigants have to run behind the unproductive and people unfriendly procedures of the court for unreasonably longer time. Every month, litigants have to ensure their presence in courts, and 90% of these appearances have nothing to do with the process of justice.[14] They doom to be merely a formality, irrespective of the cost, psychological embarrassment, and physical trouble of the concerned peoples.
- Issue of corruption by certain percentage

12. CeLRRd/TAF 2002. *Trial Court System in Nepal*. Kathmandu, Nepal.
13. Ibid.
14. Ms. Shaphala Devi, a poor village woman, is a typical example of the failure of justice system in Nepal. It took for over two dozen years to 'knock the door of courts', to get a judgment, without any execution of the same. Finally she died while still struggling to get the court's judgment executed. Some peoples from the judiciary occasionally defended the judiciary that 'execution is a matter of concern' of the government. They might be right to say that, but what forgot to remember is the 'overseeing responsibility' of the court. The court has given a powerful instrument of the 'contempt of court to ensure the authority of judiciary prevails over, if some one ignores the compliance of the court's judgment. This is, however, only example. Currently, the Supreme Court of Nepal has a caseload over 30,000 cases. With existing human resource and the facility available, it may take over six years to clear the backlog. But by then another greater backlog will be accumulated there.

of judges is also a problem.[15] The rate of reversal of judgments at different level of courts is huge. Language put in judgments is vague, ambiguous and dubious. Execution of judgments is almost 'none'.

- The courts are considered as a 'revenue generating institutions'.[16] Obviously, one has to first pay 'court fee to enter the court'. The courts do not even entertain petitions concerning violation of human rights without the fee being deposited first. According to official statistics, 38% of the population of the country lives at abject poverty. Where this population does obtain the court fee to 'enforce it rights' from? The judiciary of Nepal thus does not exist for needy and poor.
- Petty corruption at all levels of' judiciary's employees are institutionalized'. The psychology among the common people that 'justice is sold at the courts' is widespread.[17]
- Courts are seriously influenced by 'feudal hierarchical values'. Women, so-called untouchable peoples, and minorities feel that it is not possible for them of obtain justice from courts.

Purbanchal University, Kathmandu School of Law, in collaboration of CeLRRd, has prepared detailed outlines of the course on Community Mediation. Three approaches have been suggested for that objective, i.e. (1) Introduction of the MA course on community mediation (2) Establishment of the Resource and Research Center on Community Mediation in the School and (3) Introduction of Mediation Subject as independent subject at LL.B. Course. Currently, the alternative dispute resolution is taught as a part of Comparative Study in the LL.M. and Advance Jurisprudence in LL.B. level. However, they are far short to address the need of specializing about ideas of community mediation. There are challenges: (1) traditional lawyers are yet not prepared to accept 'community mediation' as a part of the legal education, and, hence, it is often difficult to convince the university policy makers to agree to incorporation of such courses; (2) availability of the funding is problem to introduce such courses as government, donor agencies and non-governmental organizations, except some, have no culture of working with universities; and (3) the human resource to teach 'community mediation' effectively is greatly deficit. Hence, KSL's activities are stranded somehow.

Despite all these problems and challenges, KSL on behalf of Purbanchal University is working hard to develop the 'curricula' and while doing so the following 'principles' have been adopted as the general policy guidelines:

a. **Approaches and Workability, and Importance of the Suggested Reform:** Resurrection of the judicial system is an urgent need of the Nepalese society for social equanimity as well as the consolidation of devolution of the power to the people. But the resurrection scheme

15. Recently, one of the judges at district court level is rounded up by "Royal Commission on Corruption Investigation". Reaction of the judiciary is, however, less visible. No changes are forthcoming even after the incidents. Judiciary has neither accepted nor denied the existence of corruption in there. The situation is, however, adversely affecting the people's confidence over the system of justice.
16. This practice was introduced by Rana regime, as a part of extortion. This system continues even after 1951. However, Prithiwi Narayan Shah fully prohibited the deposit of such revenue in the state's exchequer. He issued an explicit order for judges and state officials to refrain from depositing the fines and charges like courts fees, etc. (*danda kunda*) in the State's account. As he instructed, such fines had been used to support indigent, sages and charity activities. He said: "One can be protected from stigma of untruth". He further said: "Court is temple of identifying the truth and untruth. No case does come to case without one of the parties being bad, holding untruth'. The revenue generated by the court is thus in this or that way is stigmatized by untruth. Such income should be used by the state'. Moreover, he said: "Sometime the truth might be overshadowed by circumstance, and in such a situation an innocent person might have been condemned to punishment, and as such by appropriating the fines in the state coffer a wealth earned out of injustice will stigmatize the justice" (See, Rewatiraman Khanal, 1979. "Justice System in the Reign of Prithwi Nrayan Shaha", in Kusum Shrestha, et.al. (ed.) *Nyaydoot*, No. 32. Year. 13. Nepal Bar Association).
17. In an event of 'street law program' organized by Kathmandu School of Law in a village west of Nagarkot, common peoples expressed complete lack of confidence with judiciary.

should not be confined to the 'reforms of the formal system and mechanisms' alone as it is 'doomed to be fiasco' in absence of a scheme to popularize, devolve and democratize the judicial system. To seriously consider for introduction of the 'community mediation' program as a 'mainstream system of justice' is the point to begin with. The most important issue to 'give priority in rethinking about the system of justice' demands for 'recognition of the unrestricted and unhindered access to justice as one of the indispensable elements of democracy, rule of law and fundamental rights of the citizens'. In the context of the Nepalese society, like many others, the following values or norms and dynamics confirm the viability of, and preference for, 'community mediation as a right option for revitalizes the 'system of justice':

- Nepalese people posses a tradition of believing on the 'community participation in dispute resolution' as an instrument of the 'sustainable form of justice'. Litigation is generally discarded by the Nepalese society; it is of course considered to be 'stigmatic' in individual's character. "k*ul ko santan and mool ko pani*" is a common proverb having great influence over the behaviors of peoples in Nepal. Litigation is often taken as one of the 'indicator' to test the honesty of person. Obviously, the practice of 'settling disputes' by relatives of 'disputants' in all types of ethnic groups is a common practice in rural villages.
- Social or clan bonds are still stronger in Nepal. Obviously, any dispute that arises between two peoples ultimately virtually becomes a 'dispute between families, relatives and clans'. Vulnerability of 'division of the society' by dispute is immense. The community's involvement in such a situation is not only a guarantee to amicable resolution of dispute, but also a powerful sanction to 'the enforcement of the terms and conditions agreed upon'.
- Disputes in the Nepalese society mostly relate to the 'lands, family or public forest, pastor lands, family issues relating to marriage, divorce, maintenance, etc. These issues are never properly adjudicatable by courts on the basis of proofs and evidence.
- Dispute and its escalation affect not only two parties but the society as a whole.

These values, norms or dynamics of the Nepalese society do not prefer the 'litigation' as a system of choice. The viability of the 'dispute resolution by community' participation is thus overtly stronger. However, the Government of Nepal has seriously failed to 'develop this sector'. Its overemphasized reliance on the 'formal justice system' is one of the major causes of the 'emergence of violent conflict' in Nepal. In any society, when the normal and progressive growth of the 'societal development is suppressed or obstructed', the potentiality of social conflict being transformed into violent one is simply a natural phenomenon. If we analyze the emerging dynamics of the Nepalese society, the following trends demonstrate pro-violence characters, and as such strongly justify the 'role of community mediation' as an important apparatus of the peaceful transformation of the conflict:

- The disparity between men and women were not progressively addressed by laws, but they were intensified by 'enactment of various laws that directly and indirectly subordinated women'. Women, for instance, were defined in terms of 'marital status'. As a matter of fact, daughter's rights are not determined by her 'being an independent person', but by her 'being a married or unmarried woman'. A woman is not defined as a person, but she is defined as a 'married woman, unmarried woman, married wife or kept wife or borrowed wife, *sadwa* (women with living husband) or widow, etc. Dynamics in the changed context of the present society do reject such values and practices. However,

the law still holds them large. The function of courts is confined to 'reinforce' such obsolete laws. The judgments of courts thus obviously intensify conflicts. The pro-hierarchical status based society is prone to 'intensification' of conflict. Community mediation can play a vital role to eliminate 'hierarchical status-based disparity, and rationalize behaviors of peoples. Capacity to influence the attitudinal change and attached social sanction are two major 'instruments' community mediation to rationalize traditional behaviors of the people.

- Disparity between peoples from various castes is also protected by laws to the exclusive advantage of some caste groups. This fact constitutes another source of conflict, which formal justice system has failed to address. The same instruments mentioned above can enhance the 'change in this particular' situation. Community mediation being an effective means to transform social conflict into equanimity can be progressively used to address problem of untouchability.
- Local resource distribution is another significant issue of conflict. Resources are monopolized by some groups and agencies of the central government. But the formal justice system is not only unconcerned with it, but also incapable of granting ownership of the local resources to the local peoples. Community mediation can work as a strong source for enabling people claim ownership over the local resource.
- Access to justice has been recognized as a 'right of the people'. It has rather been taken as the privilege of the government. The community mediation can be catalytic to change this mentality.

b. ***Deinstitutionalizing gender and caste disparity***: Community mediation has an immensely great scope of democratizing the 'justice system', as it grants voice to the concerned party or interest groups. Women are often voiceless in the formal justice system due to their ignorance and dominance of males in the present set up of judiciary. Introduction of the dispute resolution process through participation of community will ensure women's voice is heard equally, and as such helps to 'deinstitutionalize' the 'stereotyped' gender disparity in the justice process. Similar impact will emerge in the context of relation between peoples of various castes.

c. ***Breaking of obstacles to 'access to justice'***: Dispute resolution by community participation does relieve economically and socially disenfranchised community from obstruction to access to justice. Obviously, they can have their voice heard in a system. They should not, therefore, refrain from having access to justice simply because of poverty or lack of resource.

d. ***Breaking the monopoly over local recourses by a group or outsiders***: Possession of resource such as lands by disenfranchised community is not possible to be held at court due to lack of proofs and financial capacity to play with the formal system. Poor peoples' language is often incomprehensible for formal system, as they are trained to understand what the government and lawyers say. Community dispute resolution method will thus be an effective platform for poor people to 'establish their possession' over the resource.

e. ***Philosophical Foundation of the Community Mediation Program***: While the belief on, practice of, mediation in the neighborhood common in the Nepalese society, the efforts to introduce and institutionalize modern Community Mediation model can be said a recent 'initiative'. It can be said that such efforts have been largely induced by the 'incorporation' of a concept of 'hybrid of mediation and arbitration' in the Local Self Governance Act, 1999. The model presented by the Act has three dimensions:

- Firstly, it recognizes the concept of 'devolution of justice to the grassroots'

as it provides for a 'panel of mediators in each Village Development Committee (VDC);

- Secondly, it recognizes the right of disputants to 'engage in discussion, and arrive at the points of agreement; and
- Thirdly, it grants a power to the VDC authority to intervene and take a decision if the parties to negotiation fail to reach a consensus agreement.

These three provisions recognize the right to access to justice but do not adequately ensure 'effectiveness and propriety of the concept of community mediation' that works for mutual and respectable agreement disputants as opposed to 'win and loss' verdict. The possibility of intervention by the elected members in the situation of failure to reach an agreement is politically as well socially vulnerable. Significance of the community mediation as discussed in the preceding part is thus obscured by the Local Self-Governance Act.

Nevertheless, the community dimension of the mediation process is always independent, as it is not a matter of law. In fact, community mediation always being a social institution can exist and operate even in absence of law, because it takes dispute as a social problem, not a legal problem. Hence, no authority or law can prohibit 'people's right to amicably resolve their disputes in accordance with procedures and process as agreed in between themselves'. Moreover, no authority or law can prohibit 'role of the civil society or social activists to help needy people to resolve their disputes'.

The legal debate is thus virtually redundant and obsolete. In legal theory, the practice and emphasis on community mediation as a mode of justice making process is a pro-people effort 'to socialize the jurisprudence' as a opposed to its 19th and 20th century centralist legalist approach. This was what the philosophical foundation of the 'Community Mediation Pilot Project' jointly implemented by CeLRRd, Pro-Public, SUSS, RUWDUC and IGD[18] in technical and financial assistance of The Asia Foundation.

Much debate has flowed in this regard, but the action of these organizations has largely brought to an end to it. However, what one cannot deny is that 'the enforcement of the legislation will definitely provide the community mediation with popular recognition'. Thus, importance of the legislation is generally confined to 'recognition or enabling of the process by the state. Value of the mediation attached to 'authority' has, however, nothing to do with the law, because, as stated before, the outcome and effectiveness of the agreement between the disputants exist independent of law. This understanding has surely guided the objectives of the 'Community Mediation Pilot Project".

The pilot project comprised of three fundamental objectives:

- To establish the necessary enabling legal framework for mediation under the Local Self-Governance Act, 1999.
- To build the institutional capacity of VDCs and Municipalities to conduct mediation
- To increase public awareness of the community-level dispute resolution provision and the availability of local-level capacity to resolve dispute.

At the implementation and impact level, the objective of the project was, however, broader and substantive. To be very frank, the project was not implemented simply to test as to whether the local Nepalese community is receptive of the community mediation or not. It was a pilot project only in the sense of 'the geographical locations of implementation' and 'the number of beneficiaries'. In terms of significance and impact, the project was a beginning of an 'immensely great shift in the notion or understanding of the concept of justice'. In terms of impact, the project intended to:

- Reorganize the concept of mediation with modern values and justifications, i.e.

18. CeLRRd: Center for Legal Research and Resource Development; Pro-Public: Forum for Protection of Public Interest; SUSS: Service to Underprivileged Section of Society; RUWDUC: Rural Women's Unity and Development Center; IGD: Institute for Governance and Democracy.

democratization and devolution justice system.[19]

- Empower peoples to perceive justice as an attainable and objective phenomenon, largely controlled by their own choice.[20]
- Enhance access to justice with firm conviction that 'justice is not something a prize to be handed over by someone' but something that could be 'bargain or negotiated between concerned peoples themselves'.[21]

Specifically speaking, the project's objective at the impact level was 'to give the grassroots people of a sense of ownership over the system of governance'. This project has largely articulated an idea that 'systems of delivering services to people' are virtually controllable by themselves. The over all objective of the project in this context is to 'strengthen democratization process at the grassroots level' through ensuring an 'access to justice' by media of community's involvement in the dispute settlement process. The project has thus fully proved that 'the community mediation is the mainstream' of the notion of justice in the Nepalese society.

IMPACTS OF THE COMMUNITY MEDIATION PROGRAM:

Outcomes of the program can be analyzed both qualitatively and quantitatively. Qualitatively, the following outcomes deserve presentation:

Clarity of the Concept: The implementation of the project in 75 locations (VDCs and Municipalities) amidst the confusion created by the 'failure of the Government to enforce the Local Self Governance Act concerning mediation, was a great breakthrough in itself. It broke the silence of the Government as well as the civil society. In this context, attainment of the 'clarity' of the concept of the community mediation has been the most outstanding outcome of the project which has helped tremendously to popularize the faith of people to the 'settlement of disputes' by their fellow villagers.

Creation of Efficient Human Recourses: Based on discussion with local mediators, one of the most important factors for high rate of success in mediating disputes goes to the 'outstanding training' that created skills of negotiating. Gathered from the impression of mediators, the skilled based training had been instrumental in achieving the:

- developing the conviction of the mediators that the 'the model of the community mediation program would be an effective alternative to access to justice and create a positive impact in the society,
- convincing that 'community mediation program' was a need of the disenfranchised community, but not an importation,
- generating social responsive attitude in mediators, and

19. Observation of the Post Evaluation Forms filled in by disputants (Form No. 4) shows a great interest of disputants on the community mediation program. They invariably suggest that 'disputes should be resolved in the community itself'. A large number of such disputants have suggested to 'set up mediation units or cell at the level of each neighborhood'.
20. Study of Evaluation Forms (which are filled in by disputants subsequent to resolution of their disputes) shows that most them liked Community Mediation for its unique character of 'letting them to say their concerns' and very friendly behaviors of the mediators. (This information is generated from post evaluation sheets (Evaluation Form No. 4) of disputants, which gives their opinions concerning mediation process).
21. According Gyanu G.C. Mediation District Program Coordinator at Nawalparasi, community mediation program is substantially important in a society like Nepal for (1) large number of people at rural villages are poor and cannot afford litigating dispute at the courts, (2) behaviors or social relations of people at rural villages are influenced by 'conventional and defective values', so that justice is inaccessible for large number of them, and (3) ignorance is rampant and people are not aware of their rights and duties. The community mediation brings justice at their home. It educates people that 'justice is possible in community itself'. Moreover, it responds to 'conventional and defective value system that justice is privilege available only to some category of people'. In her opinion, the largest benefit of the program goes to the 'women', the most marginalized section of the Nepalese population. She opines that the 'program has broken the silence of women and habit of tolerance of violence'. Progress Report of Nawalparasi District, 2004.

- planning strategies for smooth and meaningful holding of mediation sessions.

Building of Institutional Set up of Community Mediation Program: The community mediation program has given an institutional set up to the community mediation structurally. A group of 1300 community mediators are trained.[22] Each location (VDC or Municipality) has at least 18 mediators trained to deliver service to the people. Similarly, orientation has been carried out for VDC or municipality ward secretary. Similar orientation is conducted for district officials of the ministerial line agencies in the district. Series of 'practice sharing meetings are conducted among the community mediators, program coordinators, disputants and civil society members. Timely refreshment for community mediators is implemented, and most importantly the 'adequate social marketing of the mediation process reflecting on importance, techniques and methods has been done. Along with these several capacity and awareness interventions, the following institutional set of the community mediation is established:

- Placement of community mediation's office at VDC or Municipality premise. Mostly, office of the community mediation is placed at the VDC or Municipality premise. However, in some VDCs the office has been placed in a 'rented space due to destruction of the VDC premise in the wake of the insurgency'. VDC and Municipality administration have extended full cooperation to the community mediation activities. The support includes:
  - referral of the dispute registered at the VDC or municipality office,
  - provision of the communication support, i.e. telephone facility,
  - endorsement the list of mediators trained under the program, and
  - use of the VDC or municipality authority to secure presence of the parties in the mediation process.
- Listing of the trained mediators: In all VDCs and Municipality under the project area, the list of trained community mediators is displayed in a place visible to the common people. In some of the VDCs and Municipalities, the photos of the mediators are displayed at the community mediation office.[23]
- Disputes registration book, agreement book and progress report books are maintained in the office. In each program VDC and municipality, a facilitator is appointed to look after daily affairs of the mediation process.
- Copy of the agreement is provided to the VDC or Municipality Office.

This structure has helped to familiarize and gradually institutionalize the structural shape of the community mediation program. Most importantly, the population of the trained mediators is a great asset to the nation itself. There has been a tremendous potentiality among these mediators as a 'resource persons to train mediators in other parts of the country once the State will officially embark into the program.

Institutional Support to Court Referred Mediation: The community mediation has supported or strengthened the court referred mediation in many ways. The observation and interviews with mediators and court staff reveal the following positive impacts of the community mediation program:

22. This figure valid tills the end of 2004. Subsequently, all partner organizations have initiated training mediators for additional VDCs. Obviously, by the end of this year the number of trained community mediators will exceed 2000. Since training activities are still in progress, the figure of this year (2005) is not included in this presentation.
23. Nawalparasi district is seen highly innovative in quality promotion and added social marketing of the community mediation program. For instance, In Ramagram Municipality, the Municipality Office has provided a space and telephone facility to the mediation office. In the space, the team responsible for implementing the program has displayed the list of mediators as well as the photographs of all mediators. According them, the display of photographs helps disputants to 'recognize mediators by face'. This practice in itself is an inceptive to the mediators, as they are recognized as mediators by large number of peoples in their surroundings.

- The social marketing of the community mediation program as well as the very high rate of success of mediation at the community level has indirectly motivated litigants to mediate disputes in the courts. Obviously, the community mediation program has created a positive environment for the court referred mediation. There is number of instances now in which the litigation is referred to mediation by the court.[24]
- After the amendment of the District Court Regulation with effect to provide for mediation of the cases as initial step in the court, the interest of parties to 'resolve the case through mediation is significantly' increasing. In this process, the community mediation-trained mediators are found of great assistance to the court to achieve its goal. For instance, in Banke district more than ten listed mediators come from community mediation program. In fact this has been a matter of great 'success of the program'.[25]
- According to community mediators of Banke district, the benefit is mutual. The enlistment of community mediators as mediators for the court referred cases has given respect and sense of pride to community mediators. The enlistment also has given a positive message to the people. On the other hand, the court has been benefited from the knowledge and skills of the highly trained community mediators.

These interesting facts show an interesting achievement as to how community mediation and the court referred mediation are mutually buttressing each other. Increasing success of both these programs is an indicator of 'merging culture of conflict resolution' at the community level. The quantitative analysis of the following figures of success also presents a variety of outcomes and impacts.

Distribution of Mediators: One of the major reasons for the wider margin of success of the community mediation program is the 'wider distribution of mediators in terms of gender, ethnicity and the social strata'. The following figures give a 'detail picture of the scenario'. (see Table 1)

While these figures still show disparity, there has been tremendous improvement compared to other sectors such as politics, civil service, judicial service etc. In the civil service, Brahmin, Chettri and Newar three dominant communities occupy 96% of positions,[26] whereas minorities/indigenous community and dalit together have only 4%stake. In Judicial service, the proportion of women and minorities together is less than 5%, whereas not a single judge is found in the judiciary from the Dalit community. Compared to the participation of women, minorities and dalits in other sector of public life, the proportion in community mediation service is immensely huge and promising. These figures thus present the following positive characters and trends:

Table 1

Mediators	Gender		Ethnicity/Social Starta		
Total Number Effective till December, 2004	Females	Males	Brahmin Chettri	Minorities/ Indigenous	Dalit
1327	377	950	665	639	123
Percentage	28	72	50	41	9

24. In Nawalparasi, a litigation continuously going for 17 years has been settled by mediators. This case had been running at the Supreme Court during the occasion of mediation. This incident is an unique event in itself. Interview with disputants revealed a deep sense of 'remorse in both of them' for fighting a case for so long time. According them the loss they sustained economically, socially and psychologically during those 17 years is irreparable. However, they are now fully convinced that they have through community mediation brilliantly protected their children from the same fate.
25. Source, The Notice of the Banke District Court dated 2061/2/3.
26. See, Deepak Thapa, with Bandita Sijapati (2003), *A Kingdom under Siege: Nepal's Maoist Insurgency, 1996 to 200:* Published by Printhouse, Kathmandu

- The approach of the project towards the participation of women, minorities and dalit population is positive and inclusive.
- The project activities have reached to the grassroots level, and are grounded on philosophy of mobilization of excluded community in the justice making process.
- Through inclusive nature, the project has been able to strategize the access to justice for the whole population through a single and unstratified platform.
- Seen it from the rate of success of the mediation of disputes and the durability of the agreement, it is clearly established that women, minorities and dalits are equally competent to address the social disputes, with sense of impartiality, honesty and prudence.
- Comparatively wider participation of women, minorities and dalits in the community mediation process accompanied by higher rate of success in resolution of disputes and their durability indicates to the fact that 'community mediation process' is a right approach to reform and democratize the justice system.

These characters or trends themselves are an important outcome of the program. They obviously show that the 'community mediation is an effective and efficient alternative to the costly and poor people unfriendly litigation system'.

Disputes Disposal and Success Rate of Mediation Program: Dispute disposal and success rate is one major indicator of judging the 'effectiveness' of the community mediation program. The following figures give a clear message in this regard: (see Table 2)

The proportion of disposal and success rate in the table projects an extremely positive trend. The total figure represents performance of the program in a period of 9 months. The analysis of the figures in the table presents the following trends:

- Overwhelming majority of disputants have their disputes settled, thus setting a new trend of participatory justice making process.
- The proportion of the disposal and success rate indicates to potential of the community mediation program to develop as a viable and credible alternative of the justice system.
- Overwhelming proportion of the disposal and success rate as compared to that of failure rate indicates to the emerging trend of conflict resolution culture in the community
- The cost involved in the process is negligible. Obviously, the community mediation program has proved its 'poor friendly' alternative of the justice.

From this situation one can very easily assume that the progressive expansion and enlargement of the performance of the community mediation program will relieve the courts of law from their huge caseload. From this point of view, the impact of the community mediation program can be projected as follows:

- Increased use of community mediation may relieve districts courts of their civil caseload, which currently constitute 73.20% of the total caseload at the national level. To distribute at Supreme Court, Appellate Court and District Court level, the proportion of the civil caseload is 90%, 74% and 66% respectively.[27] These figures show that the problem of delayed justice in the judiciary is largely caused by the overflow of the civil cases, and thus reform of the judiciary is virtually impossible without

Table 2

Total Disputes Registered Till the End of December, 2004.	Disposal and Success Rate		
	Total Settlement Achieved	Process Launched and Pending	Failure to Settle
1,473	1,185	159	129
Percentage	80	11	9

27. See for detail, CeLRRd/TAF, 2002. *Trial Court System of Nepal.* Kathmandu, Nepal.

addressing the overflow of the civil litigations. The community mediation program directly responds to this problem as it refrains from taking cognizance of the criminal cases. The impact of the community mediation in reform of the current system of the justice is thus obvious. In this context, the community mediation can contribute to strengthen the formal system of justice in two ways:

- It provides an alternative forum for resolution of civil disputes, thereby helping to reduce the stress of the courts concerning. The impact is visible at all level of judiciary. Once the judiciary is relieved of the civil caseload, it may invest its time, resources and efforts to revamp or reform the criminal justice system. The strengthening of the fair trial is virtually impossible without getting rid of the massive civil caseload of the judiciary.
- The national poll on the judiciary conducted by the Law Society[28] records a bleak situation about people's confidence over the system of justice and its apparatus. One of the major causes for decreasing confidence to the judiciary is its long time to dispose cases. The community mediation in this context is a vital intervention to revamp the confidence of the people to the judiciary.

One significant problem facing the justice system of Nepal is related with the 'enforcement or execution of judgments' of courts. While there is a lack of specific findings to show an exact dimension of the problem, it is believed that the proportion of failure in this regard is enough to frustrate peoples about the current state of the system of justice. As often pointed out by the judiciary, one of the serious problems facing the execution of the courts' judgment is uncooperative attitude of the local authorities and peoples. However, there have been reasons for such 'non-cooperation'. As presented by the Law Society's poll, the level of suspicion of the people towards the impartiality of the courts is rampant. This problem, however, is not encountered by the community mediation program. This is exactly why there has been a serious attraction of the people to the community mediation program.[29] The issue of execution of the judgment is thus not related with the 'cooperation of the people'; it is rather related with the 'impression of people' to the process. The court's judgment is perceived as an 'imposed decision', whereas the agreement made through community mediation is conceived as a 'social obligation'. Obviously, one very significant impact to be made by the community mediation is in the sector of the 'execution of the agreement', which in turn is seen instrumental to 'institutionalize the culture of conflict resolution' at the community level.

Analysis of the TAF concerning durability of the agreement explores interesting findings. According to it, out of 85 cases examined, 64% were found fully executed. Of them, 19% had been partly executed. Only 6% agreements had been not implemented. Thus, even to take the 64% at the bottom line of the success, the potential of the community mediation to 'develop a culture of conflict resolution at the community level' cannot be underestimated. Moreover, the similar analysis of TAF concerning 'level of satisfaction' records 79 percent. One of various reasons driving to satisfaction is the 'disposal of case' in one strike. A number of cases settled did take not more than 'one sitting'. This factor is important in many respects:

- Firstly, it relieves the disputants from prolonged stress or tension,

28. See for detail, Law Society 2002. *The Judiciary in Nepal: National Survey of Public Opinion.* Kathmandu, Nepal.
29. Disputants while asked about the interest to 'get the dispute settled through local community mediation' instead of courts pointed out the following reasons: (1) it was easily accessible and there was no compulsion to accept the terms of reference, if they were found unjust, (2) the mediation was carried out by persons familiar to them, and they also had information of the disputes (3) it provided an opportunity to select a mediator from amongst those who are familiar (4) once the agreement is reached consensually, the scope of non-compliance is very limited as the social sanction attached to the agreement is stronger. These impressions are gathered from interview with disputants at Nawalparasi.

- Secondly, it saves their time, which is so crucial for people to earn livelihood through every day's work,
- Thirdly, it did not involve humiliation such as payment of penalty, fines etc.

Types of Disputes and Access to Justice: Analysis of disputes settled presents that community mediation program has been particularly effective in issues relating to *kutpit* (physical assaults), land issues, such as encroachment of boundary, possession, etc, *sarsapati* (small scale money lending and transactions), *Gharaysi samasya* (domestic disputes, such as maltreatment of spouse, animosity between brothers, parents and children and spouces), *galigalauz* (defamation), and others. If one minutely examines the types of cases dealt by courts, there is hardly difference in nature, except the difference in terms of values, seriousness and acuteness. In these types of cases, the social hierarchy and stereotyped conceptions seriously affect cases. Women dalit approaching courts for such issues will have hardly anything to achieve. Issues of defamation of dalit peoples, domestic violence against women, etc. are types of cases which hardly motivate judges to deal seriously. The access to justice in such cases is thus a serious problem in the formal system. But the community mediation has been proved a significant forum for such issues. Impacts in this regard are obvious:

- Women and dalits facing violence, humiliation, intimidation and assaults have a forum to complain against problems and get social redress thereof. In the community mediation they get not only their voice heard, but it also provides for them a social platform of protection, as perpetrators have to face social sanction in repetition of their actions in contrary to the agreement.
- This marginalized community has found a forum which understands their language. In the courts they have to speak formal language, but in the community mediation they can tell their story, they can cry, they can shout, and most importantly they will decide what is good for them to agree on.

The access to this platform has thus broken the obstacles which prevented marginalized peoples to 'break their silence and unjust tolerance'.

CHALLENGES FACING THE COMMUNITY MEDIATION PROGRAM

It is said that a good program faces more challenges then others. The Community mediation program is not an exception. Some pressing challenges facing the program can be outlined as follows:

1. *Confusion about the Legality of the Activities of Mediation*: The Local Self Governance Act provides for concept of mediation in a hybrid form. Local authorities thus understood it not in its true dimension. Largely, it was understood as a 'system where the decision can be imposed'. This impression was very much reflected by participants of the master training and subsequently by mediators. The suspicion that how would/could the mediation work beyond the scope of the legislation was pervasive. Obviously, in the initial days the confusion did cast suspicion on successful implementation of the program. Among others, the following issues or concerns seriously hindered in the ways to effective implementation of the program:

   - How to ensure the execution of the agreement in absence of a clear law in this regard was one of the most strong issue of debate in the 'meeting of steering committee', seminars and even during training activities.
   - While considering the nature of the community mediation the issue of execution was not a very important hindrance, however it was good to have some legal sanction in the agreement for ensuring effective execution. Thus, alternatives had to be searched about. The trouble to convince mediators and local authorities had thus been major challenges. It still looms large. The government has not still invoked the regulation to give implementation to the provisions of the Local Self Governance Act.

   In this situation, while the community mediation activities been effectively implemented with bright success, the legal framework in order to institutionalize it is still lacking. Most importantly, the Local

Self Governance Act exist with is hybrid structure of the mediation program. If the concept gets enforced by the government without any change, it can largely affect the 'philosophy' of the community mediation practiced at present.

2. ***Lacking of Networking of Various Programs***: Besides the program under the umbrella of TAF, community mediation programs had been implemented under the umbrella of DFID, UNDP and others. Communication among actors and stakeholders of these various programs was seriously lacking. Obviously, implementation of various modalities of the community mediation program not only was potential of duplication of activities, but they also were prone to 'generate unnecessary competition, confusions and envies among each other. This problem has partly been addressed through building communication between implementing organizations and donors, yet it still exists in this or that form.
3. ***Absence of Local Bodies***: The elected local bodies had been dissolved by the government. In absence of the local bodies, a great lapse or lake of coordinating agency had been felt. This problem still continues affecting the further smooth implementation of the program.
4. ***Frequency of Transfer of Government Officers***: The role of CDO, LDO and other officials in the government offices is crucial for successful implementation of the program. But their frequency of transfer often created the problem in coordination between the program and the government offices.

Many of these challenges still persist. However, the lacking of local elected bodies and prevailing situation of insecurity pose problems in smooth implementation of the program activities. The issue of insecurity can be managed applying security awareness and measures, but the absence of local bodies may hinder in the process of institutionalization of the program.

CONCLUSION

The settlement of disputes through application of 'mediatory role of trusted person' in the local context has been a long tradition of the Nepalese society. However, the same has been destroyed by 'coercive application of the common law litigation' system after 1952. The over-burden of the present judiciary and immense backlog of the cases running for several years has been seriously tarnishing the image of the judiciary. The community mediation can be the most reliable and trusted solution to the problem. Hence, we need to rethink on the issue of justice.

Annex - 6

Institutionalizing of Mediation in Formal Justice Mechanism

- Dr. Trilochan Uprety, Nepal

1. Introduction

Conflicts or disputes have been an integral part of human life. Various mechanisms have been designed to resolve disputes and some mechanisms are in the process of being designed. State has been main provider of justice and the state has designed mechanism for justice. However, these mechanism have not been able to provide access to justice, provide justice cost effectively and promptly. Therefore, quest for a cost effective, prompt mechanism of justice is continued. Mediation is one of such mechanisms.

2. Mediation System

Mediation is settlement of a dispute by the parties themselves of a dispute with assistance of a mediator Therefore, it is a voluntary process, dependent totally upon the will of the parties. Mediation sharply differs from formal justice mechanism as well as from other forms of the mechanism of informal justice i.e. arbitration. Whereas formal justice mechanism is mandatory and dispute is decided by a state appointed authority; arbitration involves decision by the persons appointed by parties themselves; mediation involves decision by parties themselves with facilitation or assistance of mediator. Hence, mediation system consists of:

(a) specification of disputes that can be settled through mediation,
(b) organization,
(c) mediator,
(d) enforceability of decision,
(e) relation with formal justice mechanisms.

Some disputes can not be resolved through mediation i.e. criminal offenses. Therefore, disputes that can be resolved through mediation should be specified. Similarly, organization to train and overseas mediator may also be needed. Mediators are the most important constituent of mediation. The success of mediation largely depends upon the skillfulness or competency of mediator. Decision arrived at mediation is to be executed by the parties themselves. Mediation must have relation with formal justice mechanism, that is to say, if mediation fails, the concerned party has a right to recourse to formal justice mechanism.

3. Formal Justice Mechanisms

Formal justice mechanisms are the mechanisms designed by the state for dispensing justice to people. Such mechanism may differ from country to country. In the context of Nepal, these mechanism are as follows:-

(a) **courts:**
  (1) Courts of first instance,
  (2) Appellate Court,
  (3) Supreme Court.
(b) **quasi-judicial bodies:**
  (1) Forest offices
  (2) District administration offices,
  (3) Land Revenues offices.
(c) **Local bodies:**
  (1) Village Development Committees,
  (2) Municipal Corporations.

4. Institutionalization of mediation in formal justice mechanism

Institutionalization in reference to mediation requires :

- Validity of the system,
- Viability of the institution ,
- Enforceability of the outcome (settlement).

Validity of the system may be granted by recognizing it in constitution ,as in South Africa, by recognizing tribal system of justice; by legislations, as in Sri Lanka; by courts' practice, as in Nepal and the Philippines. Viability of the system may be effected by providing effective organization, easy access to the system, skilled mediators, least cost services, logistic supports. Enforceability of the outcome(settlement) depends upon satisfaction of the parties.

In order to recognize mediation in formal justice mechanism, legislation must guarantee that mediation system is as good as mechanism of formal justice system; specify cases that can be resolved through mediation; introduce mediation system in every layer of formal justice system : courts, quasi-judicial body, local bodies. It must be ensured that parties have to go through mediation process before applying for formal justices or before delivery of judgment by Court , quasi- judicial bodies ; that Court , quasi- judicial bodies can refer cases for mediation and that formal justice mechanisms are available in case of failure of mediation. Similarly, a coordinating agency must be established and mediators should be trained and the activities of mediators should be monitored and action should be taken against the defaulting mediators. The viability of the system may be effected by providing effective organization, easy access to the system, skilled mediators, least cost services, logistic supports.

5. Institutionalization of mediation in the formal justice mechanism in Nepal

Mediation, in the form of ' Panchayat' (assembly of elders for settling disputes) has been practiced in rural areas from time immemorial. Similarly, Tribal justice system, i.e *badghara* in Tharu community , is still practiced in various indigenous community.

Provision of compromise by parties in cases (with or without a formal mediator) has been practiced from a long time (Muluki Ain,A.. Ban.82) ,except in some criminal cases.

Power to adjudicate some cases has long been given to the Village Development Committee and Municipalities.Local Self- governance Act,2055 provides for a system of med- arb (first, mediation; failure of mediation- then cases to be decided by arbitration). However, due to difficulty of arranging mediators, this provision has not come into force. Also the concerned clause has not came into force due to several reasons.

The Supreme Court introduced mediation in all tiers of courts for the pending cases by amending the Supreme Court Rules, Appellate Court Rules and District Court Rules in 2006.

These rules provides for freedom of parties to opt for mediation, power of judges with parties' consent to refer cases for mediation, preparation of roster of mediators, procedure of referral of case, mediation procedure, settlement procedure, referring cases back to court in case of failure of mediation. In line with these rules, there have been established mediation centers in the Supreme Court and Kathmandu, Kavre, Dolakaha districts. Similarly, Some non-government organizations and Village Development Committee have established mediation centers across the country: Jhapa, Ilam, Saptari, Nawalparasi. districts and have settled the cases effectively.

6. Mediation Bill

The Bill was initiated in the year 2061.The bill is being drafted with collaboration of the Supreme Court and MOLCA . The Bill aims to:

- introduce mediation as a means of dispute resolution,
- provide that disputes in which deed of compromise can be made can mediated ,
- establish professional mediation ; court referred mediation, court-annexed mediation with parties consent,
- establish Central and District Mediation Committee,
- appoint, train and administer mediators, by district mediation committee,
- provide procedure of mediation,
- provide validity to settlement ,
- provide provision for execution of settlement by parties,
- provide option for parties to seek recourse

to formal justice, if mediation fails,

- provide Mediators' Code of conduct and their fees

7. Challenges

The biggest challenge for effective mediation system is to secure the cooperation of another party. Unless another party agrees to proceed the dispute to resolve the aggrieved party can not alone start the mediation procedure , because mediation procedure is voluntary. Therefore, the biggest challenge for mediation legislation is non cooperation by another party. Similarly, it is a Hercules task to arranged trained mediators. It has already been stated earlier that provision of mediation in the Local Self-Governance Act has not come into force due to difficulty of arranging mediators .Furthermore, monitoring of mediators is also difficult. Moreover, another biggest hurdle for mediation is whether mediator will serve for remuneration or free of cost ?. Nobody will agree to do mediating work for free for a long time. If remuneration is to be given, the fate of mediation may also take that of arbitration. Therefore, unless community mediation is introduced effectively, mediation system may not work properly.

Conclusion

- Mediation is the cheapest means of dispute resolution, with relation of party renewed,
- Mediation needs to be introduced in all mechanism of formal justices,
- Indigenous system of mediation must be recognized,
- Mediation must be resorted by parties before applying for formal justices,
- Nepal is in process of introducing mediation in formal mechanism by introducing legislation in this regard.

Annex - 7

Socio-Cultural Orientations of Some Communities in Nepal: Possible Implications for (Rational) Mediation

- By Mukti Rijal, Nepal

1.0 Introduction

Nepal is a multicultural and multiracial society. Approx 110 indigenous groups inhabit in Nepal. Over 60 groups have their own languages, customs / cultures / self-governance practices. Moreover, they have their own conflict-closure (settlement) process. The Magars, Gurungs, Tlhakalis and other communities use their traditional mechanism to settle disputes. Nepal has been an unitary state for centuries. This has led to centralization of power. Nepal is going to be a federation through disaggregation of the current state organization to cater to social and cultural diversity, among others. The studies done by different agencies reveal that around 90% disputes are resolved within communities, very few disputes are taken to the court. The Constituent Assembly is going to draft a new Constitution to this end.

2.0 Dispute Resolution Alternatives used by Communities in Nepal

Two types of Dispute resolution alternatives exist in Nepal. They are formal and non-formal. The Formal Institutions are created by the state whereas Non-formal ones are based on customs and traditions. Nepal being a multicultural state offers profuse example of dispute resolution alternatives. The following table lists them:

	Institutions/Forums/Sites		Process
Formal	▪ Judicial Institutions (Courts', Adalats'/Tribunal)	----->	Adjudication
	▪ Quasi judicial institutions (Administrative agencies, police authorities, line authorities exercising judicial power)	----->	Summary decision/Impositional
	▪ Local governments (VDCs, MCs/DDCs)	----->	Arbitration/Med-Arbitration
	▪ Mobilized/organized community based institutions/networks (FECOFUN, Cooperatives, Water users networks (CBOs) & other Networks)	----->	Med-Arbitration
Informal	▪ Interest based community mediation	----->	Mediation
	▪ Communitarian Justice system (various indigenous communities)	----->	Arbitration (Indigenous ordering) Arbitrary Riti-Thiti (Custom is the King)
	▪ Political tribunals (Jana Adalats) (Extra state structures)	----->	Contradictions/Disputes • People vs. People (Reform/Reeducation) • People vs. Class enemy (Criticism Action/ Annihilation)
	▪ Political informals/formals (In-party structures)	----->	Reprimand / Resolution / Strictness
	▪ Street crowds/Mob	----->	Arbitration/intimidation (lynching, forced settlement)

3.0 Key Standards of Mediation

Mediation has been popularized and accepted as an important mechanism for dispute resolution in the Nepalese communities. The key standards of mediation are as follows:

- Conflicts are natural and should be resolved (closure). It can further prospects for positive peace
- Disputants in mediation should determine the outcome themselves (Self-determination). Mediation is an act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.
- Mediation is an opportunity to address relationship issues (Relationship)
- Mediators should be impartial (Impartiality) – Freedom from favouratlism, bias or prejudice etc.
- Mediation should be private (Privacy/ confidentiality) – No disclosure of the names of the disputant, content of disputes without explicit permission

However, some cultural values and orientations of some communities in Nepal may militate against the rational standards of the mediation. Some value patterns and cultural orientation have been identified as follows:

4.0 Collectivist Orientation of the 'Self'

Some communities in Nepal have group biased orientations. They place group interests above the individual choices. They prevail over individual interest. They identify themselves with group. Their identity is tied to family/ kinship networks. They have predisposition to Interdependence / harmony. The collectivist orientation of the self has it's implications on the rational standards of mediation.

4.1 Implication on Mediation

Self-determination is less stressed because of requirements to conform to group norms. Relationship is highly valued. Privacy is less important inside the group. Dispute Resolution is a part of harmony and interdependence in the community

5.0 Concept of Power

Power is considered as god gifted. Inequality, injustice and deprivation is understood as fatalistic, preset and thus accepted. As a result, emphasis is often placed on seniority, rank, title, age etc. Control is assumed as not falling not within individual self. The guiding philosophy is "Events happen, deeds are done, consequences happen but there is no individual doer of any deed" (**Lord Buddha/Geeta**).

5.1 Implication on Mediation:

Self- determination on resolving disputes are not preferred. Determination by others for one self is given priority. It is regarded that powerful and seniors know better. In the same way, impartiality may be interpreted as not helping in time of adversity and non conformance to expectations. Moreover, external control on outcome/result is accepted as natural. Furthermore, success is considered as combination of good fortune/efforts (**Bhagya ko khel**) etc.

6.0 Pattern of Communication

Pattern of communication among communities is ambigious. 'Yes' may not always mean 'Yes'. It may mean

'I hear you', may be even 'no'. Non-verbal communications are used rather than saying direct to convey

messages. Face-saving is very important among communities.

6.1 Implications on Mediation

Equivocal communication between disputants may hit impasse. Mediation and facilitation in the resolution of disputes may become difficult. Clarifying options / finding solutions may not proceed along linear process.

7.0 View of Conflict (Disputes)

Conflict is not viewed as direct, confrontational. It is not understood in the form of exchange between those directly involved. It is but

perceived as disruption of community ties / relationship. While resolving disputes, indirect, non-confrontational methods are preferred. It is not used to impose loss of face on anyone.

7.1 Implication on view of conflict

There is close linkage between Person and Problem. The process may be directed toward resolving tensions in community. It may not result in the resolution of individual problem

8.0 Conclusions

There is a tension between Individual satisfaction/needs and collective imperatives. The changes in the realm of the state in terms of promoting (human rights, individual rights/ interest/self-determination rational values) may not contribute to change in the realm of society (Social oppression, discrimination inequity). Universal values/standards may not be applicable in the communities. Civic identity can be subordinated to group based identity.

9.0 (Possible) Recommendations

On the basis of the preceding discussion it can be said that adaptation and contextualization of mediation process might be necessary. It should be done without compromising/undermining the basic values of interests/rights. No one method/process fits for all. Training to mediators on intercultural mediation as well should be imparted. Action Research (AR) activities can be linked to test the above assumptions as well.

Annex - 8

Scope and Practices of Mediation in Conflict Situation and Lessons Learned

- Ms. Gunathevi Sinnadurai, Kuala Lumpur

Introduction

Mediation, a form of 'alternative dispute resolution' (ADR) or 'appropriate dispute resolution', aims to assist two or more disputants in reaching an agreement. Whether an agreement results or not, and the content of that agreement (if any) the parties themselves determine rather than accepting something imposed by a third party. The disputes may involve (as parties) states, organizations, communities, individuals or other representatives with a vested interest in the outcome. Mediators use appropriate techniques and skills to open and improve dialogue between disputants, aiming to help the parties reach an agreement on the disputed matter. Normally, all parties must view the mediator as neutral and impartial.

The styles and approaches adopted by individual mediators are likely to differ depending on their cultural, religious, professional background, training and personal beliefs and values. Mediation styles vary not only among individual mediators but also among countries because of the cultural and societal influences. . Many of the approaches in mediation are influenced by the customs and norms that exist in different cultures, notably between those of the Western and Asian cultures.

This paper examines scope and practices of mediation in conflict situations in Malaysia and lessons learned.

Mediation in Malaysia

History has a way of repeating itself. Mediation used to be the means of settling disputes with a win/win approach in the early stages of human history and now in modern history it has become an 'alternative dispute resolution' (ADR). In Malaysia, mediation is promoted mainly for resolving commercial disputes as the mediation centres are established by the commercial institutes themselves.

The fundamentals of community mediation has been a practice of the East for centuries and the roots can be traced back to the teachings of Islam, Hinduism, Buddhism, Christianity including the teachings of Confucius. Malaysia, a country with multitude of faiths and religions has been a host for the practice of mediation amongst its recipients. In Islam, mediation is an indispensable condition and is represented by the word *shafa'a*, whilst in Hinduism; the mediation process is reflective in the text of its scriptures as well as in the concept of the *panchayat*. Confucius came up with this proverb, "*in death avoid hell, in life avoid law courts*" [1].

In Malaysia, since 1600, the village heads or Penghulus as popularly known dealt with matters of land claims, relations with traders, mining community, religion, war, illnesses and diseases [2]. Not only was the village chief part of a larger administrative structure, but he was also the leader of customary practices and was consulted in matters dealing with debt, marriage, the pilgrimage, and many other personal matters that required advice from a wise elder of the group [3]. As human civilization progressed and disputes became more complex, along with the British colonization, it was found that mediation by elders and village chiefs was no longer suitable to settle disputes effectively, so courts, the law, lawyers and judges came into the picture. As Malaysia developed economically, commercially and socially, more and more cases were presented in court and

there was a complex growth in the legal and judiciary system. The system was not able to cope in disposing the ever increasing cases within a reasonable time and costs. Hence came the conversation of resolving some of these matters outside court. Modern mediation was introduced to Malaysia only recently.

Let us look at mediation work in Malaysia. Malaysian public still remain relatively unaware of ADR methods and are therefore cautious, due principally to their lack of knowledge, experience and understanding of the mediation process. If you view the areas in which mediation has taken off progressively, it would focus around the commercial area. Let us look at some of the mediation centres established in Malaysia.

The Insurance Mediation Bureau (IMB)

The insurance Mediation Bureau (IMB) is the first formalized industry initiative in Malaysia to provide an ADR mechanism for consumer disputes. It as established in 1991. The IMB acts on rules provided for the insurance industry by the Central Bank of Malaysia. The existence of the IMB has shown that there is potential for mediation in Malaysia. IBM acts to assist the resolution of any consumer complaints between Insurance companies and the consumers/ policyholders in an independent, cost-effective, efficient, informal and fair way[4].

Malaysian Mediation Centre (MMC)

In 1995, the Malaysian Bar Council set up an Alternative Dispute Resolution (ADR) Committee to look into the possibility of setting up a Mediation Centre in Malaysia. The ADR Committee made an in-depth study of the various mode of alternative dispute resolution practiced in the Commonwealth as well as the United States of America. Members of the Singapore Mediation Centre were invited to make presentation of their Centre.

After a thorough study of the various modes of ADR and in particular Mediation, the Bar Council set up the Malaysian Mediation Centre (MMC) on 5th of November 1999. At the time of setting up the Centre, we only had about 27 Mediators who had gone through a 3-day study of Mediation techniques conducted by members of the Singapore Mediation Centre and the Law Society of Singapore. At present, the MMC has on its panel, a total of 150 accredited mediators who are trained to provide professional mediation services for a minimal fee (which is calculated based on the quantum of the claim)[5].

The Centre offers the following services:

a) Mediation Services;

b) Assist and advise on how to get the other side to agree to mediation if one party has shown interest;

c) Provides Mediation training for those interested in becoming Mediators and accredits and maintains a panel of mediators.

Currently the Centre accepts civil, commercial and matrimonial matters and intends to expand the scope to other matters at a later stage.

The Financial Mediation Bureau (FMB)

The Financial Mediation Bureau (FMB) is an independent body set up to help settle disputes between clients and their financial service providers who are its members. Bank Negara Malaysia established it in 2004 as a one-stop centre to provide consumers with an avenue to legal redress against all financial institutions. The bureau would deal with their grievances against banking institutions, insurance companies, financial institutions under the central bank's supervision and payment system operation. The FMB provides free, fast, convenient and efficient avenue to refer disputes for resolution as an alternative to the courts. These disputes may be Banking/Financial related as well as Insurance and Takaful related [6]. Takaful is an Islamic insurance concept which is grounded in Islamic *muamalat* (banking transactions), observing the rules and regulations of Islamic law.

Banking Mediation Bureau (BMB)

The Banking Mediation Bureau (BMB) was established in 1997. The Bureau was formed by the banking industry primarily to provide dispute-resolving services for the benefit of their

customers. Customers may refer their claim to the Bureau if they have any dispute involving monetary loss arising out of banking services provided by the banks, namely the charging of excessive fees, interest and penalty, misleading advertisement, unauthorised ATM withdrawals, unauthorised use of credit cards and unfair practice of pursuing actions against the customer as a guarantor.

The BMB can only address complaints against commercial banks, finance companies and merchant banks licensed under the Banking and Financial Institutions Act 1989 ("BAFIA").8 The BMB only deals with complaints, which have first been lodged with the banking institution concerned [7].

The Housing Buyers Tribunal

In a response to a major grouse of house buyers that civil action in court is expensive and slow; in 2002, the Ministry Of Housing created a new part in the Act i.e. a House Buyers Tribunal to be an alternative forum for parties to resort to in settling their disputes. The mechanics of which are provided by Section 16 of the Housing Development (Control and Licensing) Act 1966 ("Housing Development Act").[8].

The Tribunal For Consumer Claims (CCM)

The CCM is an independent body established under the Consumer Protection Act 1999 ("CPA") with the primary function of hearing and determining claims filed by consumers under the CPA. Although, the CCM does not expressly use the word mediation, the procedure is very similar to the HBT. The ADR mechanism employed in the CCM leans towards negotiation. [9].

Mediation in Medical Negligence Cases

Mediation, undoubtedly, offers a solution to the difficulties of tort litigation. It has many features that make it an attractive and a viable alternative in the context of medical negligence. In particular, the goals of litigation have absolutely nothing to do with healing whereas the goals of mediation appear entirely consistent with the paramount goals of medicine such as enhancing communication, increasing understanding, easing the exchange of information, focusing on the human side of a dispute, giving an opportunity for conciliation and restoration of relationships, an opportunity for healing, and an opportunity for a cost-effective and timely resolution. The flexibility of the mediation process will also make it possible to design remedies that are not only compensatory, but prevent future occurrences of medical negligence [10]. Mediation is a more appropriate forum as it enables the doctor to admit fault (if any), explain the variety of procedures available in treating the said patient and assure the complainant that all the necessary steps were taken during the operation. Mediation should also be practiced in the resolution of medical disputes as it reduces the damage suffered by the Defendant medical practitioners as a result of negative publicity. Mediation also provides speedier justice to the patient affected by the alleged negligence and curtails the expenses incurred for litigation.

The Malaysian Medical Council works with the Malaysian Mediation Centre, to provide for parties to appoint suitable Mediators to settle their disputes outside court. Medical negligence litigation is on the rise in Malaysia as people become more aware of medical developments as well as their ability to sue doctors. Currently, there are more than 3,000 healthcare personnel who are registered members of the Medical Protection Society [11]. This figure in itself suggests the level of precaution taken by medical personnel against the harsh consequences of litigation.

It is interesting to observe that most of the mediator work done is court-oriented mediation. Mediation is now embraced as part of the judicial process.

Is there any Community Mediators?

Where are the Community Mediators? What happens when there is a racial issue? Do the politicians act as mediators? Who mediates neighbourhood disputes?

On most occasions, what happens is that NGOs, Residential Associations, Interest Groups form

coalition to have their grievances and disputes heard. Expertise within the groups will mediate however this is not in the true essence of the meaning of community mediation as the mediator will be biased and has an interest in the dispute. Now this does not really come under the true meaning of a community mediator. Here the interested party is biased to the issue.

Examples of such groups are highlighted below:

Joint Action Group for Gender Equality (JAG)

It was formed in the 1980s and was previously known as Joint Action Group Against Violence Against Women (JAG-VAW). JAG is a coalition of five organizations: All Women's Action Society (AWAM), Sisters In Islam (SIS), Women's Aid Organisation (WAO), Women's Centre for Change (WCC) Penang and Persatuan Kesedaran Komuniti Selangor (Empower). JAG works at the policy level and advocates for legal reforms to create a gender equal society. It has campaigned for issues of rape, domestic violence and sexual harassment amongst others. As the progressive women's movement grew, JAG also took on other critical issues such as democracy, development, culture and religion, and sexuality.

In 1985 a Joint Action Group (JAG), trade unions, university and consumers' associations and individual women, was set up against Violence Against Women. JAG declared domestic violence a 'social concern' and called for the enactment of a Domestic Violence Act in Malaysia. The Act was passed by parliament in 1994.. After eleven years of workshops, campaigning and negotiations, the Domestic Violence Act (DVA) was finally implemented on 1st June 1996 [12].

National Youth Consultation Conference

NYCC is a coalition of five organizations advocating for youth issues and serves as a platform for young people to share their views on issues that concern them. The five organizations are Youth for Change (Y4C), Kuala Lumpur & Selangor Chinese Assembly Hall Youth Section, Pusat Kesedaran Komuniti Selangor (Empower), Solidariti Mahasiswa Malaysia (SMM) and the National Young Lawyers Committee (NYLC) [13].

Coalition to Save Kuala Lumpur (CSKL)

Various residents' associations in Kuala Lumpur formed this coalition to voice out their disagreement over the Draft City Plan 2020 that was produced by City Hall. The vision for 'Kuala Lumpur, 'A World Class City', encapsulates the ambition of Kuala Lumpur Structure Plan 2020 (KLSP2020) to make Kuala Lumpur a city that will assume a major global and sub-global role for the benefits of all its communities, workers, visitors and investors [14]. The points are that The Kuala Lumpur Draft Local Plan 2020 violated the strategic policies of the National Physical Plan (NPP) adopted under Section 6B of the Town and Country Planning Act 1976. High rise buildings in already populated areas, development on hill slopes, conversion of open spaces to commercial areas had all created an uproar among residents. Residents were given an opportunity to appear in front of a panel to voice their grievances. However this was far from mediation as the panel was appointed by the Draft Planners themselves. City Hall had differing views on matters which are legal in nature pertaining to the draft plan. The politicians , Pakatan Rakyat (The Opposition) members of parliament wanted to meet with Prime Minister, Datuk Seri Abdullah Ahmad Badawi, to discuss matters pertaining to the "grossly flawed" Draft Kuala Lumpur City Plan 2020. Development does not mean more buildings and high-rises and taking away open spaces. What is the purpose of developing communities? Just to make money? We also want to live a happy life, to feel safe and have decent facilities. Who do we have

Residential Associations and Community Centres (Rukun Tetangga)

Residential Associations work partly as mediators based on their own expertise to resolve disputes and grievances between residents and the relevant authorities like DBKL(Town Council), Police and other service sectors in the area.

Rukun Tetangga or community centres were

projects launched in the early years of the 70s and 80s to help minimize the possibility of crime in residential areas. Until today, Rukun Tetanggas are still prominently active in such areas where they run more fellowship programmes than night patrols. Rukun Tetangga was previously very much associated with night patrols where residents of a specific area group together and walk around in groups every night in order to keep the area safe. The Ministry of Women, Family and Community Development is one that plays a big role in promoting Rukun Tetangga in residential areas. Led by the Ministry, it was established to uphold various causes and policies that affect national unity through the few agencies of Department of Women Development, Social Welfare Department, National Population and Family Department and the Social Institute of Malaysia. Its responsibilities include running and sponsoring programmes that promotes national unity and harmony, planning and implementation of women and family development programmes and many others. The Ministry of Culture, Arts and Heritage too plays a part in promoting national unity through cultural programmes and the arts. All of which serves a common purpose. Rukun Tetanggas would have worked closely with all these ministries where funding and support are given out whenever needed [16].

Latest in Community Mediation Development

After 51 years of independence, Malaysia is still experiencing racial conflicts after suffering a major ethnic violence in 1969 which left more than 200 people dead. Other grievances between ethnic communities have occasionally sparked bloodshed. A dispute between Malays who celebrated a wedding and their Indian neighbours who held a funeral at the same time prompted violence that killed a few people near Kuala Lumpur. Authorities have acknowledged that racial polarization has increased in recent years even though the Malay Muslim majority still has generally amicable relations with the large ethnic Chinese and Indian communities, who are mainly Buddhists, Christians and Hindus.

With all these racial tensions flaring up in the country Malaysia needs neutral mediators who can prevent the usual conflicts between neighbours from accumulating and transforming into ethnic problems.

In disputes involving different ethnic groups, people in the community tend to take sides based on race and religion, but nobody mediates. In Malaysia politicians often take charge when racial or religious tensions arise, or are sometimes accused of being the cause of the tensions, it is unclear where the mediators will fit in.

The National Unity and Integration Department had planned to train special mediators to resolve disputes between neighbours of different races in a bid to prevent communal tensions in the ethnically diverse country.

In 2007, about 300 volunteer community representatives (rukun tetangga members from community centres) had undergone mediation courses as part of the government's efforts to curb racial and religious friction. They were people who could talk to both sides in a dispute to defuse racial problems. They were trained locally by sociologist, Prof Datuk Dr. Wan Abdul Halim Othman. The mediation programme would be implemented in urban areas where the risk of racial disputes is relatively high because many multiethnic residents live alongside each other. Plans are to focus on areas like Kuala Lumpur, central Selangor state, northern Penang state and southern Johor state. If successful, it would be implemented nationwide [17].

In 2008, the government jailed without trial five ethnic Indian activists from a group that brought more than 10,000 protesters into the streets over claims of race discrimination. A panel of 10 to 15 people, drawn from unity department staff trained in mediation and neighbourhood watch officials, were called in to work with the police and tackle problems on the ground to defuse any racial tension.

The committees were given the task of achieving a win-win situation for all the parties concerned. Once informed by police of a clash or argument that might take on racial overtones, the panel

members would swing into action and try to resolve matters. Eventually, the government planned to widen the district-level panels to include grassroots leaders, local authorities and members of the police as well. And being locals, they would have a better picture of what happens on the ground and there would be less suspicion about their intentions.

"They had planned to have monthly meetings where people can voice their grouses to the mediators so the matter can be resolved peacefully. We have yet to decide whether this should be done according to zones or districts.

Conclusion

Mediation in general has not been actively promoted to the public in Malaysia. It would seem that the Malaysian culture is most suited for such a dispute resolution process. I came across this perspective blogged by Chan Kheng Hoe an Advocate-Mediator in Malaysia. In the Malaysian culture we think more in terms of relationships than contracts. Who do we engage for specific works? People with whom we have a relationship. How do we engage them? We trust them, based on the existing relationship. How do we collect overdue payment? We buy them a meal, and build more relationship. In other words, the Malaysian culture is all about creating relationships, inter-personal skills, invested over the long term. Mediation too, is a promotion of relationships, and many times that holds the key to resolve conflicts where a contractual breach has clearly happened.

We all have a need to "save face". Saving face means having a bottom line under which we would not go (contributing to the solution being more realistic), as well as not pushing our way beyond a certain limit, leaving an open door for the other side to step down. Because we all understand the need to save face, there is less likelihood to insist on our strict rights all the way. And not insisting on one's strict rights is clearly a good step towards dispute-resolution [18].

In a Multi racial and cultural country like Malaysia, the question of should we have community mediators and develop them poses a challenge. The races that make up its population have in some way drifted apart, separate friends, separate social lives. Malaysia marked 50 years of independence in 2007, but many citizens lament the lack of ties between majority Malays and the Chinese and Indians living alongside them.

For Muslim family mediators and for family mediation trainers in Malaysia, Prof Datuk Dr. Wan Abdul Halim Othman has also stated concerns that mediation can potentially lead to unjust outcomes. It is essential, therefore, that Islamic mediators are mindful of the structural factors contributing to conflict and work toward findings ways of achieving socially just outcomes for all parties in marital disputes, in particular for women and children who are at risk of ongoing violence and abuse.

The Malaysian Government and agencies should aggressively educate and create awareness on community mediation that is currently available and being developed. All training provided should be non biased and only be based on promoting national unity among all races irrespective of their religion.

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Annex - 9

Mediation: Comparative Legislative Models

- Ben Reed, The Asia Foundation

A country's formal law grows out of its culture and society. Mediation particularly does not exist in a vacuum. It operates against a backdrop of national dispute management culture and institutional rules and regulations. Accordingly, it is nothing less than misleading to consider mediation as a universal process in isolation from its context. Context determines how mediation is absorbed and applied by mediators, dispute management professionals such as lawyers and clients. Context defines mediation and has a direct impact on how it is practiced. National legal contexts reveal historically embedded systemic differences that can provide insights into the reasons behind the rapid expansion of mediation in common law jurisdictions, and the comparatively hesitant development of mediation in civil law jurisdictions.

We will first look at the effect of culture on legislation, and then we will examine the basic principles of mediation in four different countries. The first example will be court-connected mediation in Germany, as stipulated by the first state mediation legislation. We will then examine the Japanese concept of court-connected mediation. Next we will discuss Australian laws and rules on mediation; and finally we will briefly discuss the U.S. At the end, we will look at what questions to ask to determine whether existing draft law matches Nepali cultural and legal practice.

Cultural Context - Some Questions

- Is the jurisdiction discussed a civil or common law jurisdictions and how does that influence mediation's development?
- To what extent do history and culture shape mediation's development?
- How do cultural differences among groups impact the development of mediation?
- Which problems in the justice system drive efforts to develop mediation programs in a country?

These questions, and their answers, will differ considerably from country to country. For example, we know that Germany is a civil law country, and the U.S. is a common law. But much of U.S. law is interpreted as it would be in a civil law country; and the same is true in Nepal. In order to be uniform and through, we will look at seven important parts of mediation:

1. Mediation Style And Values And Theories That Underlie The Mediation Process.

   Here, we will ask how the culture shapes the style of mediation. In the alternative, we might ask what a particular culture means by the word "mediation."

2. Voluntary Or Mandatory Nature Of Mediation

   To what degree do both parties, or either, have to agree to the mediation? If mediation is mandatory, why, and in what cases? And, does this approach make sense in another cultural context?

3. Informality Of The Process

   Does the legal culture require strict rules about how the mediation is structured? Are there variations in these rules? Why, or why not – and which works best?

4. Qualifications Of Mediators

   In many legal for a, mediators are required to be lawyers. However, this is not always the case. The cultural bias for, and against attorneys is important to explore. Sometimes, an attorney might not be the right tool for the job, so to speak. Ought there to be some minimum qualification? Who ought to choose what this qualification is?

5. Role Of Mediators

   This leads back to the question in #1: what is mediation? A mediator can support the process, act as a guide to the parties, or work primarily as an arbiter of fact.

6. Confidentiality, Presence Of The Parties

And Other Persons

Culturally, a dispute is not always between one individual or entity (e.g. a corporation or company) and another. It can be between one family and another, or can have even broader ramifications. Should others be involved? Also, some legal cultures promote the idea that third parties with an interest in the mediation, or who have special qualification, should be allowed to participate in the mediation.

7. Private Caucuses Or Joint Session

Finally, we will look at the question of whether the mediation is done as a private session in which only the mediation and one of the parties is involved, or whether mediation is performed in a quasi-courtroom setting.

Germany: A Clarification Of The Facts

The German approach is to focus on "the clarification of the facts" and the fact that most mediators (if not all) under the mandatory program will be lawyers and notaries, indicate that a very legalistic and evaluative form of mediation is likely to become the face of mediation.

Laws and ordinances in Germany and other countries now recognize mediation as part of the role of a lawyer and, in some jurisdictions, as part of the judge's role. In Germany, the mediative element in the judicial role has led to one view that mediation, at least in a court-related context, is a judicial function – an example of laws having a direct impact on the conduct and context of the mediation process.

1. Fact-finding, Analytical Style Based On Legalistic Approach
2. Voluntary Mediation (unless harm is de minimis)
3. Less Formal Process
4. Mediators Lawyers or Notaries
5. Legalistic/Evaluative Role For Mediators
6. Confidential Process Involving Only Parties
7. Private Caucuses Or Joint Sessions, But With Interventionist Approach

Japan: The Pursuit For Social Harmony

"Mutual concession" is a central feature of judicial court-connected mediation in Japan, be it civil or family. In modern western ADR theory, concession is thought to be less desirable than a creative solution that satisfies the needs and underlying interests of both parties to a dispute. However, in Japan the role of concession in effecting disputes is considered so important that it is specifically provided for by law. This reflects the cultural tradition of consensus in Japan, mutual concessions being one means by which consensus is achieved.

The Japanese model is based on the pursuit for social harmony, moral, duties and other extra-legal considerations. A problem with this approach is that the legislatively enforceable rights are not necessarily recognized, as the court-connected mediation committee is not bound by law or the formal weight of evidence. Rather, in their interventions the mediators will look more to standards such as reason, common sense, equity and morality. This may, of course, mean that the mediator is less impartial than he might be.

1. Non-Adversarial Style Based on "Meeting of the Minds," "Mutual Concession"
2. Voluntary Mediation
3. More Formal, Judge-Managed Process
4. Committee of Mediators From Various Professions
5. Mediators Help The Parties To Discuss The Conflict And Devise Their Own Solution
6. Confidential, But Third-Party Presence Permitted
7. Largely Private Caucuses

Australia: Maximum Flexibility

Australian Community Justice Centers have well-established government – sponsored mediation centers located throughout Australia. The centers offer mediation services either free of charge or for a very low cost to the public. Generally, mediation in all industry areas is available, although most mediations that take place deal with family, neighborhood, small business or consumer disputes. The mediation process applied in Community Justice Centers is regulated by state legislation as are other mediator relevant issues such as standards of care and mediator liability.

In addition, both government and non-government organizations in Australia offer community mediation services. These include UNIFAM and Relationships Australia with respect to family disputes, organizations with religious connections, legal aid offices and community legal centers that provide inexpensive legal services including mediation to members of the public, the ombudsman and government departments dealing with families and juveniles. School mediation projects focusing on peer mediation and anti-bullying can be found in all Australian States.

Variations of voluntary and mandatory court-connected mediation schemes exist at federal, state and local levels. Court-related mediation in Australia dates back to the 1980s. Today mediation is offered as a court-related dispute resolution process in almost every Australian court. Examples of voluntary schemes can be found in the Federal Court of Australia and the District Court of New South Wales, while examples of mandatory schemes are to be found in the Queensland, Victorian and Western Australian Supreme Courts, the Family Court of Australia and the Administrative Appeals Tribunal (AAT). The developing trend is towards mandatory referral to mediation at the discretion of the court.

1. Resolving the dispute, or at least its scope
2. Trend towards mandatory mediation at the discretion of the court
3. Informality Of The Process
4. Regulation by service-providers and industry groups
5. Mediator is an Early Neutral Evaluator
6. Confidentiality, Flexible Structure
7. Either Private Caucuses Or Joint Session

U.S.A.:

Because of the federal structure of the U.S., it is difficult to make sweeping generalizations about the U.S. Where possible, it tends to match Australia. However, mediation is much more frequently mandatory, especially where the nature of the dispute is likely to inspire friction (e.g. family and labor law).

1. Client-directed, Flexible Style designed to limit costs
2. Mediation Often Mandatory
3. Process Informal, Agreed upon beforehand
4. Mediators Lawyers, or Selected By Parties
5. Mediator is neutral advisor
6. Mediation conducted serially; mediator helps clients strategize
7. Primarily Private Caucuses

Nepal: Some questions and Suggestions

- The questions that Nepali legislators should ask themselves before committing to a Mediation Law is to examine the experiences of the countries I reviewed above, and ask some important follow-up questions that are not strongly emphasized in the existing draft legislation:
- Does the legal culture restrain the development and acceptance of mediation? Is the court system and legal profession too highly regulated, and will this discourage lawyers from embracing mediation as an alternative to litigation? How can this problem be addressed – or does it need to be?
- Who will pay for the mediation? And is the time and cost efficiency of the legal system such that that the promise of time and cost savings will motivate stakeholders?
- Has the law been written with precise definitions of terms? Is there uniform terminology such that all agree on the meaning of mediation? If not, is the law flexible enough to be applied in all cases?
- Is there a cultural settlement or arbitrative function inherent in Nepali culture that has been confused with mediation?
- What is the curriculum for mediators? Is everyone using the same curriculum? And is the style of legal education practical or theoretical? Flexible or rigid?

I believe that it is Nepal's best interest to incorporate the following principles into the Law on Mediation:

1. Maximize Clarity and Flexibility
2. Make Mediation Voluntary
3. Make Mediation Informal
4. Flexible Qualifications Of Mediators
5. Role Of Mediator: Neutral Advocate
6. Permit Presence Of Other Persons
7. Private Caucuses, General Caucus at end.

Annex -10

National Conference to Institutionalize Mediation in Nepal
16 and 17 January, 2009

Program Schedule

Venue: **Hotel Radisson**, Lazimpat MC: Sudeep Gautam

INAUGURATION SESSION

Time	Particulars
9:00 to 9:10	Welcome Remarks and Highlights on the objectives of the Conference Mr. Nick Langton, Country Representative, TAF
	Highlights on the papers by the respective paper presenters
9:10 to 9:15	Dr. Ferdous Jahan, Department of Public Administration, University of Dhaka, Bangladesh
9:15 to 9: 20	Ms. Gunathevi Sinnadurai, Vice-President, Bangsar Baru Residents Association, Kuala Lumpur, Secretary to Coalition to Save Kuala Lumpur Malaysia,
9: 20 to 9: 25	Atty. Rowena Daroy Morales, Professor, College of Law, University of Philippines, Philippines
9: 25 to 9:30	Ms. Kamalini de Silva, Attorney-at-Law: Additional Secretary, Ministry of Justice and Law Reform, Sri Lanka
9:30 to 9: 35	Prof. Nomita Aggrawal, Professor of Law, Campus Law Center, Delhi University, India
9: 35 to 9: 40	Remarks by Guest, Dr. Ram Krishna Timalsina, Registrar, Supreme Court
9: 40 to 9: 45	Message from Deputy Prime Minister Bam Dev Gautam MC: Sudeep Gautam
9:45 to 10:00	Inaugural Remarks by Chief Guest, Honorable Top Bahadur Singh, ED, NJA
10:00 to 10: 45	Key Note Speech, Prof. John Paul Lederach
10:45 to 11:00	Question and Answer with Key Note Speaker
11:00 to 11:15	Vote of Thanks Ms. Geeta Pathak, President, CeLRRd
11:15 to 11: 30	Hi-tea

PRESENTATION SESSION

Day One (16th January 2009) 11:30 to 11:45 - Participants break up in two groups

GROUP A (SESSION 1)	Time	GROUP B (SESSION 1)
Chair by : Hon'ble Dr. Arju Rana Deuba		Chair by : Prof. Manik Lal Shrestha
Paper : Access to Justice for the Poor in Bangladesh: Problems and Prospects, By: **Dr. Ferdous Jahan**, (Bangladesh)	11:45 to 12:15	Paper : Legislative Framework and Practices for institutionalization of Mediation, By: **Ms. Kamalini de Silva,** (Sri Lnaka)
Comment by : **Mr. Sadhuram Sapkota**, Joint Secretary, MOLJ & CAM	12:15 to 12:30	Comments by : **Hon'ble Ishwor Pd. Khatiwoda,** Judge Appellate Court
Floor Discussion and Response	12:30 to 1:00	Floor Discussion and Response
Wrap up by Chair	1:00 to 1:15	Wrap up by Chair
GROUP A (SESSION 2)		**GROUP B (SESSION 2)**
Paper : Institutionalizing traditional mediation practices focusing Lok-Adalat. By: **Prof. Nomita Aggrawal** (India)	2:15 to 2:45	Paper : Barangay Justice System: A Citizen-Driven Tool For The Resolution Of Disputes In The Philippines, By **Atty. Rowena Daroy Morales** (Philippines)
Comment by : **Hon'ble Dr. Anand Mohan Bhattarai,** Judge Appellate Court	2:45 to 3:00	Comments by : **Hon'ble Keshory Raj Pandit**, Judge Appellate Court
Floor Discussion and Response	3:00 to 3:30	Floor Discussion and Response
Wrap up by Chair	3:30 to 3:45	Wrap up by Chair
Nepali Folk Song Presentation by Lal Bahadur Gayak		

Day Two 17th January 2009

GROUP A (SESSION 3)	Time	GROUP B (SESSION 3)
Chair by : **Mr. Prakash Mani Sharma**		Chair by : **Mr. Gobinda Das Shrestha**
Paper : Community Mediation: A Pedagogic Reflection, **Dr. Yubaraj Sangroula,** Kathmandu School of Law	9:00 to 9:30	Paper : Institutionalizing mediation in formal justice mechanism., **Dr. Trilochan Uprety,** Secretary, MOLJ & CAM
Comments by: **Dr. Ramkrishna Timalsina**, Registrar, Supreme Court	9:30 to 9:45	Comments by : **Mr. Narendra Pathak** (Former Deputy Attorney General)
Floor Discussion and Response	9:45 to 10:30	Floor Discussion and Response
Wrap up by Chair		Wrap up by Chair
Tea Break	10:30 to 10:45	Tea Break
GROUP A (SESSION 4)		**GROUP B (SESSION 4)**
Paper : Some Cultural value orientation of communities in Nepal: Possible implications for Mediation - **Mr. Mukti Rijal**, IGD	10:45 to 11:15	Paper : Scope and practices of mediation in conflict situation (also focus on conflict-affected situation) and lessons learned, **Ms. Gunathevi Sinnadurai**, (Malaysia)
Comments by: **Mr. Mahendra Prasai**	11:15 to 11:30	Comments by : **Ms. Geeta Pathak**
Floor Discussion and Response	11:30 to 12:15	Floor Discussion and Response
Wrap up by Chair	12:15 to 12:30	Wrap up by Chair
Lunch-break	12:30 to 1:30	
GROUP A (SESSION 4)		**GROUP B (SESSION 4)**
		Chair : **Dr. Sagar Prasain**
Case –presentation from districts (1:30 Hrs)	1:30 to 2:00	Paper : Comparative study of legislative framework of Mediation - **Mr. Ben Reed**
	2:00 to 2:15	Comments by : **Hon'ble Mr. Binod Sharma,** Judge District Court
	2:15 to 2:45	Floor Discussion and Response
	2:45 to 3:00	Wrap up by Chair
Tea Break	3:00 to 3:30	

CLOSING SESSION

Closing Session Chair – **Manik Lal Shrestha**	
3:30 to 4:00	TAF's Efforts and Experience in Community Mediation Nepal, Preeti Thapa, TAF
4:00 to 4:10	Question and Answer
4:10 to 4:20	Remarks from a Nepali Paper presenter, Mr. Mukti Rijal
4:20 to 4:35	Remarks from a Foreign Paper presenter, Atty. Rowena Daroy Morales
4:35 to 4:50	Remarks from local mediators of partner organizations
4:50 to 5:00	Remarks from MUAN Representative
5:00 to 5:10	Remarks from Honorable Ram Chandra Rai, District Court Judge, Dolakha
5:10 to 5:20	Remarks from Honorable Ek Raj Bhandari, CA Member
5:20 to 5:30	Remarks from MOLD Minister, the Chief Guest of the closing session, Hon'ble Ram Chandra Jha
5:30 to 5:40	Remarks from Prof. John Paul Lederach
5:40 to 5:50	Vote of Thanks and Closure of Program by Chair
5:50 On wards	Dinner

Annex - 11

National Conference to Institutionalize Mediation in Nepal

16-17 January, 2009

Participants' List

PAPER PRESENTER

SN	Name	Country
1.	Dr. Ferdous Jahan	Bangladesh
2.	Ms. Kamalini De Silva	Sri Lanka
3.	Prof. Nomita Aggrawal	India
4.	Atty. Rowena Daroy Morales	Philippines
5.	Dr. Yubaraj Sangroula	Nepal
6.	Dr. Trilochan Uprety	Nepal
7.	Mr. Mukti Rijal	Nepal
8.	Ms. Gunathevi Sinnadurai	Malaysia
9.	Mr. Ben Reed	The Asia Foundation, Nepal

COMMENTATOR

SN	Name	Designation	Organization
10.	Hon'ble, Kesari Raj Pandit	Judge	Appellate Court
11.	Hon'ble, Ishwor Khatiwoda	Judge	Appellate Court
12.	Dr. Ananda Mohan Bhattarai	Judge	Appellate Court
13.	Dr. Ram Krishna Timalsina	Registrar	Supreme Court
14.	Hon'ble, Binod Sharma	Judge	District Court, Rasuwa
15.	Mr. Sadhuram Sapkota	Joint Secretary	MOLJ& CAM
16.	Mr. Mahendra Prasai		Mediation Center
17.	Mr. Narendra Prasad Pathak	Former Deputy Attorney General	
18.	Ms. Geeta Pathak	President	CeLRRd

TRANSLATORS

19.	Hriseekesh Upadhaya	TU English Faculty	
20.	Kalanidhi Devkota	Freelancer	

PARTICIPANTS

SN	Name	Designation	Organization
21.	Hon'ble Top Bahadur Singh	Executive Director	NJA
22.	Hon'ble Arju Rana Deuba	Member (President RUWDUC)	Constituent Assembly
23.	Prof. Manik Lal Shrestha	General Secretary	SUSS
24.	Mr. Sagar Prasain	Deputy Country Representative	TAF Nepal
25.	Mr. Govinda Das Shrestha	Chief of Party	TAF
26.	Mr. Til Prasad Shrestha	Joint Registrar	Supreme Court
27.	Mr. Shreekanta Poudel	Joint Registrar	Supreme Court
28.	Hon'ble Yagya Prasad Bashayal	District Court Judge	Lalitpur
29.	Hon'ble Ram Chandra Rai	District Court Judge	Dolakha
30.	Hon'ble Dipendra Adhikari	Judge	NJA
31.	Hon'ble Lekh Nath Regmi	Judge, Kavrepalanchok	District Court
32.	Mr. Nripdhoj Niraula	Registrar	NJA

SN	Name	Designation	Organization
33.	Mr. Bidur Mainali	General Secretary	MuAN
34.	Mr. Lekhnath Bhattarai	Legal Officer	MuAN
35.	Mr. Madhav Poudel		ADDCN
36.	Mr. Jeevan Shahi		ADDCN
37.	Mr. Hem Raj Lamichhane	Executive General Secretary	ADDCN
38.	Mr. Shankar Subedi	Secretary	Nepal Mediator' Society
39.	Mr. Ganesh Upadhaya	Vice-President	Nepal Mediators' Society
40.	Mr. Prakash Raut	Section Officer	Supreme Court
41.	Mr. Udaya Raj Sapkota	Under Secretary	Nepal Law Commission
42.	Ad. Ashish Adhikari	Asst Prof.	Kathmandu School of Law
43.	Mr. Prakash K.C.	Associate Professor	Kathmandu School of Law
44.	Mr. Kumar Ingnam	Asst. Professor	Kathmandu School of Law
45.	Mr. Sukhadev Sapkota	Academic Program Manager	KSL
46.	Mr. Dipendra Upadhaya	Retd. Chief Judge	Appellate Court
47.	Mr. Bashanta Acharya	Chief Legal Officer	KMC
48.	Mr. Shiva Dhungana	Coordinator	Search for Common Ground
49.	Mr. Debendra Poudel	Deputy-Register	Appellate Court, Patan
50.	Mr. Ram Prasad Aryal	Advocate	Patan
51.	Mr. Sudarshan K.C.	Mediation Trainer	
52.	Mr. Binod Lamichhane	General Secretary	
53.	Hon'ble Ek Raj Bhandari	CA Member	Constituent Assembly
54.	Hon'ble Amrita Gharti	CA Member	Constituent Assembly
55.	Hon'ble Dal Bahadur Sunar	CA Member	Constituent Assembly
56.	Hon'ble Radha Gyawali	CA Member	Constituent Assembly
57.	Mr. Kamal Pd. Sharma	District Coordinator, Dhankuta	SUSS,
58.	Mr. Deepak Guragain	Trainer, Dhankuta	SUSS
59.	Mr. Ganesh Prasad Bhattarai	Dhankuta	SUSS
60.	Ms. Alina Hingmang	Mediators, Dhankuta	Dhankuta SUSS
61.	Ms. Anita Gurung	District Coordinator, Kaski	SUSS
62.	Mr. Hari Pd. Pandit	Trainer, Kaski	SUSS
63.	Mr. Ram Mani Adhikari	Kaski	SUSS
64.	Mr. Yagya Adhikari	Kaski	SUSS
65.	Mr. Lal Bahadur Gayak	Mediator, Kaski	SUSS
66.	Mr. Ramesh Pradhan	Trainer, SUSS	Kathmandu
67.	Mr. Bidhya Khanal	District Coordinator, Tanahu	IGD
68.	Mr. Sitaram Bajagai	Mediator, Tanahu	IGD
69.	Ms. Mina Dura	Mediator, Tanahu	IGD
70.	Ms. Kalpana Pokharel	VDC Coordinator, Tanahu	IGD
71.	Mr. Bandhu Raj Poudel	District Coordinator, Chitwan	IGD
72.	Ms. Kabita Adhikari	Trainer, Chitwan	IGD
73.	Mr. Surya Adhikari	Mediator, Chitwan	IGD
74.	Mr. Min Prasad Bastola	VDC Secretary, Chitwan	IGD
75.	Dr. Bhogendra Jha	Mediator, Dhanusha	Pro-public
76.	Mr. Pankaj Kumar Karna	Dhanusha	Pro-public
77.	Mr. Jagat Narayan Jha	Dhanusha	Pro-public
78.	Ms. Sammi Karna	Trainer, Dhanusha	Pro-public
79.	Mr. Mohammad Hassim Nadaf,	Mediator, Dhanusha	Pro-public
80.	Mr. Men Kumar Gautam	Sarlahi	Pro-public
81.	Mr. Raj Kumar Mahato	Sarlahi	Pro-public
82.	Mr. Jitendra Kumar Singh	Sarlahi	Pro-public

SN	Name	Designation	Organization
83.	Mrs. Shobha Regmi	District Coordinator, Sarlahi	Pro-public
84.	Mr. Prasad Joshi	District Coordinator, RUWDUC	Doti
85.	Mr. Sujit Kumar Shrestha	District Trainer, RUWDUC	Doti
86.	Mr. Kumar Singh Tailor	Mediator, RUWDUC	Doti
87.	Mr. Raj Ratna Shrestha	VDC Secretary, RUWDUC	Doti
88.	Mr. Rohit Deuba	District Coordinator, Dadeldhura	RUWDUC
89.	Mr. Dhirendra Awosthi	District Trainer, Dadeldhura	RUWDUC
90.	Mr. Padam Singh Khati	Mediator, Dadeldhura	RUWDUC
91.	Mr. Nawal Singh Pal	VDC Secretary, Dadeldhura	RUWDUC
92.	Mr. Ganesh Kadayat	District Coordinator, Kailali	RUWDUC
93.	Mr. Govind Narayan Upadhyay	District Trainer, Kailali	RUWDUC
94.	Ms. Laxmi Bhandari	Local Coordinator, Kailali	RUWDUC
95.	Mr. Ganesh Datta Joshi	VDC Secretary, Kailali	RUWDUC
96.	Mr. Bhanu Bhakta Rijal	District Coordinator, Banke	CeLRRd
97.	Mr. Radheshyam Tharu	District Trainer, Banke	CeLRRd
98.	Mr. Thakur Prasad Pokharel	VDC Secretary, Banke	
99.	Mr. Rishi Ram Kafle	District Coordinator, Bardiya	CeLRRd
100.	Mr. Balhari Subedi	Chairperson Mediator's Network, Bardiya	CeLRRd
101.	Mr. Padam Raj Bhatta	District Coordinator, Kanchanpur	CeLRRd
102.	Ms. Tulasi Joshi	District Trainer, Kanchanpur	CeLRRd
103.	Mr. Mahendra Khadka	Central Representative, Mediators Network, Kanchanpur	CeLRRd
104.	Ms. Gyanu G.C.	District Coordinator, Nawaparasi	CeLRRd
105.	Mr. Sanjaya Chaudhary	District Trainer, Nawaparasi	CeLRRd
106.	Mr. Nagendra Pd. Yadav	Chairperson Mediator's Network, Nawaparasi	CeLRRd
107.	Mr. Narayan Regmi	District Coordinator, Morang	CeLRRd
108.	Mr. Mohan Bhattarai	Mediator, Morang	CeLRRd
109.	Hon'ble Dambar Khadka	CA Member	Constituent Assembly
110.	Hon'ble Jaya Ghimire	CA Member	Constituent Assembly
111.	Hon'ble Shanti Jirel	CA Member	Constituent Assembly
112.	Hon'ble Devilal Thapa	CA Member	Constituent Assembly
113.	Hon'ble Punan Singh Dahal	CA Member	Constituent Assembly
114.	Hon'ble Krishna Kumar Chaudhary	CA Member	Constituent Assembly
115.	Hon'ble Bharat Psd. Shah	CA Member	Constituent Assembly
116.	Ms. Laxmi Devi Humagain	Section Officer	Mo L D
117.	Mr. Dhurba Raj Pandit	Section Officer	Mo L D
118.	Mr. Krishna Pd. Bhusal	Section Officer	Mo L D
119.	Mr. Hari Bd. Budhathoki	Section Officer	Mo L D
120.	Ms. Kalpana Shrestha		MoWCSW
121.	Mr. Hum Bahadur KC		Ministry of LJ&CAM
122.	Mr. Raj Bista	SSP	Police Headquarter
123.	Ms. Geeta Uprety	DSP	Nepal Police
124.	Hon'ble Yamlal Kandel	CA Member	Constituent Assembly
125.	Hon'ble Bina Gyawali	CA Member	Constituent Assembly
126.	Mr. Chet Raj Bhatt	Center Coordinator	CeLRRd
127.	Mr. Phatik Thapa	Ex- MP	
128.	Ms. Tamara Relis	Research Fellow	London School of Economics
129.	Mr. Rajendra Ghimire		PPR Nepal
130.	Mr. Devendra Poudel		Appellate Court, Patan
131.	Mr. Keshab Dahal	Project Coordinator	Access to Justice, UNDP

SN	Name	Designation	Organization
132.	Mr. Hemang Sharma	ED	PPR Nepal
133.	Ms. Shikha Prasai	Media person	Interface, Nepal
134.	Mr. Milan Poudyal	Assistant Director	Interface Nepal
135.	Mr. Dil Bhusan Pathak	Media person	Interface, Nepal
136.	Mr. Rajesh Timilsina	Cameraman	Interface Nepal
137.	Mr Pitambar Bhandari	Student, Conflict, Peace and Development Studies	TU
138.	Ad. Basanta Acharya	Legal Officer	Kathmandu Metropolitan City
139.	Ad. Rammani Adhikari	Legal Officer	Lekhnath Municipality
140.	Assoc. Prof. HK Rana	Teaching Faculty	KSL
141.	Mr. Lars Peter Christensen	Programme Coordinator	DanidaHUGOU
142.	Mr. Mukunda Kattel	Advisor	DanidaHUGOU
143.	Ms. Michelle Parleviet	Conflict Transformation Advisor	DanidaHUGOU
144.	Ms. Sharada Gyawali	GDO	USAID
145.	Mr. Bhim Psd. Dhungana	General Secretary	NAVIN
146.	Mr. Kiran Psd. Dhungel	Consultant	Local Peace Committee
147.	Mr. Loknath Ghimire	Student	Conflict, Peace and Development Studies, TU
148.	Ms. Karen Bennett		McConnell Foundation
149.	Ad. Bhabishwor Gurung		Nepal Bar Association
150.	Ms. Chetana Regmi		
151.	Mr. Ramesh Neupane	Media person	ABC Nepal
152.	Mr. Yam Birahi	Media person	*Annapurna Post*
153.	Mr. Satish Sharma	Reporter	*Mulyankan*
154.	Mr Janak Tiwari	Reporter	*Trishuli FM*
155.	Ms. Geeta Pathak Sangroula	President	CeLRRd
156.	Mr. Kishor Silwal	Director	CeLRRd
157.	Mr. Anjan Kumar Dahal	Secretary	CeLRRd
158.	Mr. Rammani Gautam	Treasurer	CeLRRd
159.	Mr. Sudeep Gautam	Program Coordinator	CeLRRd
160.	Ms. Preeti Thapa	Program Manager	The Asia Foundation
161.	Ms. Sameera Shrestha		The Asia Foundation
162.	Mr. Prakash Mani Sharma	Executive Director	Pro-public
163.	Ms. Shova Basnet	Program Coordinator	RUWDUC
164.	Mr. Nayan Bhakta Shrestha	Program Coordinator	SUSS
165.	Ms. Sushila Serchan	Program Coordinator	IGD
166.	Mr. Kumar Sharma Acharya	Program Coordinator	CeLRRd
167.	Ms. Sakila Chhetri		CeLRRd
168.	Mr. Ramsharan Pokharel		CeLRRd
169.	Mr. Maheswor Phuyal	Volunteer, Secretariat	
170.	Ms. Sushila Karki		Kathmandu School of Law
171.	Mr. Anil Shrestha		Kathmandu School of Law
172.	Mr. Santosh K.C.	Volunteer	Kathmandu School of Law
173.	Mr. Prashant Pathak	Volunteer	Kathmandu School of Law
174.	Ms. Sangita B.K.	Volunteer	Kathmandu School of Law
175.	Ms. Sushila Neupane	Volunteer	Kathmandu School of Law
176.	Mr. Amit Uprety	Volunteer	Kathmandu School of Law