

Assessing the Function of Judicial Committees in Nepal: Case Study of Bhaktapur District

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Abstract

The transition of Nepal from a unitary set-up to a federal system has come with a host of institutional changes that are both functional and structural in nature. The existing institutions of the State have been refurbished towards implementing the new federal constitution. All the organs of government have devolved their power to all three tiers of government to address the concerns of the citizenry. In a similar vein, Article 217 of the Constitution of Nepal (hereinafter Constitution) has revived traditional dispute settlement mechanisms to mitigate the inefficiencies of the formal legal system by envisioning judicial committees that devolve judicial power to the local level. This paper is an attempt to analyze whether these judicial committees are functioning effectively and explore the challenges that they face in exercising their judicial power.

Keywords: *Constitution of Nepal, federalism, three tiers of government, local level, judicial committee, judicial power, Article 217*

1. Introduction

With changes in the governance system of the country, the new set-up has also introduced changes to the 'functional' aspect of the judiciary. The *Constitution* has envisioned 'Judicial Committees' for all 753 local bodies to settle specific disputes and ensure that justice is 'home-delivered' to people.¹ The Judicial Committee envisioned by the *Constitution* in Article 217 is led by the Deputy Mayor and Deputy Chairperson of the Rural Municipalities with two other members elected by the members of the Village Assembly or Municipal Assembly. However, this concept is not new in the history of Nepal.²

The legacy of the judicial committee can be explicitly traced back to the traditional dispute settlement mechanisms developed during the *Panchayat* era. Post democratic change in 1990, certain changes were introduced to respect the notion of separation of power in government. In doing so, elected representatives were kept from the justice delivery mechanisms through the provision of med-arbitration panel.³

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¹ Til Prasad Shrestha & Namit Wagley, 'Judicial Committees: A Closer Look', Nepal Law Society, 2019, Nepal, available at <http://nepallawsociety.org/uploads/attachments/py45jbbbei5e4whqp.pdf>, accessed on 27 June 2020.

² Krishna Mann Pradhan, 'Judicial Committees', The Kathmandu Post, Nepal, 7 February 2018, available at <https://kathmandupost.com/opinion/2018/02/07/judicial-committees>, accessed on 27 July 2020.

³ Ibid

2. Purpose and Methodology of Study

The overall objective of this article is to assess the functioning of the newly envisioned judicial committees in Nepal. The article attempts to analyze the judicial power conferred to the judicial committees and explore the ground level challenges faced by them in exercising their judicial power by sampling the judicial committees of Bhaktapur district.

The methodology of this article is based on the review of secondary data and analysis of primary data collected from the interview and focused-group discussions of the officials of judicial committees of Bhaktapur District. The conceptual structure of the research is both descriptive and analytical in nature.

3. Historical Backdrop of Justice Dispensation at Local Level

History shows that there were various types of dispute settlement methods in different phases of Nepal's development. Prior to democracy, a mixed model of traditional and formal dispute settlement mechanisms was in practice. During the Kirant dynasty, justice administration was based on the *Mundbum* in which a system called *Pantumang* was institutionalized. Herein, a respected person in a village would settle⁴ local disputes by calling a mass meeting. During the Lichhavi dynasty, *Panchalis* used to settle⁵ disputes based on the Hindu scriptures and practices. *Panchalis* had three tiers- *Gram*, *Taba* and *Dranka* among which the *Ilaka Gram Panchalis* settled local disputes in the community. In the Malla regime, the *PanchaSamuha* or 'Panchayat' was introduced for the settlement of the disputes. During the Shah dynasty, *26 thitis* and the *DibyaUpadesh* by Ram Shah and Prithvi Narayan Shah stood as the basis for justice dispensation.⁶ *Kot Linga*, *ItaChapli*, practice. In the year 1949, the first positive statutory attempt was made by enacting the Village Panchayat Act, 1949 to create local bodies and entrust them with certain roles, functions, and responsibilities.⁷ Thus, during the pre-democratic era, a mixed version of formal and informal dispute settlement mechanisms was in practice.

When the party-less *Panchayat* system was established in 1960 with the promulgation of a new constitution, it consisted of a separate part titled 'Local Panchayats and National Panchayats' in Part 8 as an attempt to lay down their roles and functions in governing local units. In the spirit of this constitution, three new enactments were made -- *Gaun Panchayat Act, 1961* for villages, *Nagar Panchayat Act, 1961* for towns and *Jilla Panchayat Act*. Again, after the promulgation of the new *Constitution of Kingdom of Nepal 1990*, in the spirit of this, several local government laws, specifically, *Village Development Committee (VDC) Act*, *Municipality Act* and *District Development Committee Act* were enacted in 1991 along with the role of dispute resolution⁸. In the year 1999,

⁴ R Krishna Prasad Timilsina, 'Problems and Prospects of Local Judicial Committee in Nepal', *Journal of Political Science*, volume 20, 2020.

⁵ Sirjana Sharma Pokhrel & Md. Ershadul Karim, 'Research Guide of the Legal System of Kingdom of Nepal', Hauser Global Law School Program, available at <https://www.nyulawglobal.org/globalex/Nepal1.html>, accessed on 27 July 2020.

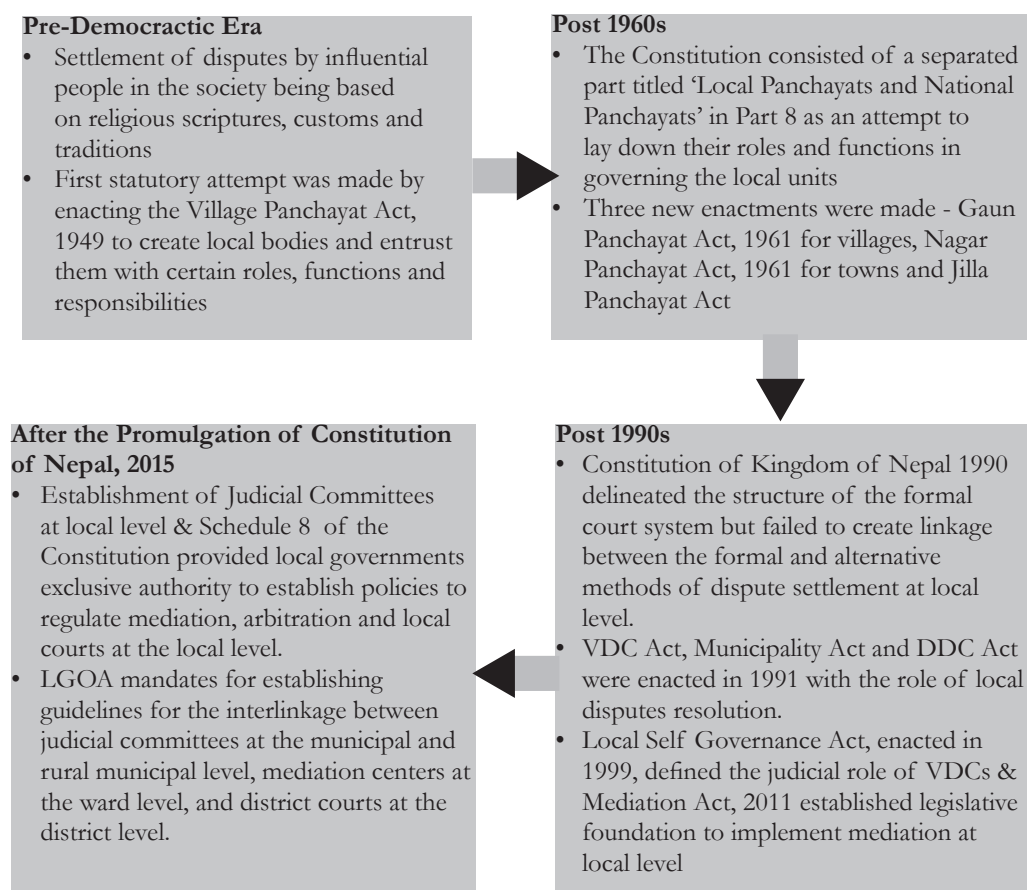
⁶ 'A Guide to Government in Nepal: Structures, Functions, and Practices', The Asia Foundation, 2012, Nepal.

⁷ Pokhrel & Karim (n 5).

⁸ Krishna Prasad Timilsina (n 4).

the *Local Self Governance Act (LSGA)* was enacted for designing local governance. This is considered a landmark step for the devolution of power and authority to local bodies⁹. However, it could not be implemented properly as immediately after three years of enactment, the entire leadership of the local level bodies had to be dissolved with the completion of tenure.¹⁰ After the promulgation of the *Constitution*, judicial committees are mandated at the municipal and rural municipal level to settle disputes. Besides that, the *Constitution* in Schedule 8 also provides exclusive authority to the local government to establish local courts at the local level which can work as an ad-hoc body which can be established based on the needs of local governments.¹¹

Along with this, the *Local Government Operation Act, 2074* has been enacted in line with Article 217 of the *Constitution* that provides the legislative framework for the operation of the judicial committees at the local level. The Act specifies 13 matters that the judicial committees are responsible to settle. Thus, from the pre-democratic era to today, the experimentation of the devolution of power and development of the traditional dispute mechanisms can be seen in distinct phases. It is presented below in a glance:



⁹ Balananda Paudel & Krishna Prasad Sapkota, 'Local Levels in Federalism Constitutional Provisions and the State of Implementation', The Asian Foundation, July 2018, available at https://asiafoundation.org/wp-content/uploads/2018/08/Local-Levels-in-Federalism_Constitutional-Provisions-and-the-State-of-Implementation-English-Version.pdf, accessed on 20 September 2020.

¹⁰ Suresh Adhikari, 'Making Federalism Work', The Kathmandu Post, Nepal, 4 March 2018.

¹¹ *Nepal ko Sambidhan* (Constitution of Nepal), sch. 8.

4. *Local Self Governance Act, 2055: Predecessor of the Local Level Operation Act, 2074*

The *Local Self Governance Act (LSGA)* was enacted to design a local governance structure as this is a landmark step for the devolution of power and authority to local bodies. But it could not be implemented properly as immediately after three years of enactment, the entire leadership of the local level bodies had to be dissolved with the completion of its tenure.¹² Afterwards, new elections were not held, and the mandate of the *Local Self Governance Act* remained unaddressed.

The *LSGA* had even conferred judicial power to the VDCs in Section 33¹³ and Municipalities in Section 101¹⁴ of the Act. They had power to hear and settle the cases within their area at the first instance that are related to the property boundary disputes, disputes about compensation for damage to crops, disputes about payment of wages, disputes about lost and found cattle etc. The Section 34 and 102 of the Act also had conferred power to the VDCs and Municipalities to form Arbitration Committees composed of three independent arbitrators for settlement of disputes in the village development area.

However, these local levels could never exercise their judicial power as their judicial authorities was contingent upon the publication of a notice in the Nepal Gazette and unfortunately, it was never published. When local bodies were dissolved in 2002 without the implementation of such provisions, the judicial powers conferred were also never exercised.¹⁵

The *Local Government Operation Act, 2074*, can be considered as the successor of the *Local Self Governance Act, 1999* as they both are similar in many fronts. The judicial powers conferred in Section 33, 34, 101 and 102 depict the power of the judicial committees conferred by Section 47 of the *Local Government Operation Act*. However, one of the fundamental differences that we can spot concerns the extended jurisdiction of the *LGOA*. The *LGOA* provides jurisdiction to judicial committees to try criminal cases that carry a potential sentence of one year.¹⁶ While the *LSGA* limited the judicial power of the local levels to try civil cases, the horizon has been broadened by the *LGOA* in incorporating both civil and criminal matters.

Similarly, the *LSGA* had provided arbitral power to the local levels for the same cases listed in Section 33 and 101 of the Act where the local levels were entitled to exercise the authority to settle disputes through ordinary procedures. However, the *LGOA* has been progressive enough to provide a separate list of cases where the judicial committees are entitled to settle through the mediation only. The list for such cases involves contemporary issues like those of divorce, defamation, looting and assault, unauthorized entry to other's residence, cultivating or possessing land that is

¹² Paudel & Sapkota (n 5).

¹³ *Sthaniya Swayatta Sasan Ain 2055* (Local Self-Governance Act 1999), s. 33.

¹⁴ *Ibid*, s. 101.

¹⁵ Shrestha & Wagley (n 1).

¹⁶ *Sthaniya Sarkar Sanchalan Ain 2074* (Local Government Operation Act 2017), s. 47 (2)(k).

in other's possession, sound pollution or throwing solid waste, etc. Such issues were not incorporated by the *LSGA*.

Thus, even though both Acts conferred the jurisdictions to settle disputes through mediation, the *LGOA* seems to be broad enough to cover a wide range of issues specially in regard to the cases that are to be resolved through mediation. Also, the judicial committees established now holds not only the statutory mandate of *LGOA* but also a constitutional mandate. Thus, it departs fundamentally with the judicial power conferred to the local levels by the *LSGA* as it was moreover dependent upon publication of notice in the Nepal Gazette by the government.

5. Judicial Committees: A Brief Account

a. Structure of Judicial Committees as Envisioned by the *Constitution & LGOA*

The *Constitution* in Article 217 states that in each rural municipality and municipality of the country, there shall be a three-member judicial committee established under the chairpersonship of the Vice-Chair or Deputy Mayor to settle the disputes under their respective jurisdictions. Furthermore, it mentions that the other two members shall be elected by the members of the Village Assembly or the Municipal Assembly from among themselves.

JUDICIAL COMMITTEES
Member elected from either Municipal or Village Assembly
Chair either Deputy Mayor or Deputy Chairperson of Rural Municipality or Municipality
Member elected from either Municipal or Village Assembly

b. Judicial Rights and Powers of Judicial Committees

Judicial committees have been an extension of the integrated judicial system that fosters access to justice at the community level. The *Local Government Operation Act, 2017* has determined two major kinds of jurisdictions-

- Jurisdiction to settle disputes.
- Jurisdiction for settlement of dispute through mediation

At present, Section 47 of the *Local Government Operation Act* explicitly mentions the cases that fall under the jurisdiction of the judicial committees. As per this Act, there are 13 specific matters that judicial committees are responsible to settle. The matters are related to border/boundary of land, dams, ditches or distribution and use of water, damage to other crops, unpaid wages, matters related to lost or found of domestic animals and birds, matters related to house rent and house rent facility with amount

up to twenty-five hundred thousand annually, matters related to planting of trees to affect other's house, land, or property, etc.

Besides that, the *Local Government Operation Act, 2074* also mentions certain matters that can be settled through mediation like matters related to land encroachment, matters related to construction of house or any structure, matters related to divorce between wife and husband, defamation, looting and assault, physical assault liable to a maximum of one year of imprisonment, other than those leading to dismemberment, etc.

c. Judicial Committees: An Extension to the Integrated Judicial System

It is pivotal to understand that judicial committees are merely an extension of an integrated judicial system which may help increase access to justice. The *Constitution* has not envisioned judicial committees to be courts as it has not been incorporated as the part of integrated judicial system that specifically includes three tiers only namely-District Court, High Court and Supreme Court.

Furthermore, the members of the judicial committees are elected officials themselves and are not governed by the Judicial Council which scrutinizes and recommends the appointment and transfer of the members of the judicial administration. Also, the framers of the *Constitution* did not envision judicial committees to be local courts.¹⁷ This suggests that the judicial committees are developed as mechanisms for alternative dispute resolution at the municipal and rural municipal level.

However, there are differing opinions of analysts that the judicial committees' proceeding such as provisions of closed-door proceedings, in-camera hearings, witness examinations for adjudications etc., the structure of the committees consisting of three members with presiding member and power of the committees to investigate and decide on complaints, issue orders, impose of fine and punishment etc. resembles those of the district courts and other formal judicial systems. Thus, the judicial committees are to be considered as the 'judiciary' of the local level.¹⁸

There exists a need to examine the provisions of the *Constitution* and *Local Government Operation Act* whenever the debate of whether the judicial committees are separate entities or local courts as envisioned by Schedule 8 of the *Constitution*. Experts opine that since the judicial committees are established under the Part 17 of the *Constitution*, part of the Local Executive, they are thereby only extended hands of the local levels for adjudication, and are not subordinate to district courts.¹⁹ In conclusion, the judicial committees are not local courts, they are the entities composed of elected representatives which are broadly the part of local executive branch.

6. Judicial Committees of Bhaktapur District: A Case Study

For the purpose of determining the current scenario of functioning of the judicial committees of the Bhaktapur district, the detailed interview of the officials working

¹⁷ *Constitution*(n 11), sch. 8.

¹⁸ Shrestha & Wagley (n 1).

¹⁹ Ibid.

in judicial committees was taken focusing on the following parameters- adequacy of physical resources, adequacy of human resources, availability and maintenance of archives, provision of trainings and skill development programs, the community awareness scenario, effect of the political affiliations of the members of judicial committees etc. The following table presents the exact scenario:

Basis of Study	Madhyapur Thimi Municipality	Suryabinayak Municipality	Bhaktapur Municipality	Changunarayan Municipality
In Terms of Institutional and Bureaucratic Constraints	Inadequate	Inadequate	Adequate	Inadequate
In terms of Affect in Decisions due to Political Affiliations	Yes, Affects a Lot	No, Doesn't Affect at all	Yes, Affects a Lot	Yes, Affects a Lot
In Terms of Acquaintance with Basic Standards of Fair Trial/Legal Procedures	Adequate	Inadequate	Inadequate	Inadequate
In Terms of Maintenance of Archives	Maintained	Highly Main-tained	Low Maintenance	Low Maintenance
In Terms of Adequacy of Qualified and Skilled Manpower	Adequate	Inadequate	Inadequate	Inadequate

The study reflects both bright aspects of the judicial committees and the challenges of their operation which has been discussed below:

a. Judicial Committees: Silver Lining to the Nepalese Justice System

At present, all local levels have been operating judicial committees despite certain constraints. The study shows that the establishment of the judicial committees has brought a lot of opportunities as it has been a gateway for access to justice for those who do not opt for court mechanisms. In fact, it has been a matter of heavy reliance to all those who are tired of the inadequacies of the formal justice system as it is easily accessible, cheaper and quick in terms of time taken to settle the disputes.

Firstly, the study shows that judicial committees have been settling disputes in a language the disputants understand and with reference to norms and values that they are familiar with. The credibility of the decision has also been very high as disputing parties are not that reluctant to abide by the final decisions. The major reason behind the reluctance of people to step forth is due to a fear of judgments that they might

be contrary to the norms and values of certain sociological context.²⁰ Thus, since the members of the judicial committees are the same person who are elected by a majority of the people in the locality, who themselves are part of the same sociological context, the entrustment of the responsibility of dispute settlement by the disputing parties is not that hard now as much it was hard to render it to the courts.

Secondly, we need to understand the fact that a society like ours believes in social harmony and cohesion. Since Nepal is an organic society based on the social harmony and cohesion, the settlement of the disputes by the judicial committees has been crucial to resolve many stranded relationships in the society. The committees have been emphasizing on harmony, consensus, and reconciliation, which have been key for maintaining peace and stability in society. There were even scenarios in many parts of the society where because of the local power relationships and norms, many grievances were never voiced in public. But now, as per the officials of the judicial committees of Bhaktapur district the situation has changed and this problem has been resolved as they emphasize on settling differences through reconciliation where people must settle their differences through compromising where necessary.

Thirdly, the study shows that the judicial committees have been anti-septic to the disputing parties of petty issues. In their absence, people had to spend hard-earned money unnecessarily in the court procedures. As such, the establishment of the judicial committees has relieved many from this burden. The parties now will not have to spend years waiting for the justice. Thus, since the judicial assistance that the judicial committees are entitled to provide are simple and people-friendly and this ensures geographic proximity, people have better access to justice.

Therefore, since the judicial committees ensures geographic proximity, ease of access, allows for the use of local languages, recognizes local social contexts, and avoids the usage of complex court procedures, the importance of the judicial committee is remarkable.

b. Manifold Challenges Littered and Seen Forth

There are several constraints of this system despite bright aspects. Firstly, the political backdrop of the elected representatives has been affecting the case matter a lot. The interview of the officials of the judicial committees suggests that the affiliations of the members of the judicial committees has posed risk in the politicization of the dispute resolution process at the local level which have been hampering not only on the efficiency and credibility of judicial committee but also has been posing threat to the individuals seeking justice.

Similarly, since the members of the judicial committees are also the part of the executive municipal and rural bodies, their ability to administer justice in an impartial manner without blurring the doctrine of separation of power as envisioned by the *Constitution* is questionable. Conflict of interests are likely to arise among elected officials. The study even shows that there are situations where it is even difficult to enforce the decisions due to the issues of political hierarchy and power dynamics created by their political affiliations.

²⁰ Lead International, 'Pahunch: Strengthening the Poor and Marginalized Communities' Access to Justice and Security in Nepal', *Search for Common Ground*, 2019, Nepal.

Secondly, the members of the judicial committees of Bhaktapur district expressed that the lack of human resources with legal knowledge in the local level has been another biggest impediment to the justice delivery as the elected representatives lack qualifications. Thus, after whole five years of establishment of the judicial committees and settlement of a wide range of complaints, it is doubtful whether they have been resolving the disputes understanding the judicial spirit following the standards and principles of law or not. This in fact poses serious questions to the credibility of the decision given by the committees.

Thirdly, the study shows that the judicial committees are struggling with the issues of resource constraints. There is lack of physical and human resources in almost every judicial committee. In some cases, hearings are being conducted in the meeting halls rather than a separate courtroom. It is a well understood fact that the local levels are in their infancy but in absence of the physical infrastructures, the committees cannot function effectively, and this leaves many questioning the quality of dispute resolution at the local level. Besides that, archives have not been properly maintained. The study shows that only one out of four municipalities has kept the record of the complaints since inception. This scenario is very saddening as keeping records of the decisions is not only pivotal for future cases but also equally critical as many documents may need to be submitted to the district courts if a petition appealing against the committee's decision is filed.

Similarly, the study shows that there is a problem regarding the enforcement of decisions given by the judicial committees as concerned agencies have not been cooperating and coordinating for the implementation and enforcement of decisions. In one of the cases as the study shows even after issue of order for the implementation, the land revenue office did not implement the decision and the justice seeker was stranded for 2 years. Similarly, the study also shows that inter-agency coordination and support are inadequate. During the interview, one of the officials said that here are even scenarios where even the government bodies responsible for the implementation of the decision have been reluctant and have instead asked for a court order. In such a scenario, where even the existence of the judicial committees has not been recognized by the government agencies, we can meaningfully presume the level of awareness required in society.

Lastly, the study shows that there is lack of awareness in the society about the functioning of the Judicial Council. People do not know about the jurisdiction and modus operandi of the Council. As per the officials, in the initial phase judicial committees even have noted complaints of the disputing parties without a careful review about whether the complaints fall under their jurisdiction or not.

7. Conclusion and Recommendations

The *Constitution* envisions the formation of three different tiers of court- Supreme Court, High Court and the District Courts and apart from this structure of court, it also envisions the formation of the Judicial Committees specifically for facilitation of access to justice in the grass root levels of the country. The very purpose of making judicial committees at the local level is to make justice accessible, cost-effective and

loosen the burden of the tiers of court.²¹In the meantime, it is understandable that all judicial committees are newly formed institutions and are in their infancy. They are in the phase of learning by doing and have been established without concrete vision and adequate support. As a result, they have been struggling to perform as per the standards that we envision. However, the study shows that in the experience of five fundamental years of establishment, if provided with adequate support and resources, the judicial committees can deliver as mandated by the law and as expected by the citizens.

In conclusion, we can see that all the local levels have been operating judicial committees despite certain constraints. They do not have enough resources; however, they have been managing to hear the complaints through any other alternatives. They have not been provided legal training; however, they have been settling disputes through their own wisdom and knowledge. Thus, had they been acquainted with the resources and support, it is certain that they can deliver service as per our expectations. It is seen that due to the lack of training of the officials of judicial committees with regard to the modus operandi of the judicial proceedings, legal principles and theories, there is plenty of room for questioning the credibility of the decision given by the committees in coming days. Thus, the attention of the concerned authorities should not only be on the institutionalization of judicial committees but also for making officials skilled and qualified, leaving no room for questioning their credibility.

Since the study shows that, the other state institutions do not seem to cooperate and coordinate with the judicial committees for the enforcement of decisions these bodies risk being entirely ineffective. Besides that, there seems to be huge scarcity of conceptual clarity on the roles, responsibilities and working procedures of the judicial committees which has been another impediment for the committees to perform in an effective manner. Amidst such challenges, the judicial committees, however, have been providing service to the people which may be considered a silver lining.

Therefore, the current scenario of the judicial committees reflects that they have been facing key challenges in operation, however along with these challenges, opportunities must also be noted. The judicial committees possess a high potential to drastically change the justice relations at the citizenry level in the country and can be the best gateway for access to justice for those who do not opt for court mechanisms. It has already been a matter of heavy reliance on all those who are tired of the inadequacies of the formal justice system as it is easily accessible, cheaper and quick in terms of time taken to settle the disputes. It is one of the very crucial innovations under the new *Constitution* which brings justice administration closer to individual communities and make it more responsive to the needs of citizens and the state mechanism shall not delay in providing timely assistance, policy reforms and institutional consolidations to keep them in track. The following are the recommendations for the effective functioning of the judicial committees:

a. Enhance Inter-Agencies Coordination

One of the aspects to tackle the current scenario is inter-agency coordination

²¹ Namit Wagley, 'Judicial Committees in Federal Nepal', *Nepalese Constitutional Law, Governance and Public Policy Issues*, 2019, available at <https://bipinadhikari.com.np/miscellaneous/references/the-conundrum-surrounding-judicial-committees/>, accessed on 27 July 2020.

and support. The other state institutions should also cooperate and coordinate with the judicial committees agencies like MoFAGA and MoLJPA can provide concrete assistance in this preliminary phase in terms of law making. Besides that, the District Court Bar Associations can share their expertise and access to justice programs. Even the Supreme Court and other local associations can conduct trainings.

b. Develop Clarity on Role of Judicial Committees through Robust Policy Dialogues

Since there seems to be a huge scarcity of conceptual clarity on roles, responsibilities and working procedures of the judicial committees, there must be robust policy dialogues between the stakeholders that clarify and generate mutual understanding of the conceptual and procedural framework of the functioning of the judicial committees. Until and unless there exists such understanding, it is difficult for the judicial committees to perform in an effective and uniform manner.

c. Enhance Community Awareness

Since there is lack of awareness in society about the functioning of the judicial committees, the concerned authorities must enhance the level of community awareness. Even after three long years of establishment, people do not know about the jurisdiction and modus operandi of the judicial committees. Thus, for the purpose of raising the level of community awareness, the local governments can play a key role in educating people in regard to the meaning and purpose of judicial committees. The use of community radio and local sharing forums along with social media can be an effective mechanism for this.

d. Provision of Comprehensive Skills and Competency Development Trainings

It is seen that due to lack of trainings of the officials of judicial committees in regard to the modus operandi of the judicial proceedings, legal principles and theories, there is plenty of room for questioning the credibility of the decision given by the committees. Thus, comprehensive training must be provided. Similarly, practices sharing exercises would be supplementary to the training which will enhance the skills and competencies of the members of the judicial committees.

e. Provision of Adequate Resources

As it is seen by the study, there is serious scarcity of both human and physical resources at the local levels. Since such dearth limits the efficiency of the officials and the ability of the judicial committees to provide adequate judicial services, the concerned stakeholders must be focused on making the judicial committees self-sufficient. The judicial committees must be provided qualified judicial officers as a helping hand and the mediators also need to be trained. Besides that, the committees must be acquainted with enough physical resources. There must be separate hearing rooms for judicial committees and the mediation centers need to be established at the ward level to ease the burden on judicial committees.