

Problems and Prospects of Local Judicial Committee in Nepal

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Abstract

Decentralization and local governance is the base of grassroots democracy, giving strong foundation of democracy at nation. Local governments are the closest unit of people. Constitution of Nepal acknowledges that executive legislative and judicial bodies may be formed at the local level. Constitution provides to consolidate socialism-oriented federal democratic republic governance right from the local level as per the principle of the rule of law and sustainable development through proportionally inclusive and just distribution of the fruits of democracy, and to make necessary provisions in relation to the operation of the local government to institutionalize the legislative, executive and judicial practice at the local level by consolidating local government through development of local leadership. This article aims at examining current provision of judicial power in local government of Nepal, its service delivery status, analyzing challenges of justice delivery. To draw the conclusion in this study descriptive analytical and content analysis method has been used and information has been taken from secondary method.

Keywords : Dispute, dissolution, judiciary, local government.

Background

Democracy is a form of government in which the common people hold political power and can rule either directly or through their elected representatives."The local assemblies of citizens" wrote De Tocqueville, "constitute the strength of free nation. Town meetings are to liberty what primary school is to science, they

bring it within the people's reach, and they teach them how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institution it cannot have the spirit of liberty. Local government is a school for democracy (Bhushan 1997:142). Local governments are the bases or foundation of democracy at a sovereign nation.

The historical development of Nepali legal system including overall justice system can be traced back to the 750 BC. Before this, no authentic document regarding its development could be found. Basically, the development of justice system is divided into two eras for comprehensive understanding of Nepali legal and judicial system. The first era represents no codified law consisting of *Kirat*, *Lichhavi* and *Malla* period. The second era starts from commencement of codified law in 1854 AD. The cut off period between two is 1854 AD from where the Country Code (Muliki Ain) 1854 came into effect to regulate the society. In *Kirat* period, the society was regulated by the religious scriptures, custom, tradition and order of the King. The dispute used to be settled on the basis of religious scriptures. The dominant religious scripture was *Kirat Mundhum* (Khanal S2058:22) which was the basis for settling disputes. The disputes were settled by the *Punch Bhaladmi* by hearing two parties in an open place. Both the parties had been given an opportunity to produce evidences on his/her own behalf before giving verdict on disputed matters. Similarly, the justice system of *Lichhavi* period was also pervasively influenced by the religious scriptures including *Sanad*, *Sawal* as a form of order of the King. The Bicharis and the Mukhiyas- the influential people, were called upon to settle disputes during the Lichhavi era. The *Malla* period was different from that of *Kirat* and *Lichhavi* period from the point of view of dispensing justice. In *Malla* period, the written code named '*Manav Nyayashstra*' was introduced by the

then King *Jayastithi Mallato* regulate the society as well as to administer justice. It was promulgated as a form of code intending to make uniformity in dispensing justice in civil and criminal matters. *The National Code*, 1854 (MulukiAin) was the first modern codified law in the legal history of Nepal. The code was in operation up to 1963 (with amendments) and many important clauses from the same code were placed in the present Country Code.(Vaidya and Manandhar 1985).The Rana oligarchs ruled Nepal in an autocratic manner. The Rana regime (1846-1950) in many cases allowed the primacy of local customs over national Muluki Ain code for the settlement of disputes (Dahal&Bhatta, 2008). However, they held sway over the total administration of the country and put the country into their own grip.

The Village Panchayat Act enacted in 2006 BS was the first positive statutory attempt on the part of the government to create local bodies and entrust them with certain roles, functions and responsibilities. King Mahendra introduced party lessPanchayat polity in the country in 1960 AD. He had promulgated a new constitution to serve and sustain the party-less polity. This ended Nepal's first flirtation with democracy after the country became entrenched in three decades of what is popular known as Panchayat rule (Shakya: 2009:36) The party-less constitution often alleged to be based on the motives of basic or guided democracy had a separate Chapter on local bodies to lay down their roles and functions. Subservient to the spirit and provisions of the partyless constitution, the Gaon Panchayat Act 1961 for villages, Nagar Panchayat Act 1961 for towns and Jilla Panchayat Act 1961 for districts were formulated.

The multiparty democracy was restored in Nepal during 1990 following the abolition of the partyless Panchayat polity. The Kathmandu centric governance had long been the reality of

life in Nepal but the 1990 constitution sought to reverse it by providing for representative democracy and participation of the people in order to run the country (Dixit:2011:7). The local government laws, Village Development Committee (VDC) Act, Municipality Act and the District Development committee act enacted in 1991 introduced new elements, among others, in the provisions relating to dispute resolution. Pursuing a clear break from the past, the new law conferred on VDCs, the competencies to mediate and resolve disputes to see them through to an amicable settlement. However, municipalities had been vested with the same kind of mandate and role as had not been granted to VDCs in regard to dispute resolution.

The Constitution of Nepal (2015) defines Nepal as a federal democratic republic organized around three levels of government – federal, state, and local. State is divided into seven provinces and local power is divided into 77 districts & 753 local levels (including six Metropolises, 11 Sub-Metropolises, 276 Municipalities and 460 Gaunpalikas). These 753 local units are known as the local level in Nepal. The Constitution of Nepal 2015 (Schedule 8) gives 22 powers to these local levels. This enables them to formulate laws to implement these powers. Besides these single powers, there are 15 such concurrent powers that can be implemented by all three levels of government, i.e. federation, province, and local levels, in the principles of coordination, cooperation, and coexistence. Constitution provides judicial committee at article 217, there shall be a three member judicial committee to be coordinated by its Vice-Chairperson in case of Village Body and by its Deputy-Mayor in the case of a Municipality, in order to settle disputes under their respective jurisdictions in accordance with law (constitution,2072: article 217.1). The judicial committee under clause (1) shall consist of two members elected by the members

of the Village Assembly or the Municipal assembly from amongst themselves (ibid: article 217.2). This article focuses (a) the provision of judicial power ensured the constitution of Nepal, (b) judicial power and procedure as stated in the local government operation act 2074 BS and prospects and challenges to the judicial power given to the local government.

The Objectives of the study

The overall objective of this article is to assess local dispute resolution as an integral element of local governance. The specific objective of the article is to assess the strength and weaknesses of the local governance institutions, with special reference to Pokhara Metropolitan city regarding the functions of judicial committee for resolving local disputes.

Methodology

Methodology of this article is more or less based on the review of secondary data and interview and discussion with the local level constituencies. The data information was collected from secondary sources. Secondary sources include books, e-articles, articles, journals, reports, organizational publications, memorandum, and discussion papers, etc. and have been analyzed in this article.

Theoretical Framework:

Currently, Nepal is divided into 77 districts, 7 Provinces, and 753 local government units for sharing of power among the governments. The Constitution of Nepal 2015 (Schedule 8) gives 22 powers to these local levels. This enables them to formulate laws to implement these powers. Besides these single powers, there are 15 such concurrent powers that can be implemented by all three levels of government, i.e. federation, province, and local levels, in the principles of coordination, cooperation, and

coexistence. Constitution provides judicial committee at article 217, it says "there shall be a three member judicial committee to be coordinated by its Vice-Chairperson in case of Village Body and by its Deputy- Mayor in the case of a Municipality, in order to settle disputes under their respective jurisdictions in accordance with law" (constitution,2072: article 217.1). While conducting the study, the grounded theory approach was employed as methodology of this study, which argued to a traditional top-down theory. The grounded theory method proposes a bottom-up process of discovering "theory from data" (Glasser & Strauss, 1967). More importantly, this method enables to collect, refine, and interpret the data which are collected at the field. The fieldwork was conducted in Pokhara Metropolis. Potential respondents are Deputy Mayor of Municipality, and listed local Mediator, beneficiary, scholars and experts of related subject matter. A number of theoretical frameworks are helpful to discuss on the concept of local governments. In this article, concepts and theories of local government and judicial committee are discussed.

Review of the Works

The title word "Law of Constitution" by A.V. Dicey (1948) is the first of its kind that analyses the prevailing provision and practices of the rule of law. Rule of law means one law for all men alike. It means that "no man can be made to suffer punishment or to pay damages for any conduct not definitely forbidden by law; every man's legal rights or liabilities are almost invariably determined by the ordinary Courts of the realm, and each man's individual rights are far less the result of our constitution than the basis on which that constitution is founded.

The work titled 'Crime and Punishment in Nepal in Historical perspective' by Tulsi Ram Vaidya and Tri Ratna Manandhar

(1985) are among the pioneer contributors in the field of the history of crime and punishment in Nepal during the Rana Period (1846-1951) in particular. This work was written keeping the historical –chronological methodology in view and provides ample materials to investigate into the historicity of crimes and punishment system in Nepal.

The work titled Modern Political Constitution's by C. F. Strong (1966) is first of its kind that analyses the prevailing provision and practices of constitutionalism. It is his first study of constitutions; his work was in the mainstream of academic study and part of the early vanguard of systematic comparative government. Tulsi Narayan Shrestha (1981) has traced the historical background from the ancient period, sketched the administrative framework and analyzed the vital regulatory function of law and order of different periods in Nepal. Dinesh Prasai (2001) focuses on the role of local institutions especially VDCs and communities as justice processors and dispensers. Development Associates for Rural and Regional Development (DEVA) (2002 AD) is the most comprehensive study undertaken yet in analyzing the role of local bodies especially Village Development Committee and Municipals in accordance with the provision of Local Self Governance Act, 1999. There are three major aspects of the study - Legal aspect, organization aspect and social and human rights aspect that -provide a wide view on the current strength and capacity of local bodies in dispute resolution with focus on the provisions of the Local Self governance Act.

Judicial Power and function of Local government

On 15th October 2018, the Local Government Operation Act 2074 B.S. to implement the provisions related to the powers of the local level as per the constitution. In order to promote cooperativeness, co-existence and coordination between the

federation, province and local level, and deliver efficient and quality services by ensuring people's participation, accountability and transparency, and institutionalize the legislative, executive and judicial practice at the local level,(Ain Sangraha, Khanda 17:63). The Local Government Operation Act, clause 11(1) provides the exclusive rights of the rural municipality and municipality shall be as mentioned in Schedule-8 of the Constitution (ibid: 73).

Local government operation act, 2074, provide a judicial committee in every rural municipality and municipality as per Article 217 of the Constitution (clues 46).The judicial committee have right to settle the cases; border/boundary of land, dams, ditches or distribution and use water, damage to other crops, pasture land, green fodder, fuel wood, unpaid wages, lost or found of domestic animals and birds, not caring and looking after elderly citizens, not providing decent food and clothing or education to minor children or husband-wife, house rent and house rent facility with amount up to twenty-five hundred thousand annually, planting of trees to affect other's house, land or property, throwing water from one's house or balcony to others house, land or public road, not leaving the area of land to be left as per the law while constructing a house with a window towards the land of the immediate neighbor, not allowing to use or causing obstruction to a road being used publicly since ancient times even though it is under the right or ownership of any individual, way out for cattle, pasture for grazing cattle, drain, canal, pond, rest place, cremation site, religious site or any other public location and other disputes designated by the federal or provincial law to be resolved by the local level (Nepal Ain Sangrah Khanda 17: 117, Local Government Operation Act 2074 clause 47.1).

In addition to the rights to resolve disputes mentioned above judicial committee shall have the right to settle disputes through mediation in only to these disputes; a land other than government, public or community land owned by one is encroached by other, construction of house or any structure in a land other than government, public or community land, noting belonging to the person but of others, divorce between wife and husband, physical assault that could be liable to a maximum of one years of imprisonment, other than those leading to dismemberment, defamation, looting and assault leaving cattle stray or affecting others due to negligence in course of keeping animals and birds, unauthorized entry to other's residence, cultivating or possessing land that is in other's possession, affecting neighbor with sound pollution or throwing solid waste, and other civil disputes filed by an individual as claimant which could be mediated as per prevalent law and criminal disputes that could lead to up to one year's imprisonment (ibid:117,clause 47 sub-clause 2).

In case of the settle disputes relating to through mediation it shall not be regarded to have obstructed to file a case directly at the court if the concerned party wishes. In the disputes mentioned above in the petition must be filed before the Judicial Committee within the limitation if any such limitation is prescribed to file petition before the case hearing authority in the prevalent law and within thirty-five days of such act having committed in case where no limitation has been prescribed.

Constitutional Provision of Judicial Committee in Nepal

The right to get justice is one of the most fundamental rights of a human being. But for ordinary people, justice has become almost inaccessible for various reasons. General study shows that out of total disputes, only around 15 per cent tend to be registered in proper court and judicial authorities. Even then, there are around

one lakh pending cases at different levels of court.

The practice of local justice dispensation is not new in Nepal. After the 1990 constitution and the subsequent Local Self Governance Act 1999, there were local agencies recognized as quasi-judicial bodies, and the practice of community mediation too gained ground. The new constitution promulgated in 2015 has taken a big step forward in this direction. To overcome the inefficiencies of the formal system, increase access to justice and bridge the formal/informal justice divide, the drafters of the constitution envisioned judicial committees at each of the 753 municipalities and rural municipalities.

The constitution of Nepal (2072), considers that the local governments share major domain of government at the bottom level, constituted based on principal of subsidiary. Post 2059, the local government units were largely steered by the centralized mechanism, which failed to reach the services to the doorstep of the local people as a result people were obliged to visit either the district head quarters or Kathmandu, the capital city of Nepal each and every problem they had. To end the public constraints, the Constitution 2015 has conferred extensive roles, powers and responsibilities on local units to develop their area by themselves. In the constitution of Nepal, a judicial committee has been arranged at the local level for easy access to justice for the people. A judiciary has been arranged in Part 11 of Constitution of Nepal (2072). There are three tiers of court, they are: Supreme Court, High Court, District Court. In addition to the above court, judicial bodies may be formed at the Local level to try cases under law or other bodies as required may be formed to pursue alternative dispute settlement methods (Constitution of Nepal, 2072:64). Article 217 of the Constitution of Nepal has the provision of judicial committee. There shall be a three member

in judicial committee, coordinated by its Vice-Chairperson in the case of a Rural Municipality and by its Deputy Mayor in the case of a Municipality, in order to settle disputes under their respective jurisdictions in accordance with law. In addition to a coordinator, two members Elected by the members of the Village Assembly or the Municipal Assembly from amongst themselves (ibid: 104).

Dispute Resolution at Pokhara Metropolis City

Pokhara Metropolitan City was established on May 2017 as a local government of Nepal. The headquarters of this Metropolitan City is located in New Road, Pokhara, Kaski district, Gandaki Province of Nepal. Pokhara is a Metropolitan city. Pokhara is the second largest city in terms of population after the Capital city Kathmandu. Pokhara Metropolitan City is surrounded by Madi Rural Municipality and Rupa Rural Municipality on the East, Annapurna Rural Municipality, Parbat and Syanja District on the West, Machhapurchhre and Madi Rural Municipality on the North and Syangja and Tanahu on the South.

The total area of this Metropolitan city is 464.24 km² (179.24 sq. m) and the total population of the municipality is, according to 2011 (2068 BS) Nepal census 600,759 individuals. The density of this rural municipality is 892.1/km² (2,311/sq. m). This municipality is divided into 33 wards.

The third municipal council of Pokhara Metropolitan City has constituted a judicial committee in accordance with Article 217 of the Constitution in the municipality of the Judicial Committee under clause 46 of the Local Government Operation Act, 2074. It has already been more than two years since Pokhara Metropolitan City formed a judicial committee, but in Fiscal year 2075/076 only 32 cases had been registered and in Fiscal year 2076 /077 (Date 2076|04|01 to 2076|08|30) 11 cases have been registered

with the committee.

Judicial committees have been formed in all 753 local units as per the provision in the constitution. These three-member extra-judicial bodies have the mandate to settle 13 different types of disputes through regular judicial process, which are explained above. By reconciliation they are also authorized to settle another 11 types of disputes, which are explained above.

The judicial committees, which are headed by deputy mayors in municipalities and vice-chairpersons in rural municipalities, are crucial for local units because it is expensive to fight legal battles in courts where legal proceedings are cumbersome. Despite all this, only few people have filed compliant with the judicial committee in Pokhara Metropolitan City. According to local representatives, people still do not know much about judicial committee and its function. “Due to lack of awareness people do not approach the judicial committee to settle minor disputes,” said local representatives. The data of the country’s largest local body (Pokhara) show that the committee only records on an average one complaint in twelve days in fiscal years 2075/076, and 2076/077 while hundreds of people go to district court or to police station to settle various disputes.

The third municipality of Pokhara Municipality has constituted a judicial committee to be a member of Parbati Karki and Kishor Baral under the coordination of the Deputy Mayor as per the law of the constitution of Nepal. Citizens have been relieved of the hassle of attending court even after the formation of a judicial committee. The function of the judicial committee has been the work of the secretariat from the Department of Justice, Law and Human Rights Enforcement to manage the proceedings. In the jurisdiction of the Judicial Committee, there is a legal provision for the parties to file a complaint / complaint in their own right

and within the matter. Accordingly, the Municipal Council of Pokhara Municipality has prepared and implemented the 'Municipal Judicial Committee (Procedure) Act'.

The Judicial Committee of Pokhara Metropolitan District has initiated the process of resolving disputes in the metropolis immediately after being identified and selected by the mediator. Since the judicial committee was formed in Chaitra 2074, the judicial committee had been calling the parties and the opposition for discussion and reconciliation upto Marga 2075. Manju Devi Gurung, deputy chief of Pokhara Metropolis and coordinator of the judicial committee said that the responsibility of reconciling both the parties and the opposition through reconciliation was given to the mediator.

After the formation of judicial committee in Pokhara Municipality, only 32 complaints were registered in Fiscal Year 2075/076 and from the hearing of Fiscal Year 2076/077 till the end of Marga, there were only 11 complaints registered by the Municipal Judicial Committee.

Types of Disputes at Pokhara Metropolitan City

S. N.	Types of Disputes	Fiscal year 2075/2076	2076 04 01 to 076 08 30
1.	Unpaid wages.	-	1
2	Not caring and looking after elderly citizens	-	1
3	Not allowing to use or causing obstruction to a road way.	6	1
4	land owned by one is encroached by other,	6	2
5	House rent	1	2

6	Not providing decent food and clothing or education to minor children or husband-wife	7	4
7	Planting of trees to affect other's house, land or property.	1	-
8	Defamation,	3	-
9	To provide justice	3	-
10	Affecting neighbor with sound pollution.	1	-
11	Keep the house restrained	1	-
12,	Divorce	1	-
13	deed executed on household is lost, rewrite the deed	1	-
14	Dispossess the house	1	-

Source: Pokhara Metropolitan City

Of the 32 complaints filled in the judicial committee of Pokhara Metropolitan City in the fiscal year 2075/076, 29 complaints have been settled and 3 are on pending. By the middle of Fiscal Year 2076/077, there have been 11 complaints registered where 1 complaint was settled and 10 complaints are on pending. Somnath Lamsal, the facilitator of Reconciliation most of the complaints, concluded through the reconciliation center.

Prospect and challenges

The Local Government Operations Act-2074 B.S. has made the rules and regulations applicable to the judicial committee by making local laws and regulations accordingly. There is

no provision with the possibility of hearing the arguments of both parties, by giving the court an opportunity of hearing in accordance with the principles of natural justice. This does not allow a single member to make a decision alone, even if the coordinator is the Deputy Mayor. In the absence of a coordinator, the members have the right to do all the work without decision which has increased the value of the Deputy Mayor. If there is any member of the judicial committee that has a vested interest in the dispute, then there is a provision to make a decision excluding those members, according to the National Civil Code, 2074, clause 271 of the Judicial Settlement, the principle that the judge should not look at the dispute itself has been applied. In case all three members of the judicial committee have disputed interests, there is a provision that a committee can form the assembly with another three-member judiciary. This reduces the risk of exposing yourself and others to the party, but since the law does not clarify whether or not the party workers are within the definition of their own people, clarity is required in local law. The jurisdiction which the Act may decide is general and minimal, which seems to be expanding. For example, cooperative disputes, divorce, division of land.

Therefore, it appears that the Assembly can extend the authority based on the implementation of the Judicial Committee. Thus, while the local level judicial committees are very positive in order to make peace in the society and establish access to justice, it will be supportive to provide fast and accessible justice, which needs to be readjusting immediately. The coordinators of the judicial committee are mostly women and one of the two remaining member is female. Women are often unaware of the laws. Therefore, there arises the question whether the judgment from the judicial committee is trusted or not. It is imperative to develop publicity about judicial committee by promoting it in

the society and with the help of legal adviser, promptly making impartial decisions and making effective implementation of it. It is very difficult to perform justice without the law, without staff, without infrastructure. The judicial committees have started work but there is no one as process server. There is lack of manpower to dictate, order, measure, or prosecute cases for prosecution. There is need for a decision-making mechanism that has no interest in management. What issues to register, Superior has no separate management. Technical Amin's on-site report cannot be judged without a dispute over land, exhaust route closures. Post of Amin's is not in approximately local body. There is a provision to appeal the decision made by the Committee. The decision that a court can make for a judicial trial must also be in accordance with court standards. It requires skilled manpower to make decisions. On the whole, no one has shown interest in fulfilling most of the infrastructure needed in the judiciary, even at the local level, which has overshadowed the Judiciary Committee. To manage all of this requires physical infrastructure and local laws, which are lacking. These are the challenges of the judicial committee. Although most of the infrastructure needed is indispensable at the local level, no one has shown interest in fulfilling it which has overshadowed the Judicial Committee, whether it will be punished for contempt or not, is unanswered in the current law. Let us hope that the opportunity will be used to remove such a chunk from the upcoming meetings.

Conclusion

Nepal's constitution has provision of the Supreme Court, the High Court and the District Court, and apart from these courts, the purpose of making judicial committees at the local level is to make justice accessible and cost-effective by arranging a judicial committee at the local level. Rather than making decision it is

better to reconcile dispute resolution which is the alternative solution. Alternative ways of resolving disputes in the world are mainly in the practice of negotiation, mediation, friendship and reconciliation. The Act on Local Government Operations made in accordance with the constitution of Nepal and the judicial committees made by some villagers or municipalities make it clear that reconciliation as a cornerstone of justice is in keeping with the principles and procedures of reconciliation.

At the local level, the Local Government Operations Act lacks legal knowledge among local representatives and, to a large extent, members of the local judicial committees, about the right to settle disputes under judicial authority and to settle disputes only through reconciliation. Due to the lack of information about the main principles, characteristics and importance of reconciliation for many local governments and also due to the lack of alternative principles and knowledge of reconciliation mentioned clearly by the constitution, the lack of information about its main principles, attributes and importance, makes the reconciliation process accessible and easier for the general public. Further, it could not be established in a justifiable manner.

In a diverse society like ours, reconciliation between the parties is certainly a complex task, but in the process of reconciliation, it not only resolves the issues of the parties but also reduces the bitterness that exists between them. The representatives of the local people seem to think that the reconciliation process is a way of resolving a promising dispute to the common people who are persecuted by our formal justice system, bound in a long, tangled, expensive, formality. Since the party is elected, it is important for members of the judicial committee to rise above the party.

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